

**-OPINION-**

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**Querist:** *Dublin City Council*

**Subject:** *Part 8 Fairview Cycleway*

**I PRELIMINARY**

1. Querist [hereinafter ‘the Council’] seeks advices regarding Part 8 Clontarf to City Centre Cycle Route proposal which was adopted, subject to modifications, by the Council on 2<sup>nd</sup> October 2017. Concerns have been expressed by certain councillors regarding the integrity of the process. Advices are therefore sought in respect of whether the process and decision was in compliance with the applicable legal requirements.

**II BACKGROUND**

2. The proposed works comprise the construction of 2.7km of high quality cycle facilities, improved footpaths and landscaping from Clontarf road/Alfie Byrne road to Amiens Street/Talbot Street, via Clontarf road, Marino Mart, Fairview, Annesley Bridge road, North Strand road and Amiens road. A public notice for the Clontarf to City Centre Cycle Route was published in the Irish Times on the 12th January 2017. Plans and were available for inspection at the Civic Offices, Central Area Office, North Central Area Office, Charleville Mall Library and Marino Library.
3. 192 submissions were received in relation to the proposed project. After the public consultation process, the Chief Executive drafted a report dated 28<sup>th</sup> August 2017 that summarised the observations and responded to those observations. However, prior to such report being drafted, at the Central Area Meeting of 11th July 2018 members were advised that the Chief Executive would be submitting a proposal that included the loss of the 46 kerbside trees. Members of the Central Area Committee were not in favour of the Proposal. At the North Central Area Committee Meeting held on 17th

July 2017 members were advised by the Environment and Transportation Department that the Chief Executive would be submitting a proposal that included the loss of 46 trees. Members of the North Central Area Committee voted for the scheme to be brought to full council for decision.

4. At the Central Area Meeting Cllr Christy Burke mentioned one tree that should be treated with sensitivity and the Environment and Transportation Department gave a commitment to do so. That commitment was reiterated at the North Central Area Meeting the following week. At the North Central Area Committee meeting held on 17th July, Cllr Damien O'Farrell asked whether the Environment and Transportation Department was aware of the history of the trees in Fairview Park. Information on the historic context of the tree was first put up on the internet on 23rd July 2017 (<http://eastwallforall.ie/?p=3713>).
5. The Environment and Transportation Department reviewed the information that had come to light and made suggested modifications to the proposed scheme. This involved the reassignment of a section of one of the vehicular lanes to cyclists and pedestrians thus shortening the right turn lane to Fairview Strand, and the retention of 42 kerbside trees along the frontage of Fairview Park. The Environment and Transportation Department circulated the document "Clontarf to City Centre Cycle Route Part 8 Proposal Explanatory Note on Amendments" outlining the amendments to the original proposals as presented on the 11th and 17th July 2018. This document was followed by a set of drawings on 29th August 2018. The agenda for the September Council Meeting that included the Chief Executive's report, Report No. 300/2017 was sent out on 30th August 2018. Members of the Central Area Committee and those of the North Central Area Committee were therefore notified of the modified scheme prior to submission of the Chief Executive's Report.
7. At the Council Meeting held on 4th September 2017 and following some debate, members deferred a decision on the Chief Executive's Report, Report No. 300/2017 to allow for more time to consider the report. The Environment and Transportation Department advised members of both the Central Area Committee and the North Central Area Committee that it would be available to meet with members to discuss the details of the contents Chief Executives Report. A meeting was arranged and took

place on 15th September 2017. Members from the Central Area and North Central Area Committees attended.

8. The same Chief Executive's report, Report No. 300/2017 was included on the Agenda for the Council Meeting scheduled for 2nd October 2017. There were no amendments to the report. Members resolved to make a decision on the report without debate. Two motions from members were then passed by Council to modify the Chief Executives Report.
  
9. It is proposed to set out below a summary of concerns expressed by certain councillors regarding the integrity of the Part 8 process. Such concerns were outlined in a letter to the Chief Executive dated 9<sup>th</sup> October 2017. The main issues of concerns include the following:
  - That the Chief Executive's Part 8 Report contained significant and material changes (the proposed removal of traffic lane including road surface reconfiguration and the reversal of the decision to cut down over 40 trees). These significant and material changes had not been discussed at either the Central or North Central Area Committees.
  - A decision was made start the six-week time period for Councillors without any consultation with Ward Councillors about the significant and material changes that had been made, or without any statutory Area Meetings being held to discuss same. Confirmation was sought as to whether it is the custom and practice of the Council to consult with Ward Councillors when such changes arise and before a report is laid before the Council and if the non-consultation at Area Committee meeting level is unprecedented and highly unusual?
  - When a decision was made to defer the item at the September City Council meeting whether this was a 'private' information/briefing meeting was held just for Councillors. Confirmation is sought that this meeting was an information meeting only and that the subsequent "adjustments" to the proposed reduction of the car lane was only processed after this meeting and could also be termed a significant and material change.
  - There was a "material change to a material change" in relation to the traffic lane proposal. The first material change involved reducing the

general traffic lane for a distance of 350m. The material change to this material change was the increase in the general traffic lane by 52m i.e. reducing the 350m to 298m of lane reduction, neither change having been discussed at any Area Committee meeting.

- Serious concerns are expressed regarding the contents of the Chief Executive's report of the 28th August including the following:
  - there is no mention in the report of any attempt to look at the option of locating the commuting cycle lane inside the northern perimeter of Fairview Park despite this having been raised on numerous occasions.
  - While the Report makes reference to earlier times the Part 8 proposal was brought to Area Meetings there is no reference in the Report to the more recent July 2017 Dublin North Central and Central Area meetings where the original (before material changes were made) Part 8 proposal was discussed.
  - There is no evidence in the report of any deliberations specifically concerning the consequences of removing one lane of traffic. More specifically it is said that under interdepartmental reports, Roads and Traffic made no mention of the removal of the traffic lane. None of the 192 people or businesses who made submissions had any knowledge of the possibility of a traffic lane being removed. Despite traffic congestion being addressed in the report, there is no mention of the effect which the removal of the traffic lane will have on traffic congestion. There were no traffic surveys taken to address the removal of the traffic lane even though surveys had previously been taken on other aspects of the proposal. There were no discussions regarding the reconfiguration of the road surface after the decision not to fell the trees and materially change the original part 8 proposals. There is no cost benefit analysis as to the cost to the economy of hundreds of people spending extra time sitting in traffic.

10. In addressing these concerns, it is proposed to firstly set out the statutory requirements in respect of the Part 8 process and decision and secondly, to then to evaluate the concerns in the light of the same.

### **III PART 8/SECTION 179 PROCEDURE**

11. The public consultation procedure and approval for certain classes of local authority development is contained in section 179 of the Planning and Development Act 2000 as amended and also Part 8 of the Planning and Development Regulations 2001 as amended. There is no dispute that the cycleway falls within classes of development for which the section 179/Part 8 procedures applies insofar as it involves under Article 80(1)(b) the construction of a new road or the widening or realignment of an existing road and/or under Article 80(1)(k) development, the estimated cost of which exceeds €126,000,
12. The procedure is commenced by the publication of a newspaper notice and the erection of a site notice for the proposed development (Article 81(1) of the 2001 Regulations). The notices must under Article 81(2) include the following:
  - (a) indicate the location, townland or postal address of the proposed development (as may be appropriate),
  - (b) indicate the nature and extent of the proposed development,
  - (c) where the proposed development consists of or comprises the carrying out of works –
    - (i) which would materially affect the character of a protected structure or a proposed protected structure,
    - (ii) to the exterior of a structure which is located within an architectural conservation area, and the development would materially affect the character of the area concerned, indicate this fact, and
  - (d) state that—
    - (i) plans and particulars of the proposed development will be available for inspection or purchase at a fee not exceeding the reasonable cost of making a copy during office hours at the offices of the local authority for a specified period (which shall be not less than 6 weeks beginning on the day of publication of the notice in a newspaper in accordance with sub-article (1)(a)),
    - (ii) submissions or observations with respect to the proposed development, dealing with the proper planning and sustainable development of the area in which the development would be situated, may be made in writing to the local authority before a specified date (which shall be not less than 2 weeks after the end of the period for

inspection of plans and particulars specified pursuant to sub-paragraph (i)).”

A document describing the nature and extent of the proposed development and a location map must be made available in accordance with Article 83(1).

13. A minimum of 6 weeks period must be allowed for the making of submissions. After the expiry of the period for submissions, the Chief Executive is required to prepare a written report in relation to the proposed development and submit the report to the members of the authority. Section 179(3)(a) of the 2000 Act states that the report is required to:

- (i) describe the nature and extent of the proposed development and the principal features thereof, and shall include an appropriate plan of the development and appropriate map of the relevant area,
- (ii) evaluate whether or not the proposed development would be consistent with the proper planning and sustainable development of the area to which the development relates, having regard to the provisions of the development plan and giving the reasons and the considerations for the evaluation.
- (iii) list the persons or bodies who made submissions or observations with respect to the proposed development in accordance with the regulations under subsection (2),
- (iv) summarise the issues, with respect to the proper planning and sustainable development of the area in which the proposed development would be situated, raised in any such submissions or observations, and give the response of the manager thereto, and
- (v) recommend whether or not the proposed development should be proceeded with as proposed, or as varied or modified as recommended in the report, or should not be proceeded with, as the case may be.

14. The elected members are then required, as soon as may be, to consider the proposed development and the report of the Chief Executive under section 179(4). The proposed development may be carried out as recommended in the Chief Executive's report, unless the local authority, by resolution, decides to vary or modify the development, otherwise than as recommended in the manager's report, or decides not to proceed with the development. A resolution must be passed not later than 6 weeks after receipt of the Chief Executive's report. Under Article 84 a notice is required to be sent to prescribed bodies and persons who made submissions after the making of a resolution by the elected members or the period of 6 weeks after the Chief Executive's Report has expired.

#### IV EVALUATION

15. In the light of the above, it is proposed to consider the concerns and queries raised regarding the integrity of the Part 8 process by the councillors.

##### *Alleged Significant/Material Change*

16. The first matter of concern included that the development approved contained “significant and material” changes and that this had not been discussed at either the Central or North Central Area Committees. The entire cycleway is for 2.7 km and the changes relate to a certain section of the proposed cycleway resulting in the removal of a traffic lane for 298m of lane and the retention of 42 trees which were otherwise going to be removed. The statutory provision does not refer to “significant and material changes” and so it is irrelevant whether such change could be described in such terms. The statutory provisions expressly allow variation or modifications to the scheme as proposed and advertised. In this regard, the Chief Executive in his report may recommend approval of the scheme subject to it being varied or modified insofar as section 179(3)(b)(v) states that the Chief Executive’s Report may:

*“recommend whether or not the proposed development should be proceeded with as proposed, or as varied or modified as recommended in the report, or should not be proceeded with, as the case may be”.*

In addition, the elected members may pass a resolution approving the scheme subject to it being varied or modified. Thus section 179(4)(b) states:

*“...the proposed development may be carried out as recommended in the manager’s report, unless the local authority, by resolution, decides to vary or modify the development, otherwise than as recommended in the manager’s report...”*

The scheme as approved by the elected member may therefore varied or modified in a different manner than any the scheme recommended for approval as varied or modified in the Chief Executive’s report.

17. There is no definition of “*varied or modified*” or what is the extent or scope of what may constitute a variation or modification. However, it is clear that there are limits to what may constitute a variation or modification. Thus, where a scheme is radically

altered as to become an entirely different scheme, then it would not constitute a variation or modification. The notion of “modification” was considered in *Dietacaron v An Bord Pleanala* [2004] IEHC 332 in the context of Article 73 of the 2001 Regulations which allows An Bord Pleanala to invite modifications to a proposed development. In this case, it was argued that the purported modifications involved radical alterations and did not constitute mere modifications. The plaintiff instituted proceedings claiming that there were more than mere modifications. The Applicant relied upon *Matthew L.J. in Stevens -v- General Steam Navigation Company Limited*[1903] 1 K. B. 890 ,894, who described modifications in the following terms:

"The process involved in "modification" is thus one of alteration, and must be considered how radical that alteration is. The alteration may consist of additions or subtractions or other changes in what is already there or, no doubt, any combination of these. But throughout, there must, I think, be the continued existence of what in substance is the original entity. Once one reaches the stage of wholesale rejection and replacement, the process must cease to be one of modification".

Also

“to some extent the matter must be one of impression. Nevertheless, however widely one construes modification, it seems to me that the difference between the proposals is so great that one cannot reasonably regard the second as a modification of the first...”

Quirke J rejected the challenge on the facts stating that it was a matter of planning policy and the decision of the Board was only to be reviewed on grounds of irrationality and that there was sufficient material before the Board to justify their decision.

18. In the present instance, the reduction of a traffic lane by 350m and indeed a further modification to a reduction to 298 metres, could not be said to be so radical a change that the original scheme ceased to exist. The modification affects only a section of the cycleway and the general alignment of the route along Amiens Street, Fairview and Clontarf remains the same. It would therefore follow, the variation or modification recommended by the Chief Executive in his Report falls within the scope statutory provision. A further modification to this modification when the elected members adopted the scheme, would also fall within the scope of the statutory provision.



19. The second aspect of the query relates to the claim that the modifications had not been discussed at either the Central or North Central Area Committees. This appears not to be factually correct insofar as it was discussed at both committees. However even if it was not, there is no requirement under 2000 Act or 2001 Regulations, that modifications of proposed scheme are discussed at any particular committees or meetings of the Council. Section 179(4)(a) simply says that the members of a local authority shall, as soon as may be, consider the proposed development and the report of the Chief Executive. The Act is therefore not prescriptive as to the internal procedures which local authority members in considering any modifications. Thus, insofar as the modifications were not discussed at either the Central or North Central Area Committees, this is not required under the Part 8 procedure and will not affect the validity of any approval. However, Department circulated the document “Clontarf to City Centre Cycle Route Part 8 Proposal Explanatory Note on Amendments”. Also, it appears that opportunity was afforded to the Central or North Central Area Committees to consider the modifications. I am instructed that the Environment and Transportation Department advised members of both the Central Area Committee and the North Central Area Committee that it would be available to meet with members to discuss the details of the contents Chief Executives Report. A meeting was arranged at took place on 15th September 2017. Members from the Central Area and North Central Area Committees attended.

#### ***Commencement of 6-week Period***

20. The next concern expressed is that a decision was made to start the six-week time period for Councillors without any consultation with Ward Councillors about the significant and material changes that had been made, or without any statutory Area Meetings being held to discuss same. The 6-week period for consideration commences upon “receipt” of the Chief Executive’s report under section 179(4)(c). It appears that the Chief Executive report was sent to elected members on the 30<sup>th</sup> August 2017 for the purposes of a meeting on the 4<sup>th</sup> September 2017. It appears that the document “Clontarf to City Centre Cycle Route Part 8 Proposal Explanatory Note on Amendments” outlining the amendments and a set of drawings on 29th August 2018, were sent prior to the receipt of the Chief Executive’s Report. It therefore follows that there was some degree of explanation for the modifications prior to the

receipt of the Chief Executive's Report, although there may not have been a formal meeting.

21. However, as noted above, there is no requirement under the Part 8 procedure as set out in the Act and Regulations, which requires consultation or meetings with ward councillors before the report is received by the elected members. The procedure set out is that following the end of the period for making submissions, the Chief Executive is required to draw up a report in relating to the same including his recommendation. Furthermore, the commencement of the 6 week period is triggered under the statutory provisions under section 179(4)(c) by the "receipt" of the Report and not by a decision to commence the 6 week period.
22. It is further queried whether it is the "custom and practice" of the Council to consult with the councillors in relation to modifications before such report is delivered. I do not have information as to whether there is such a "custom and practice" of the Council. However, it would appear that it would be difficult to establish such a "custom and practice" of the Council from previous internal Part 8 processes, which may vary depending on the particular Part 8 development. Even if there was such a "custom and practice" it would have no legal effect, insofar as the legal requirements are those set out expressly in the statute and regulations.

#### ***Adjustments and 'Material Change to a Material Change'***

23. Confirmation is sought that the September meeting was an information meeting only and that the subsequent "adjustments" to the proposed reduction of the car lane was only processed after this meeting and could also be termed a significant and material change. I do not have instructed as to what was precisely discussed at the September or indeed when any adjustments may have been made. The Report of Chief Executive is not clear as to whether the proposed reduction of the traffic was 350 metres or 298 metres. The recommendation at paragraph 11(b) of the Report states that:

*"The amendments to the carriageway shall necessitate the loss of a general traffic lane over a section of the inbound route between Malahide Road Junction to a point approximately 100 metres south of Fairview Footbridge".*

It is not clear whether this equates to a reduction in 350 metres or 298 metres and so this might be clarified. However, the extent of the loss of a section of the traffic lane

is capable of calculation from the terms of the recommendation described in paragraph 11(b).

24. However, insofar as the query relates to the adjustments, it may be noted that the import of an adjustment whereby the section of traffic lane removed went from 350 to 298 metres was to reduce the extent of the modification to the original scheme as proposed. It is therefore difficult to see what prejudice could have resulted from lack of discussions relating to the same insofar as it is hard to conceive as to how a variation of 298 metres could have different and/or more environmental/planning effects than a greater variation of 350 metre. However, in any case as discussed above, there is no requirement under statutory or regulatory provisions which require such information to be placed before any particular committee. Furthermore, importantly the elected members in deciding whether to approve the scheme as recommended to varied or modified, were free to reject such variation or modification in accordance with section 179(4)(b). The case of *Cumann Tomas Daibhis v South Dublin County Council* [2007] IEHC 426 is of some note in this regard. This concerned the proposed local authority development of a soccer stadium under Part 8 of the 2001 regulations. The Council passed a resolution on the 12th December 2005 approving the proposed development but modifying the Deputy Manager's report to increase the playing area of the pitch and make other alterations. Following the resolution, the Council sought funding from the Minister for Arts, Sports and Tourism for the development, who refused it. The Council on 13th February 2006 purported to pass a fresh resolution authorising the development originally proposed in the Deputy Manager's report. It was argued that the second resolution was ultra vires as under section 179(4) the elected members had only 6 weeks to pass a resolution modifying or varying the Manager's recommendation and the resolution was outside this period. Murphy J rejected the challenge stating:

“It seems to the court that the overarching purpose of s. 179, to oblige a local authority to give notice to the public and prescribed bodies of certain classes of development proposed to be carried out and to afford them an opportunity to make submissions and observations in respect of the proposed development, has been complied with. The deputy manager reported: the Council sought initially to vary the recommendation in the hope of getting additional funds and, where those funds were not available, took a pragmatic decision. There was no requirement for further consultation or submission and observations in respect of the proposed development. The applicant was not prejudiced by the

failure to make the resolution in the third week of January rather than the second week of February”.

25. The query relating to adjustments also relates to the concerns that there was an alleged “material change to a material change” in relation to the traffic lane proposal, reducing the 350m to 298m of lane reduction. For the reasons set out above, it is doubtful whether this was a “material change” to a material change. However, in any case, as also noted above, section 179(4)(b) expressly allows the elected members to approve a scheme varied or modified as otherwise recommended in the report of the Chief Executive. However, it appears that the elected members voted on the 2<sup>nd</sup> October 2017 to accept the modifications proposed in the motions and therefore the recommendation in the Chief Executive’s Report and so the scheme as recommended by the Chief Executive varied or modified by members of Dublin City Council.

***Concerns Relating to the Chief Executive’s Report***

26. The final query relates to a number of concerns relating to the contents of the Chief Executive’s report of the 28th August. The statutory requirements relating to the content of the Chief Executive’s Report were set out earlier but may be reiterated insofar as it says at section 179(3)(a) that the report shall:

- (i) describe the nature and extent of the proposed development and the principal features thereof, and shall include an appropriate plan of the development and appropriate map of the relevant area,
- (ii) evaluate whether or not the proposed development would be consistent with the proper planning and sustainable development of the area to which the development relates, having regard to the provisions of the development plan and giving the reasons and the considerations for the evaluation.
- (iii) list the persons or bodies who made submissions or observations with respect to the proposed development in accordance with the regulations under subsection (2),
- (iv) summarise the issues, with respect to the proper planning and sustainable development of the area in which the proposed development would be situated, raised in any such submissions or observations, and give the response of the manager thereto, and
- (v) recommend whether or not the proposed development should be proceeded with as proposed, or as varied or modified as recommended in the report, or should not be proceeded with, as the case may be.

27. It may be observed that the requirement under section 179(4) is for the Report of Chief Executive is to “summarise” the issues raised. There is as such no requirement to exhaustively set out such submissions which would not otherwise be practicable.

The extent of this requirement was recently addressed by Baker J in *Byrne v Dublin City Council* [2017] IEHC 19 who cited the judgment in *Sandyford Environmental Planning v Dun Laoghaire Rathdown County Council* [2004] IEHC 133 which concerned a decision to vary the development plan which was challenged, inter alia, on grounds that the Chief Executive's report was defective and in breach of section 13(4) including that the manner adopted to summarise the submissions was unfair or incomplete. These objections were summarised by McKechnie J at para. 50 et seq - he said:

“It is said on behalf of the applicant that the manager's report was defective in a number of respects. In the first instance, it is claimed that the entire submissions and observations made in response to the published notice, should have been circulated to each member of the elected Council prior to the first of the relevant meetings. Secondly, it is suggested that the manner of summarising the content of those submissions and objections was inadequate and when taken against the manager's response conveyed an incomplete and unfair representation of those observations and submissions. Thirdly, it is claimed that the objector's names should have been assigned against their particular objection”.

McKechnie J rejected these objections:

“52. In my opinion, there is no obligation on the County Manager under the relevant provision to circulate to each member of the Council, prior to the commencement of their consideration, the entirety of the objections and submissions received by it. The requirement on the Manager is to "summarise the issues" raised by such persons. This, in my view, cannot be read as imposing the wider obligation as is suggested on behalf of the applicant. The duty upon him is but to "summarise" the issues raised. Accordingly, I cannot agree that by any method of statutory interpretation the Manager is obliged to circulate in full all the submissions and observations received. In addition, it seems from the uncontroverted evidence that his report was available to council members prior to the 9th July, 2001 and that, at such meeting there was available cases of the entire submissions so received. Moreover, from the applicant's point of view its members took steps to circulate to each Councillor Dr. Smal's report and presumably any other documents which they saw fit to do so. I, therefore, don't believe that the argument now advanced on behalf of the applicant company is in any way sustainable.

53. Likewise, I am of the view that the distillation by the Manager of the public submissions was adequate and was within the duty imposed upon him. In complying with this obligation he is not bound to use any formula or follow any specified method. There is within the section scope for a variety of presentations, some of which by choice

may be far more extensive than others. The applicant's challenge, however, is not put in this way. In truth, this is a question of statutory interpretation, and although quite briefly dealt with, I am nevertheless satisfied that the issues raised, both in substance and in materiality, were adequately outlined in his said report

Baker J approved of the above passages stated at para. 111:

“I adopt the proposition explained by McKechnie J. that no formula or method is required by which the submissions and observations are to be summarised. The question is whether the submissions and observations were sufficiently outlined in their substance and materiality.

112. No argument is made by the applicant that the Chief Executive was required to circulate all of the submissions, and that particular argument was rejected expressly by McKechnie J., but the argument is that the summary was inadequate, particularly in its failure to deal with other objectives of the Council with regard to the importance of the ‘South Georgian Core 2013’, the alleged likely negative impact on business, tourism and the future development of the area, and the conflict with the mission statement of Dublin Simon.

113. I do consider that the response of the Chief Executive to the submissions was not adequately articulated. The single line at the end of that part of his Report is not in any real sense a response in substance as to the planning materiality of the observations. While the approach of the Chief Executive can be gleaned from the report taken as a whole and the various planning and policy considerations of the Council identified there, I consider that the Report was defective in failing to clearly state the views of the Chief Executive as required by the statutory provisions.

114. The function of a court in hearing a judicial review where the adequacy of a city or county managers’ report is under consideration must be to look at whether there has been compliance with the statutory requirements in the round, and to consider whether taken as a whole, a report was sufficient to present to the elected members evidence on which they could make a decision.

115. There is no statutory requirement that mandates a particular formula or structure or amount of content that must be found in a report from the Chief Executive, and provided a report taken as a whole is not so generic or vague or lacking in detail so as to fail to identify the nature and planning implications of a proposed development, a report would satisfy the purpose for which it is mandated.

116. The perceived need which gave rise to the purchase of the subject premises by the respondent in the first place and the putting together of a planning proposal thereafter must have been known to the members of Dublin City Council. I note the observations made above with regard to the role of the elected representatives and that a report is required to be addressed to them, not as a general body but as an expert body with identified and necessary

expertise and knowledge of the planning and policy considerations in their functional area. I also consider that it is relevant that the report is prepared for submission to a meeting of the elected members at which they were free to raise questions to clarify or expand the matters continued within the report. From the minutes of the meeting, it does not seem that any question was raised in which clarification or further detail was, in fact, sought.

117. Having regard to the nature of the proposed development, and that it was to provide accommodation for homeless persons, a planning and general policy articulated by the Council in public documents, the well known Georgian area in which the development was proposed and the fact that I consider that there was as matter of fact no proposed material deviation from the Development Plan in the intended works or user, I consider that the Report of the Chief Executive laid before the meeting at which the resolution to authorise the development was approved was adequate for the statutory purpose for which it was prepared. This is because the members of the council who attended and voted were uniquely aware of the planning and policy considerations in play, and the absence of a specific indication by the Chief Executive of his recommendations and considerations did not materially impact on the capacity of the elected representatives to make a considered decision. The elected representatives had available to them for several days prior to the meeting the entire detailed and complete files on the development, and were therefore armed with sufficient information to question the Chief Executive at the meeting with regard to any element of the proposal. The minutes of the meeting suggest no queries were raised, and in the circumstances the elected representatives must be taken to have understood the nature of the proposals.

118. This was a unique development of accommodation of a sensitive nature in an area of architectural and historic importance in the city of Dublin. It was proposed at a time when provision of services for homeless persons was a matter of political importance. I consider it unlikely that the elected members required in those circumstances to have summarised for them any more details than those contained in the Report. In particular I consider that the approach of the Chief Executive to the proposals was evident in his Report, albeit not fully expressed by him. Other aspects of the provision of housing and the problems of homelessness in the city were the subject matter of other discussion at the meeting at which the decision as made.

119. I am satisfied that the Report satisfied the statutory requirement of notifying the elected representatives of the nature of the proposed development”.

28. It may be noted in the passages above, that while Baker J considered that while the Report of Chief Executive did not adequately articulate a particular issue and the response of the Chief Executive to that issue, overall the Report was sufficient and in

compliance with the statutory requirements, taking into account the knowledge of the elected members.

29. The specific concerns relating to the Chief Executive's report may therefore be considered in the light of the above.

*(i) Option of Locating Inside Perimeter Fence*

30. The first concern raised is that there is no mention in the report of any attempt to look at the option of locating the commuting cycle lane inside the northern perimeter of Fairview Park, despite it being raised it is said, on numerous occasions. In this regard the letter of the 9<sup>th</sup> October 2017 refers to a submission of Cllr O' Farrell dated 9<sup>th</sup> March 2017 in which he expressed a preference for the cycle lane to be located just inside the perimeter of Fairview Park and that it was raised at a meeting of 8<sup>th</sup> September 2015. As regard the submission of 9<sup>th</sup> March 2017, I do not have a copy of the same, but I note the extracts from the submissions contained in the letter to Chief Executive.
31. Section E of the Chief Executive's Report noted that a total of 192 submissions were received including, *inter alia*, by a number of elected representatives. A full list of persons who made submissions were set out at Appendix 1 attached to the report. It is noted that the list included a submission by Cllr Damien O'Farrell and Finian McGrath TD. Section E further set out at summary of the issues specifying some 13 issues. The Report then set out some 19 issues (A to S) which it then summarised and gave the response of the Chief Executive. It would appear correct that the report of Chief Executive does not appear to specifically address this submission/issue in a clear manner. However, the issue raised in the submission could be said to be related to a number of general issues which are addressed in the report. At issue B Segregation in the Report, observers outlined the need for the cycle way facility to be segregated along the route. It is clear that the cycleway within the perimeter fence would be a segregated route. Also in Section F Evaluation, there is reference to the greenway esplanade for pedestrians and cyclists within the park, stating at pg. 18:

“In addition to the proposed cycle route, the scheme also provides for a greenway esplanade for shared pedestrians and cyclist use along the northern edge of Fairview Park. This facility will be landscaped and lit to create a facility for leisure cycling and walking.....The proposed esplanade will



facilitate two way cycle movements together with pedestrians. It will link frequently with the internal network of footways and cycle routes within Fairview Park.

Along the route of the esplanade, there is an opportunity to provide a cycling hub with the addition of bicycle parking and possibly other attractions such as coffee shops, etc. Such facilities would increase the attractiveness of the area and would be a significant enhancement of this particular location.”

The option of the cycleway inside the perimeter fence would appear to conflict with the more specific plans for inside Fairview Park, although there is no express reference to the option of the cycleway inside the perimeter fence in this regard. Nonetheless similar to the *Byrnes* case, the Chief Executive’s report could arguably be criticised for not clearly articulating the issue and response concerning the option of locating the cycleway within the perimeter fence. However, similar to the *Byrnes* case, the level of knowledge of the elected members in considering the report relating to this issue must be taken into account. In this regard it is stated in the letter of 9<sup>th</sup> October 2017 that at a joint Dublin North Central and Central consultation meeting was held in City Hall on Sept 8th 2015. This meeting was attended by members of the design team and DCC officials. At that meeting, several Councillors including Cllr Damian O’Farrell and Cllr Nial Ring indicated a preference for a cycle lane inside the perimeter fence of Fairview Park. One of the design team mentioned to Cllr O’Farrell at this meeting, that the cycle lane being located inside the perimeter fence was the design teams very first preference but there was no encouragement from the Dublin City Council Parks. Thus considering the knowledge of this issue as evidenced at the subsequent meeting, similar to the conclusions reached by of Baker J in the *Byrnes* case, notwithstanding the absence of a specific indication by the Chief Executive on this s issue, it may be said not to have materially impacted on the capacity of the elected representatives to make a considered decision

*(ii) Absence of reference to earlier meetings.*

32. The concern is expressed that there is no reference in the Report to the more recent July 2017 Dublin North Central and Central Area meetings where the original (before material changes were made) Part 8 proposal was discussed. The report at pg. 11 does itemise the various area committee meeting including the meetings in July. The report

does not provide a summary of what was proposed or discussed at each of these meetings, however, there is no requirements for the Chief Executive's report to outline the same. The required content of the Chief Executive's Report set out earlier is contained in section 179(3)(a) and it makes no mention of summarising earlier meetings of the Council relating to the proposal. The Chief Executive's Report could not therefore be considered defective in this regard.

*(iii) Absence of deliberations on consequences of removing one lane of traffic*

33. The concern is expressed that there is no evidence in the report of any deliberations specifically concerning the consequences of removing one lane of traffic. More specifically it is said that under interdepartmental reports, Roads and Traffic made no mention of the removal of the traffic lane.

34. It is correct that the report in summarising Interdepartmental reports from Park and Environment Report does not refer to the reduction of the Traffic lane, the matter is referred to in other parts of the Report. As was stated by Baker J in *Byrnes v Dublin City Council* citing McKechnie J in *Sandyford Environmental Planning v Dun Laoghaire Rathdown County Council* [2004] IEHC 133, there is no statutory requirement that mandates a particular formula or structure or amount of content that must be found in a report from the Chief Executive. The removal of the traffic lane is addressed at Section E of the Report where in addressing "E Removal of Trees", the Response states:

"Response: The concerns regarding the loss of trees are noted. In order to address this concern the Environment and Transportation Department now propose to reconfigure the existing traffic lanes along Fairview Village. The proposed alterations to the Part 8 scheme lane configuration along Fairview (loss of a section of inbound general traffic lane) will avoid the necessity to remove the substantial majority of kerbside mature trees along the roadside boundary of the park. Four roadside trees will need to be removed at an isolated pinch point location circa 100m west of Fairview Footbridge. Of these four, two trees are in poor condition and are already recommended for removal, one is in fair condition (life expectancy of up to 20 years) and one is in good condition (life expectancy of 40+ years)".

Details relating to the consequences of the removal of the traffic lane is in fact addressed in relation to "G Traffic Congestion" where it says:

"The reconfiguration of lanes at Fairview resulting in the removal of an inbound lane from the Malahide Road junction will result in some additional

queuing for traffic during the peak AM inbound commute. To reduce the impact of this, it is proposed to remove the planned toucan crossing located at Marino College and on the inbound side of Malahide Road junction. Ducting provision of these crossings will be provided as part of the scheme delivery, and the traffic flows can be monitored during operation of the new road layout to determine if it is feasible to install these two crossing locations in the future.”

It also mentioned under K. Junction Layout- Staggered crossings, where the Response includes:

“Removal of the left-turn slip lane would reduce the capacity of East Wall Road for inbound traffic. However, the design of this junction will be reviewed in the Detailed Design phase of the project. Similarly, the staggered crossing at Malahide Road will be reviewed at Detailed Design”

While the above may not be described as extensive deliberation on the consequences of the removal of the traffic lane, there is no requirement that the Report is required to contain an extensive deliberation. The matter is considered in more detail in the Explanatory Note provided by the Environment & Transportation Department which is also dated 28<sup>th</sup> August 2017 and appears to have been circulated to elected members. A more detailed assessment of the amendments in particular at Section 4.0 Assessment & Impacts of Inbound Lane Reduction through Fairview. The report noted that:

“It is anticipated that there will be additional queuing inbound during the morning rush hours period as a result of the lane reduction, with existing queue lengths extending further on the Malahide Road, Howth Road and Clontarf road approaches especially during the 08.00- 0.9.00 time period. However, it should be noted that the volumes inbound outside the peak weekday will be adequately catered for in this new arrangement, as will weekend traffic. Maintaining the outbound lanes means that there should be no increase in queuing or congestion outbound on either Amiens Street or on the Fairview Strand approach to Fairview”

35. The revisions to the scheme is also mentioned in other sections of the Report. In Section F Evaluation, under the heading “Annesley Bridge to Howth Road”, the report says at pg. 17 in relation to the inbound cycle land that:

“It is on road through the Malahide road junction and is raised and off- road located within the two lines of trees along Fairview Park. There is raised cycle lane from edges corner before going on-road at the junction with East Wall Road”.

Also at pg. 18

“The proposed works will result in retention of 42 of the 46 roadside trees along Fairview Park. In addition, the footpath width on the village side of Fairview, from Poplar Row to Fairview Strand will be reduced to a minimum width of 1.8 metres at its narrowest section.”

The Recommendation in the Report is that the proposed should proceed subject to requirements of the respective Divisions and Sections of the City Council provided below. It then stated that the proposed development shall be modified/adhere to the following:

11. The following recommendations of the Dublin City Environment & Transportation Department shall be complied with in the development:

(a) The existing traffic lanes through Fairview Village shall be reconfigured in order to retain the majority of mature roadside trees along Fairview Park and the retention of existing on street parking. The amendments to the carriageway shall necessitate the loss of a general traffic lane over a section of the inbound route between Malahide Road Junction to a point approximately 100 metres south of Fairview Footbridge.

(b) 42 No. of the 46 No. roadside trees at Fairview Park proposed for removal shall be retained”.

36. The concern is also expressed none of the 192 people or businesses who made submissions had any knowledge of the possibility of a traffic lane being removed. However, the removal of lane was in response to considerable submissions concerning the removal 46 trees and so it was a modification in response to submissions. As noted the change falls within the scope of modifications which can made to the scheme as advertised. As regards a claim that the Council was required to re-advertise such a modification, there is no express statutory requirement in relation to re-advertisement of proposed modifications to a scheme. Such an argument was rejected in *Duffy v Waterford County Council* [1999] IEHC 241 which concerned local authority development in respect of a scheme of 79 houses. At a meeting of the Council, the City Engineer then provided a report which recommended that the Corporation proceed with the proposed development but with certain amendments, including the reduction of the number of houses from 79 to 70. The report also recommended certain other alterations which included the original proposed two storey houses along the southern boundary of the site were to be replaced by bungalows so as to reduce the degree of over-looking of the Hillview houses and the

wall between the Hillview estate and the proposed development was to be increased in height. The other alterations which were made in the proposed scheme included the replacement of 8 bungalows by 8 two storey houses to the west and east of the Applicant's own bungalow. The Respondent Corporation decided to proceed with the scheme as presented in the City Engineer's report. A motion opposing the development was defeated by 10 votes to 5. It was argued that that because the Council did not re-advertise the scheme as amended and again allow for objections from members of the public, that the Respondent did not correctly carry out the statutory procedure laid down by the then Part X of the Local Government (Planning & Development) Regulations 1994. This was rejected by the Court with McGuinness J stating:

“On the affidavit and documentary evidence before this Court, it seems to me that the Respondent was exact in its adherence to the statutory system set out in Part X of the 1994 Regulations. In particular the report of the 17th June, 1998 presented by the City Engineer dealt in the fullest detail with all the matters set out in Regulation 134(2), and a real effort was made to meet the objections of the local residents. It is of course true that the Applicant himself has a number of objections to the amended scheme. Some of these objections may be well-founded on planning grounds, but that is not a matter which can be dealt with by this Court by way of Judicial Review. In my view the Respondent followed the proper statutory procedures in reaching its decision of the 18th June, 1998 and this first ground therefore, fails”.

## **CONCLUSION**

37. Overall I would consider that Part 8 process conducted by the Council was in compliance with the statutory requirements and was valid. In respect of one specific issue concerning the option of locating the cycleway inside the perimeter fence, the Report of the Chief Executive might have more clearly addressed this issue. However, for the reasons addressed I do not consider that this to be a flaw which would vitiate the process.

**STEPHEN DODD BL**