

Your Ref: Material Alterations to Draft Dublin City Development
Plan 2022-2028

1 September 2022

Development Plan Team
Planning & Property Development Department
Block 4 Floor 3
Civic Offices
Wood Quay
Dublin 8
D08 RF3F

Dear Sir/Madam,

RE: Material Alterations to Draft Dublin City Development Plan 2022-2028

This submission has been prepared by Avison Young on behalf of the Religious Sisters of Charity in relation to a 6.55ha campus at Merrion Road, Dublin 4 in response to the publication of the Material Alterations to the Draft Dublin City Development Plan 2022-2028 (hereafter, the 'Draft Development Plan').

The Religious Sisters of Charity (RSC) welcome the opportunity to make a submission on the preparation of a new Development Plan for the City.

This submission on the proposed Material Alterations to the Draft Development Plan relates to **Material Alteration Reference Number 14.12** and the overly restrictive limitations applied to 'Z15' lands.

We submit from the outset that Dublin City Council has erred in rejecting, without valid, adequate or lawful reasons, our reasoned submission made at Draft Stage, supported by O'Connell Mahon Architects, for the rezoning of approx. 4ha of the site from 'Z6' and 'Z15' to 'Z12' and amendments to the 'Z15' zoning objectives so that the optimum mix of development can be accommodated on this site.

Background

The RSC Merrion Road campus, which totals 6.55ha, comprises the former St. Mary's Home for the Blind dating from 1866 and an adjoining late 18th Century period house, together with various extensions to St. Mary's including St. Oliver's and Loyola, and the adjoining sheltered housing accommodation fronting Merrion Road. The Caritas Convalescent Centre, RSC community accommodation in Marmion, Providence and Shalom, together with a long disused swimming pool, maintenance office and vacant site are located to the rear of the original buildings.

The RSC made a fully reasoned submission, supported by O'Connell Mahon Architects, on the Draft Development Plan (Ref. No. S-02497 - Religious Sisters of Charity 1060) where it was outlined that

the majority of the institutional buildings on the subject site are physically and functionally obsolete. It was explained that as many of the institutional uses on site have ceased and are no longer required resulting in buildings of approx. 6,465 sqm (c.87% of the accommodation) on 4.5 hectares being vacant. In this submission, it was requested that Dublin City Council amend the land use zoning on the c.4 ha area of the overall c.6.55 ha site, where institutional uses have ceased, from 'Z15' (Community and Social Infrastructure) and partially 'Z6' (Enterprise and Employment) to 'Z12', (Institutional Land - Future Development Potential). In doing so, this would mean c. 40% of the site would *remain as 'Z15'* to support an *appropriate* level of institutional and community uses at this location. It was also requested that the restrictive 'Z15' land use zoning policy provisions within the Draft Development Plan be amended to align with the existing 'Z15' provisions as per the current Dublin City Development Plan in order to facilitate potential future and sustainable development of such sites.



Figure 1: Site and Building context and Proposed Site Area for Rezoning. Source: O'Connell Mahon Architects.

Merrion Road Site

The site is characterised by low density, largely 2 storey buildings which suggest a very low Plot Ratio of 0.195:1. It is considered that the existing site is significantly underutilised and there is a clear contrast between the low-density and low-rise buildings within the subject site and the adjacent high-density Elm Park Green development and St. Vincent's Hospital campus.

As outlined in the previous RSC submission at Draft Stage, a large portion of the Merrion Road site consists of obsolete and low-density development which is largely physically and functionally obsolete. Most of the buildings and facilities are vacant within the lands and are either obsolete or approaching obsolescence due to the inability to comply with HIQA or HSE requirements. St Mary's nursing home closed in 2020 following the liquidation of the operating company with the liquidators citing insolvency due to regulatory compliance difficulties, concerns over future HSE funding and the cost of compliance with HIQA recommendations and modernisation. The licence taken by HSE to allow for the orderly closure of the Disability Centre expired in May 2022. The closure of the Nursing Home and the Disability Centre means that they are no longer required for institutional uses.

Alongside the cessation of these uses, St Vincent's Hospital Group continues to operate the Caritas Convalescent Centre on c.1.2ha portion of the lands and the RSC continue to occupy its various residences.

The Sisters of Charity, like many other religious communities, are an aging population and their needs for accommodation on the site are also reducing. The desire of the RSC to continue its institutional and community uses on site is accepted and acknowledged in their request to retain c.40% of the site for 'Z15' uses, however, the overall site at c.6.55ha is now superfluous to the previous community and social requirements of the owners.

The Merrion Road lands are an underutilised site situated along excellent transport links, in which the various modes of transport are readily available. This sets the site apart from other institutional lands as the option of bus and rail are available with nearby Dart stations at Booterstown and Sydney Parade Avenue, approximately a 15-minute walk. Additionally, public transport options within the vicinity of the area will improve with the addition of the Bus Connects Core Bus Corridors as corridor no. 15 is proposed to run along Merrion Road. Not only will this provide enhanced bus services but an improved cycle network.

Material Alteration Reference Number 14.12

Proposed Material Alteration Reference Number 14.12 relates to the 'Z15' Land-Use Zoning Objective: *to protect and provide for community uses and social infrastructure*. A number of text alterations have been made to the 'Z15' Land-Use Objective under this proposed Material Alteration. Our client is concerned that the proposed amendments under Material Alteration Ref. No. 14.12 in relation to the 'Z15' Land-Use Zoning Objective will have significant implications for any future proposals to develop on underutilised portions of such lands.

The text of Proposed Material Alteration Reference Number 14.12 is set out in its entirety as an appendix to this submission.

Comments on Proposed Material Alteration Ref. No. 14.12

Our client is of the opinion that the proposed change under Material Alteration Ref. No. 14.12 is a barrier to future essential and appropriate development opportunities for strategic 'Z15' sites such as at Merrion Road. In this regard, it is considered wholly inappropriate, not in accordance with proper planning and sustainable development, and contrary to the Guidelines issued in June 2022 which provide that existing serviced sites such as this one which are currently zoned residential (the current Z15 zoning includes Residential as an Open for Consideration uses) should not be rezoned, to restrict existing 'Z15' lands in this way. Our client is concerned that a number of the above proposed alterations will have an undue impact on the future sustainable development potential of such sites.

In respect of the proposed alterations under the '**A: Development on Z15 Lands**' section, it is stated that "*limited*" residential/commercial development will only be considered in "*highly exceptional circumstances*" on 'Z15' landbanks. The Proposed Material Alteration fails to outline exactly what a "*highly exceptional circumstance*" may consist of or as to the extent of what "*limited*" development or "*subordinate in scale*" may refer. It is considered that the lack of clarity or definition in this regard may result in a number of conflicts.

Furthermore, it is considered that the removal of residential/commercial uses from being Permissible or Open for Consideration is wholly restrictive and it is requested that the following proposed text removal be re-instated under the 'Z15' 'Open for Consideration Uses' - (~~*(see (paragraph 14.3.1 and) above paragraphs in relation to residential/office proposals).*~~). The removal of this sentence, results in the inconsistencies with the overall policy, as it is stated that limited residential/ commercial can be considered, however, these uses are not listed among the open of consideration uses.

In this regard, it is considered that the requirement to undertake a Material Contravention of the City Development Plan in order to proceed with development upon cessation of the existing use on 'Z15' lands may prove practically impossible, given the other strict criteria that apply in demonstrating that any proposals for residential or commercial development would not compromise the future needs of the existing community/ social uses.

Considering the ongoing housing crisis, it seems that the opportunity to provide new housing units should be retained as is currently provided for in the Dublin City Development Plan 2016-2022 policy provisions on 'Z15' zoned landbanks. In the case of the Merrion Road lands, the continued use of the entire lands within the Institutional and Community uses is not sustainable due to diminishing requirements of the landowners and buildings obsolescence. In this regard, it is considered wholly inappropriate to place a total reserve on such lands restricting potential future sustainable development.

Furthermore, it is noted that the Department of Housing, Local Government and Heritage in their Guidelines for making Development Plans note at Section 4.4.1 titled 'Land/Sites Already Zoned':

The development plan review process is an opportunity to take stock of land already zoned for residential purposes or a mixture of residential and other uses. This must be set out in the plan core strategy^[1].

It further states:

'Land and sites already zoned for residential purposes may be regarded as providing a baseline, or starting point to meet projected population and housing targets, especially in cases where planning permission has already been granted, based on the presumption that land subject to planning permission is already serviced or serviceable.'

Residential development is currently listed as being Open for Consideration on 'Z15' lands and it has been demonstrated that the serviced lands at Merrion Road are surplus to the requirements of the RSC and have the capacity to enable the placement of people close to existing services and employment within Dublin City and its locality. In accordance with best practice, it is requested that residential use be re-instated under the 'Z15' zoning objective.

In addition, we contend that Part B 'Development Following Cessation of Z15 Use' is disproportionate and unreasonable and represents an unlawful breach of property rights. In the instance of the Merrion Road Lands, the RSC continue to facilitate community and social uses on a sizeable portion of their lands including the St Vincent's Hospital Group operation of Caritas Convalescent Centre on 1.2ha, however, they have no demand for the entire site nor are the buildings suited to such uses. The site is suitable to residential/commercial development and there is no onus on private landowners to provide public infrastructure. As discussed further below, the City Council accepted that a portion of Jesuit lands adjoining Gonzaga College would be appropriate to be rezoned from 'Z15' to 'Z12'.

Response to Chief Executives Report

It is noted that in the Chief Executives Response Map Reference: H-0009, pg 782, it is stated that:

The subject site and associated lands to the south (now known as Elmpark Green) formerly in the ownership of the Sisters of Charity were considered for rezoning under previous development plan reviews. As part of the rezoning of the overall landholding, the southern part of the lands (Elmpark Green) were rezoned to Z1 and Z6 to accommodate large scale redevelopment comprising of commercial and residential uses, while the northern part of the lands remained as Z15 to accommodate the retention of the religious order and St. Mary's nursing home. A portion of lands to the eastern boundary of the site fronting Merrion Road within the nursing home grounds are also zoned Z6. The Development Plan commitment to provide for additional housing and employment on underutilised institutional lands has already been accommodated on lands to the south and east. Further rezoning and the further erosion of these established institutional lands, long used for social and community infrastructure is, therefore, not considered appropriate in this instance. (AY Emphasis added)

^[1] Development Plans, Guidelines for Planning Authorities, Prepared by the Dept of Housing, Local Government and Heritage, June 2022, Page 47

In the first instance it is noted that Material Alteration Reference Number 14.12 removes the criteria that ~~(Only a once-off development in respect of the site / lands in the ownership of and /or use by the institution will be considered)~~ will apply. Therefore, it is not appropriate for the Chief Executive to state that *"The Development Plan commitment to provide for additional housing and employment on underutilised institutional lands has already been accommodated on lands to the south and east"*. As highlighted in our submission, the requirements and demands of the Merrion Road Lands have changed significantly over the last 20+ years and it has been demonstrated in our submission at Draft Stage that sufficient lands will be retained under 'Z15' to more than adequately meet the existing and future community and social requirements.

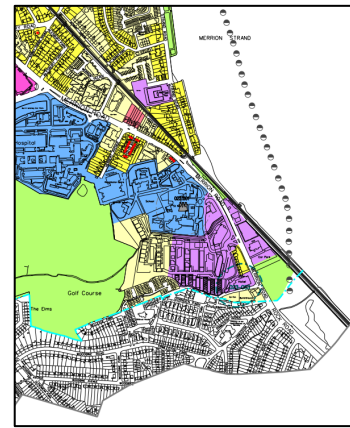
In addition to the above, it is noted that the site of Elmpark Green was zoned Objective 'Z12' to *"ensure that existing environment amenities are protected in any future use of these lands"* under the Dublin City Development Plan, 1999-2005 and again in the 2005-2011 Development Plan and these lands were subsequently rezoned Objective 'Z1' and 'Z6' under the Dublin City Development Plan, 2011-2017.



Extract from 1999 Zoning Map



Extract from 2005 Zoning Map



Extract from 2011 Zoning Map

As demonstrated, the wider lands previously in the ownership of the RSC have not, over the last 4 no. Development Plans, been identified as 'Z15' lands. As such, it is disingenuous of the Chief Executive to suggest that a rezoning of the current RSC landholding at Merrion Road would result in a *"further rezoning"* and *"further erosion of these established institutional lands"*. The lands currently occupied by Elmpark Green did not require a rezoning of, nor did they result in the erosion of, the established institutional lands and residential uses were 'permissible' and commercial use was 'open for consideration' on the 'Z12' lands.

The extent of the 'Z15' lands has remained largely unchanged over the last 20 years, however, the requirement for these lands has significantly changed. In this regard, policies and zoning objectives should be reflective of the changing land use requirements and it is inappropriate to rely on past requirements rather than present needs.

The Chief Executives Report goes on to state that an *"insufficient rationale has been provided to justify any further rezoning of these lands. There is a strong need for supported living and respite care in the area which has been long established on the subject site at St. Mary's Nursing Home"*. Contrary to this, we would contend that the City Council has failed to provide any evidential base of the following:

- *There is a strong need for supported living and respite care in the area;*
- *It is also important to retain sufficient Z15 lands in this area to provide for further consolidation of social and community uses; and,*
- *potentially for the expansion of the hospital adjoining the site.*

The Council have not demonstrated that there is an under-provision or direct need for supported living, respite care or nursing home facilities. St Vincent's Hospital operates the former Caritas Convalescent Centre on 1.2ha which meets its current needs and that site offers potential for expansion which will be facilitated by RSC.

In fact, the closure of St Mary's Nursing Home and the Disability Centre due to operational and funding issues is testament to the reduced requirements/suitability of the facilities to provide for community accommodation on this site. Aside from St Vincent's occupation of Caritas CC and the continued RSC occupation of various residential units the requirement for institutional and community uses is severely reduced and the previous submission made on behalf of the RSC clearly demonstrated that the c.6.55ha land holding is surplus to their existing and future requirements. A rationale has been provided which would see c. 40% of the site remaining as 'Z15' to support an appropriate level of institutional and community uses at this location.

In this regard, the comments of the Chief Executive regarding the Jesuit lands adjoining Gonzaga College lands are relevant in this instance also. The Chief Executive concluded that as the existing school remains within the overall 'Z15' landholding and retains sufficient space for its sports grounds and any future expansion of the school, it is considered appropriate to rezone the lands to 'Z12'. The same rationale applies to the Merrion Road lands vis a vis the RSC community accommodation and Caritas Convalescent Centre remaining within the overall 'Z15' landholding to the north of the site while retaining sufficient space for the expansion of institutional or community uses within the remains (c. 40%) of the 'Z15'lands. Therefore, it would have also been appropriate to rezone the Merrion Road lands to 'Z12' to enable future development of the lands whilst also having regard to the character and former institutional use.

The actions by Dublin City Council to effectively sterilise privately owned lands for *possible* future community uses are considered disproportionate and unreasonable. To suggest that the lands be reserved for an unknown and possible expansion of St. Vincent's Hospital is considered to constitute an unlawful breach of property rights.

Please see attached a legal submission in Appendix 2, in respect of the Proposed Amendments as described above.

Conclusion

Our client welcomes the opportunity to comment on the Material Alterations to the Draft Dublin City Development Plan 2022-2028. It submitted that Material Alteration Ref. No. 14.12 is overly restrictive *inter alia* by reasons of the removal of the potential to provide residential/commercial uses as Open for Consideration on 'Z15' lands. In this regard, it is considered wholly inappropriate, not in accordance with proper planning and sustainable development, and contrary to the Department Guidelines issued in June 2022 which provide that existing serviced sites such as this

one which are currently zoned residential (the current Z15 zoning includes Residential as an Open for Consideration uses) should not be dezoned, to restrict existing 'Z15' lands in this way.

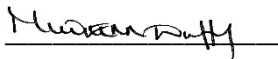
The changes proposed to the current 'Z15' zoning would have the effect of sterilising the land from development potential and would constitute an unlawful breach of property rights for the reasons set out in the accompanying legal submission.

It is also submitted that inadequate or invalid reasons have been provided for not rezoning c.4ha from 'Z15' and 'Z6' to 'Z12' as sought in our submission to the Draft Development Plan.

Our client has demonstrated that c.40% of the site is sufficient to accommodate existing or expansion of community and social uses associated with the Merrion Road lands, and it is requested that the residential use be recognised as an Open for Consideration use under the 'Z15' zoning objective.

We trust that the matters outlined above will be taken into consideration as part of the finalisation of the Dublin City Development Plan 2022-2028. We are available for discussion on any of the matters referred to above and would also appreciate if you could confirm receipt of this submission by return.

Yours sincerely,



Muirenn Duffy
Associate Director

For and on behalf of Avison Young Planning and Regeneration Limited

APPENDIX 1 - Material Alteration Ref. No. 14.12***Land-Use Zoning Objective Z15: To protect and provide for community uses and social infrastructure***

Z15 lands (*typically*) comprise ~~{a variety of}~~ *(large)* sites, often consisting of long established complexes of institutional/community buildings and associated open grounds. ~~(-but also comprise smaller sites usually in more central areas.)~~ The existing uses on these lands generally include community, ~~{social or institutional}~~ *(related)* development such as schools, colleges, sports grounds, residential institutions and healthcare institutions, such as hospitals.

Such facilities are considered essential in order to provide adequate community and social infrastructure commensurate with the delivery of compact growth ~~{and the principle of the 15 minute city}~~. It is the policy of the council to promote the retention, protection and enhancement of the city's Z15 lands as they contribute to the creation of vibrant neighbourhoods, ~~{healthy placemaking}~~ and a sustainable well connected city.

The city's Z15 landbank also accommodates many nationally important institutions such as the RDS and St. James' Hospital, and the Council are committed to safeguarding their continued operation, consolidation and enhancement.

In recent years, Z15 lands have come under increased pressure for residential development. However, protecting and facilitating the ongoing use of these lands for community and social infrastructure, ~~{as well as their use in some instances for charitable purposes,}~~ is a key objective of the Council. The Council are committed to strengthening the role of Z15 lands and will actively discourage the piecemeal erosion and fragmentation of such lands.

{The following paragraphs sets out the criteria for:

- A. ***Development on Z15 lands***
- B. ***Development following cessation of Z15 use}***

{A: Development on Z15 Lands}

Limited residential/~~(office)~~ ~~{commercial}~~ development on Z15 lands will only be allowed in highly exceptional circumstances where it can be demonstrated by the ~~(institutional)~~ landowner/~~{applicant}~~ that the proposed development is required in order to maintain or enhance the function / operational viability of the primary institution ~~{al}~~ ~~{social/community use}~~ on the lands ~~{and/or other institutional social/community use within the Dublin City Council area in the control of the landowner/applicant}~~ ~~(see paragraph 14.3.1 above)~~. The following criteria must also be adhered to:

- ***{In proposals for any residential/commercial development, the applicant must demonstrate that the future anticipated needs of the existing use, including extensions or additional facilities would not be compromised.}***

- Any such residential/~~(office)~~ **{commercial}** development must demonstrate that it is **{subordinate}**~~(ancillary)~~ in scale to the primary **{institutional}**/social/community use.
- **{Where appropriate, proposals should be subject to consultation with the relevant stakeholder e.g. Department of Education/Health Service Executive.}**
- The development must not compromise the open character of the site and should have due regard to features of note including mature trees, boundary walls and any other feature/s as considered necessary by the council.
- ~~(Only a once-off development in respect of the site / lands in the ownership of and/or use by the institution will be considered).~~
- In all cases, the applicant shall submit a statement, **{typically in the form of a business plan,}** ~~(as part of a legal agreement under the Planning Acts,)~~ demonstrating how the existing institutional~~{/social/community}~~ facility will be retained **{and enhanced}** ~~(long-term)~~ on ~~{the}~~site~~{/lands}~~.
- In all cases ~~{(with the exception of land disposed of prior to the adoption of the plan),}~~ the applicant shall be the ~~(institutional)~~ **{land}**owner~~(/occupier)~~ ~~{or have a letter of consent from the landowner.}~~
- ~~(In cases of rationalisation of an existing use in order to facilitate such a residential/office development, the applicant must demonstrate that the future anticipated needs of the existing use, including extensions or additional facilities would not be compromised.)~~

For clarity, the above criteria do not apply to residential institution use ~~{, including ancillary staff accommodation or assisted living/retirement home.}~~ ~~(e.g. supported living units.)~~ **{Student accommodation will only be considered in instances}** where it is related to the primary use on the Z15 lands.

{Any proposed development for 'open for consideration' uses on part of the Z15 landholding, shall be required to demonstrate to the planning authority how the proposal is in accordance with and assists in securing the aims of the zoning objective;} ~~(how it provides for significant new community and social infrastructure that will be of benefit to the wider community;)~~ ~~{and, how such a development would preserve, maintain or enhance the existing social and community function(s) of the lands subject to the development proposal.}~~

{B: Development Following Cessation of Z15 Use}

~~(In instances where all or part of a Z15 landholding, is sold or otherwise disposed of for development (e.g. where there has been a cessation of the existing use or the lands or part thereof are sold effectively severing them from the existing primary institutional landholding), the use of the lands will continue on the basis that the existing community and social infrastructure function of the lands remains.)~~ The cessation of an existing **{Z15 institutional}**/social/community use on a site or change in land ownership does not extinguish / negate the ~~(function of such lands for)~~ **{purpose of these lands for}**community and social infrastructure **{use. It is the objective of the Council that such**

lands should be retained for a use in accordance with the zoning objective unless exceptional circumstances prevail.}

In ~~{such}~~ **(these)** circumstances, (i.e. cessation of use on a Z15 site or disposal of all or part of a Z15 site), a variation or ~~{material contravention}~~ to the Development Plan will be required to develop such lands for ~~(other uses including)~~ residential/~~(office)~~**{commercial}** purposes. Any such variation/~~{material contravention}~~ would need to be supported by a detailed ~~{community and social infrastructure audit}~~**(masterplan)** which should clearly demonstrate why the land is not viable / suitable for social and community use **{(defined as the physical infrastructure necessary for successful communities, i.e. community infrastructure such as schools, libraries, community centres, cultural spaces, health centres, facilities for the elderly and persons with disabilities, childcare facilities, parks, and other facilities and spaces for play and recreational activity) in accordance with the zoning objective.}**

{Masterplan Requirement}

In either scenario A or B, it is a requirement that for sites larger than 1ha that a masterplan is provided.} ~~(The Masterplan should also set out a clear vision for the {Z15} lands and provide for)~~ {The masterplan must set out the vision for the lands and demonstrate that} a minimum of 25% of the overall development ~~{site/}~~lands **is retained** for open space and/or community and social facilities. This requirement need not apply if the footprint of existing buildings to be retained on the site exceeds 50% of the total site area.

~~(The masterplan must incorporate landscape features that contribute to the open character of the lands and ensure that public use including the provision of sporting and recreational facilities which would be available predominantly for the community are facilitated.)~~ The 25% public open space shall not be split up, unless site characteristics dictate otherwise, and shall comprise mainly of soft landscaping suitable for recreational and amenity purposes and should contribute to, and create linkages with, the strategic green network. **{Development proposals must incorporate landscape features that contribute to the open character of the lands and ensure that public use, including the provision of sporting and recreational facilities which would be available predominantly for the community, are facilitated.}**

Where there is an existing sports pitch or sports facility on the Z15 lands subject to redevelopment, commensurate sporting/recreational infrastructure will be required to be provided and retained for community use where appropriate as part of any new development (see also Chapter 10: Green Infrastructure and Recreation, Policy GI49).

~~(Any proposed development for 'open for consideration' uses on part of the Z15 landholding, shall be required to demonstrate to the planning authority how the proposal is in accordance with and assists in securing the aims of the zoning objective; (how it provides for significant new community and social infrastructure that will be of benefit to the wider community); and, how such a development would preserve, maintain or enhance the existing social and community function(s) of the lands subject to the development proposal.)~~

Z15 – Permissible Uses

{Assisted living/retirement home,} Buildings for the health, safety and welfare of the public, café/ tearoom {(associated with the primary use)}, cemetery, childcare facility, club house and associated sports facilities, community facility, cultural/recreational building and uses, education, medical and related consultants, open space, place of public worship, {primary health care centre}, public service installation, residential institution (and ancillary residential accommodation for staff), sports facility {and recreational uses}.

Z15 – Open for Consideration Uses

Allotments, ~~(assisted living/retirement home), (bed and breakfast)~~, car park ancillary to main use, civic and amenity/recycling centre, conference centre {(associated with the primary use)}, crematorium, craft centre/ craft shop {(associated with the primary use)}, ~~(delicatessen, funeral home, guesthouse, hostel (tourist))~~, municipal golf course, ~~(primary health care centre), (restaurant, shop (local))~~, student accommodation (associated with the primary institutional use), training centre {(associated with the primary use)}, veterinary surgery. ~~(see (paragraph 14.3.1 and) above paragraphs in relation to residential/office proposals.)~~

APPENDIX 2 - Legal Submission prepared by Arthur Cox

Material Alterations to the Draft Dublin City Development Plan 2022-2028

Submission on behalf of the Religious Sisters of Charity

LEGAL AND CONSTITUTIONAL IMPLICATIONS OF THE PROPOSED MATERIAL ALTERATION 14.12 ON THE Z15 ZONING OBJECTIVE ON THE LANDS OWNED BY THE RELIGIOUS SISTERS OF CHARITY AND THE FUNDAMENTAL FLAWS WITH THE 'Z15' ZONING IN THE DRAFT DUBLIN CITY DEVELOPMENT PLAN 2022-2028

1. Introduction

- 1.1 We make this submission on behalf of the Religious Sisters of Charity (the “**Religious Sisters**”), Caritas, Gilford Road, Sandymount, Dublin 4, regarding a 6.55 hectare campus at Merrion Road, Dublin 4 (the “**Merrion Road Lands**”) and the proposed material alterations to the Draft Proposal for amendments to the ‘Z15’ Zoning objective as set out in the Draft Dublin City Development Plan 2022 - 2028 (the “**Proposed Amendments**”).
- 1.2 We wish to highlight significant and serious issues regarding the Proposed Amendments which would, if adopted, effectively wrongly sterilise our client’s property, the Merrion Road Lands. The Proposed Amendments seek to make the requirements previously set out in the Draft Dublin City Development Plan 2022 – 2028 (the “**Draft Plan**”) for the Z15 zoning objective even more excessively restrictive and draconian to the extent that they are unlawful. There are fundamental flaws in the ‘Z15’ zoning in the Draft Plan as set out in the submission made in respect of the draft Plan on its behalf by Avison Young on 11 February 2022.
- 1.3 We have set out below the arguments as to why we consider that the material amendments to the draft Z15 zoning (and the draft Z15 zoning itself) are not only unreasonable, discriminatory and wholly disproportionate to the aim which the Council is seeking to achieve, but also an illegal encroachment on our client’s constitutionally protected property rights.

2. Background and Previous Submission to the Draft Development Plan

- 2.1 By way of background, the Religious Sisters made a submission on the Draft Development Plan (Ref. No. S-02497 - Religious Sisters of Charity 1060) wherein it was outlined that the majority of the institutional buildings on the Merrion Road Lands are physically and functionally obsolete. It was explained that, as many of the institutional uses on site have ceased, this has resulted in buildings of approximately 6,465 square metres (c. 87% of the accommodation) on 4.5 hectares being vacant.
- 2.2 **The submission made at Draft Stage, requested that approximately 60% of the site be rezoned from Z15 to Z12.**
- 2.3 More specifically, our client requested that the Council amend the land use zoning on the c. 4 hectare area *of the overall c. 6.55 hectare site*, where institutional uses have ceased, from ‘Z15’ (Community and Social Infrastructure) and partially ‘Z6’ (Enterprise and Employment) to ‘Z12’, (Institutional Land - Future Development Potential). This would mean c. 40% of the site would remain as ‘Z15’ to support an

appropriate, reasonable and proportionate level of institutional and community uses at this location. It was also requested that the restrictive 'Z15' land use zoning policy provisions within the Draft Plan be amended to align with the existing 'Z15' provisions as per the current Dublin City Development Plan 2016 – 2022, in order to facilitate potential future and sustainable development of such sites.

- 2.4 As outlined in our client's submission, most of the buildings and facilities are vacant within the Merrion Road Lands and are either obsolete or approaching obsolescence due to the inability to comply with HIQA or HSE requirements. The HSE licence of St. Mary's Nursing Home (the "Nursing Home") expired in May 2022. In the case of the Merrion Road Lands, the continued use of the *entire* lands for 'Institutional and Community' uses is not sustainable due to vastly diminishing requirements of the landowners and the buildings' obsolescence. In this regard, it is considered wholly inappropriate to effectively sterilise the lands, and restrict them to such an extent that no potential future sustainable development can be achieved on them.
- 2.5 As highlighted in the submission, the requirements and demands of the Merrion Road Lands have changed significantly over the last 20 years and it was demonstrated in the submission that sufficient lands could be retained under 'Z15' to more than adequately meet any existing and future community and social requirements.
- 2.6 The closure of the Nursing Home and the disability centre in 2020 means that they are now vacant and no longer required for institutional uses. The buildings formerly occupied by the Nursing Home are not of a suitable standard for modern healthcare requirements and accordingly have become obsolete, as confirmed by the subsequent liquidation of the operating company in 2020. The Religious Sisters, like many other religious communities, are an aging population and their needs for accommodation on the site are also reducing. As such, the c. 6.55 hectare site is now superfluous to the previous community and social requirements of the owners.
- 2.7 Our client has therefore clearly demonstrated by providing objective evidence that there is no need for the lands to remain in 'Institutional and Community' use for the purposes of its Institution. Further, they are, in principle, prepared to accept that approximately 40% of the site could be retained in the wider community purpose, subject to a more acceptable zoning being applied to that particular portion of the site.

3. **Material Alteration to Land-Use Zoning Objective 'Z15'**

- 3.1 We consider the Proposed Amendments to be unlawful on planning, constitutional and ECHR grounds. They cumulatively add to the overall restrictiveness and unreasonableness of the Draft Proposal for the new Z15 Zoning objective.
- 3.2 We consider that each of the prohibitions / requirements in respect of the Proposed Amendments are, not only, unreasonable, discriminatory and wholly disproportionate to the aim which the Council is seeking to achieve but also an illegal encroachment on constitutionally protected property rights. The above legal and constitutional arguments which were raised, but not determined by reason of the Council's failure to give its reasons for the quashed Z15 zoning objective, in the case of *Christian & Ors. v. Dublin City Council*, Record No.:56/2011JR apply with equal force to the Proposed Amendments to the draft Z15, and the draft zoning itself which they seek to amend.
- 3.3 The Proposed Material Alteration Reference Number 14.12 relates to the 'Z15' Land-Use Zoning Objective: to protect and provide for community uses and social infrastructure. A number of text alterations have been made to the 'Z15' Land-Use Objective under the Proposed Amendments. Our client is concerned that the Proposed Amendments will have even more severe implications for any future proposals to

develop on underutilised portions of the Merrion Road Lands and make any such proposals effectively impossible.

- 3.4 The proposed removal of ‘residential/commercial’ uses from being Permissible or Open for Consideration from the already draconian Draft Z15 zoning, arguably amounts to land diversion under the Constitution. If adopted, the Proposed Amendments would amount to an unnecessarily and unwarranted severe restriction of property rights on our client as private landowners in order to achieve a general public good. In this regard, the Proposed Amendments raise property rights issues under Articles 40.3 and 43 of the Constitution, as well as under Article 1 of the First Protocol to the European Convention on Human Rights (the “**ECHR**”).
- 3.5 As the property concerned is religious property, Article 44.2.5° and Article 44.2.6° of the Constitution also apply. It appears that Articles 40.1 and 44.2.3° of the Constitution, as well as Article 14 of the ECHR may also be infringed. All of these provisions would be breached if the Proposed Amendments (or indeed the Draft Z15 zoning itself, to which the amendments are proposed), were to be adopted, as currently written.
- 3.6 Separately, and distinctly, the Proposed Amendments would appear to amount to an unwarranted diversion of the Religious Sisters’ property, having regard to the reasons provided by the CE for rejecting the rezoning request and the effective sterilization of the entirety of the Merrion Road lands. This is particularly problematic in circumstances where we are instructed that no current need for wider community and institutional uses in the particular area of the lands has been demonstrated in the context of the plan making process. The restriction of the Merrion Road Lands in the manner proposed by the Proposed Amendments therefore creates an unreasonable and disproportionate interference on our client property rights.

4. **Zoning In The Draft Plan**

- 4.1 The Chief Executive’s Report on the Draft Plan Consultation Process dated 29 April 2022 (the “**Chief Executive’s Report**”) states that our client’s proposed change of the land use zoning of lands at Merrion Road from ‘Z6’ and ‘Z15’ to ‘Z12’ (c. 60%) should remain unchanged. The reasons for retaining the draft Z15 zoning were noted to include the need to retain sufficient ‘Z15’ lands to provide for further consolidation of social and community uses and potentially for the expansion of the hospital adjoining the site.
- 4.2 As set out in our client’s previous submission, a series of criteria to be satisfied if bringing forward residential or office development on ‘Z15’ lands has been included in the Draft Development Plan including the following: illustrating the residential development is ancillary in scale to the primary institutional use; 25% public open space; only considering a once-off development on the overall landholding; requirement for a legal agreement in relation to the long term use of the overall landholding; requirement for the institution to be the applicant; and demonstrating that the existing use will not be compromised.
- 4.3 While our client recognises that the provision of social and community infrastructure to support population growth is a valid and important objective to be achieved in the Council’s functional area, a disproportionate burden is being placed on our client’s private lands, to deliver community infrastructure for the common good, while they are simultaneously being prevented from developing their own lands. We note that lands in the ownership of the Council and other public bodies within the functional area could serve this objective. Only where publicly held lands are demonstrably and

objectively inadequate to serve this objective, should private lands be interfered with in the public interest and where this is done, such interference must be proportionate and using the least restrictive means possible, and the burden of the provision of community uses should be shared equally.

4.4 Regarding the Chief Executive's Report, which states that 'Z15' zoning is a diminishing land bank and that insufficient rationale has been provided to justify any further rezoning of these lands, it is submitted that the opposite appears to be the position - insufficient justification has been provided for refusing to afford zonings previously considered by Dublin City Council to be appropriate land use zonings at the Merrion Road Lands. In this regard, we are instructed that the site of Elmpark Green was zoned Objective 'Z12' to "*ensure that existing environment amenities are protected in any future use of these lands*" under the Dublin City Development Plan, 1999-2005 and again in the 2005-2011 Development Plan and these lands were subsequently rezoned Objective 'Z1' and 'Z6' under the Dublin City Development Plan, 2011-2017. Further, we are instructed that the wider lands previously in the ownership of the RSC have not, over the last 4 no. Development Plans, been identified as 'Z15' lands.

4.5 The 'Z15' lands are stated as not being development opportunity lands but no reason for this statement is provided. This is especially difficult to understand in circumstances where the site is developed and serviced but it is very underutilised as explained in our client's submission from Avison Young and where the Department Guidelines published in June 2022 expressly provide in Section 4.4.1 'Land/Sites Already Zoned' that:

*'The development plan review process is an opportunity to take stock of land already zoned for residential purposes or a mixture of residential and other uses. This must be set out in the plan core strategy.'*¹

4.6 It further states:

*'Land and sites already zoned for residential purposes **may be regarded as providing a baseline, or starting point to meet projected population and housing targets**, especially in cases where planning permission has already been granted, based on the presumption that land subject to planning permission is already serviced or serviceable.'* [Emphasis added]

4.7 The Chief Executive's Report goes on to state that it is appropriate for a development plan to zone "particular lands" for social and community use but no definition of particular lands is provided. No further elaboration is provided as to what is meant by "particular lands".

4.8 The Draft Plan's proposal to retain the 'Z15' zoning of the Merrion Road Lands (prior to the Proposed Amendments being published) would it is submitted in and of itself have been unconstitutional. However, the proposals to alter the Draft Plan by restricting the 'Z15' zoning objective further, amounts to a further encroachment on our client's property.

4.9 It appears that the intention behind the Proposed Amendments is to sterilise our client's *private* lands in order to ensure that they, along with other 'Z15' landowners, should shoulder a disproportionate amount of the burden of providing *public* community institutions and facilities and open space for the Dublin City area. No

¹ Development Plans, Guidelines for Planning Authorities, Prepared by the Dept of Housing, Local Government and Heritage, June 2022, Page 47

information appears to have been given in relation to the extent of public State owned lands already available in this area.

- 4.10 Zoning public land 'Z15' to provide for community and institutional facilities and open space for the Dublin City area is understandable. However, zoning private lands for that purpose amounts to a discriminatory attack on property rights. This is particularly so in circumstances where the Council has failed to carry out an evidence-based assessment of the need (if any) for open space and / or institutional or community facilities in the various communities within Dublin City.
- 4.11 As a consequence, the new Z15 Zoning objective is unlawful, in the event that the Council incorporates the Proposed Amendments (or indeed the Draft Proposal itself), as they are currently written in respect of the Merrion Road Lands.
- 4.12 We respectfully request that this legal submission be provided to the Council's elected members so that they can take it into consideration.

5. **The Unlawfulness Of The Proposed Amendments to the draft 'Z15' Zoning in The Draft Plan (and the draft Zoning itself)**

Property rights

- 5.1 Article 40.3.2° and Article 43 of the Constitution protect the private property rights of citizens. Article 43 is in the following terms:
 - 1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
 - 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
 - 2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
 - 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.
- 5.2 The courts have established that public authorities can only restrict property rights in a proportionate manner. Any measure must be of sufficient importance to justify overriding a constitutionally protected right. The restriction must be made for a pressing and substantial concern. The means chosen must be rationally connected to the objective; they must be neither arbitrary nor unfair. They must impair the right as little as possible and be proportionate to their objective. See, for instance, the judgment of Keane J in *Iarnród Éireann v Ireland* [1996] 3 IR 321, at 361–362. The courts have also established that it is impermissible to place the cost of achieving a general social good on a discrete section of the community.
- 5.3 Articles 44.2.5° and 44.2.6° of the Constitution make particular mention and provide special protection for the property of religious denominations:

5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

- 5.4 This further strengthens the level of property protection from that provided to non-religious organisations by Article 43.
- 5.5 Private property is also protected by Article 1 of the First Protocol to the ECHR. This has been interpreted by the ECtHR in a manner broadly similar to the Irish courts' interpretation of our Constitution. In *Hutten-Czapska v Poland* (2006) 45 EHRR 262, the Grand Chamber held that a system of rent control legislation, designed to reform the Polish housing sector after the fall of communism, was in breach of Article 1 of the First Protocol. The Court reasoned as follows at [225]:
- 5.6 It is true that, as stated in the Chamber judgment, the Polish State, which inherited from the communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. It had, on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter, often vulnerable individuals. Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. This burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole.
- 5.7 Applying all these principles to the Proposed Amendments to the Draft Proposal for the 'Z15' Zoning Objective, and the 'Z15' Zoning Objective itself is manifestly in breach of the Constitution and the ECHR. The Proposed Amendments and the draft zoning seek to preserve land for community use, but the land affected is selected in an arbitrary, irrational and fundamentally unfair manner. It specifically singles out one particular subsection of the community – religious organisations – to pay for this general community good. This selection is particularly egregious given the special protection afforded to the property of religious organisations by Articles 44.2.5° and 44.2.6° of the Constitution. If the Council adopts the Proposed Amendments or the draft zoning without the Proposed Amendments, as currently written, it is respectfully submitted that the Council will be acting both unconstitutionally and in breach of section 3 of the ECHR Act 2003, with reference to Article 1 of the First Protocol to the European Convention on Human Rights.

Equality and non-discrimination

- 5.8 The restrictions on development and the open space requirements contained in the Proposed Amendments are manifestly discriminatory against religious organisations. Article 40.1 provides that all citizens shall, as human persons, be held equal before the law. In *re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, the Supreme Court held that certain types of classification, including sex, race, language, and religious or political opinions, were presumptively proscribed. As such, there is an onus on the Council to justify why it is discriminating against religious organisations in this manner. In *An Blascaod Mór Teoranta v Commissioners of Public Works* [2000] 1 IR 6, the Supreme Court struck down a compulsory purchase

scheme for the Great Blasket Island that discriminated not between different parcels of land but rather between different owners, based on their pedigree.

5.9 Article 44.2.3° of the Constitution provides:

The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

5.10 Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the Convention (including the right to private property discussed above) “shall be secured without discrimination on any ground such as ... religion...” The Grand Chamber has held in *DH v Czech Republic* (13 November 2007) that the onus lies on the contracting state to show how a particular discrimination is justified.

5.11 Applying all these principles to the Proposed Amendments to the Draft Proposal for the Z15 Zoning Objective and the zoning in the Draft Plan overall, it is manifestly clear that they amount to an arbitrary and irrational discrimination on the basis of religion for which no conceivable justification exists. Put simply, the basis for land use decisions must be the character of the land, not the identity of the owners. The selection of religious identity as the basis for discrimination is particularly invidious, given the express references to religion as presumptively proscribed both by the Supreme Court in the *Employment Equality case* and in the text of Article 14 of the ECHR itself. Moreover, the Supreme Court, interpreting Article 44.2.3° of the Constitution, has categorically ruled out religion as a basis for discrimination save where necessary to support the free practice of religion. Nothing in zoning Z15 remotely protects the free practice of religion. Accordingly, it is respectfully submitted that if the Council adopts the land use zoning ‘Z15’ in the Draft Plan, it will be acting in breach of its obligations under Articles 40.1 and 44.2.3° of the Constitution and section 3 of the ECHR Act 2003, with reference to Article 14 of the ECHR.

Proportionality and the Least Restrictive Means

5.12 There exists a statutory procedure for providing public amenities. Section 34(4)(a) of the Planning Acts allows a planning authority to conserve land adjoining, adjacent or abutting the particular piece of land to be developed where it constitutes an amenity for the public or a section of the public, provided that the condition does not burden unduly the person in favour of whom the permission operates. In circumstances where the Council wishes to conserve land within a development site, it would be within the Council’s powers to do so, given that it would involve invoking a narrower power than that specifically granted to it under section 34(4)(a) in respect of conserving land adjoining, adjacent or abutting land to be developed.

5.13 This Proposed Amendments would oust the carefully constructed protection (under section 34(4) (a) (ii)) for the property rights of those affected – i.e. that the effect of imposition of the condition would not burden unduly the person in favour of whom the permission operates. If the Planning Acts provide for a specific method of regulating the development or use of land in order to conserve public amenities, the Council cannot legally use a different method which unlawfully interferes with private entities and persons property rights. (See *Ashbourne Holdings Ltd v An Bord Pleanala* [2003] 2 IR 114, where the Supreme Court condemned the purported acquisition of a public right of way by conditions in a planning permission when the Act itself envisaged that it could be acquired by agreement or compulsory acquisition.)

- 5.14 If the Council wishes, when granting planning permission, to preserve public amenities, it should do so through the mechanism and subject to the specific controls provided by section 34(4)(a) of the Planning Acts. If there are two ways of achieving an objective, one of which is more restrictive of private property rights than the other, the less restrictive measure must be chosen.

6. Conclusion

- 6.1 In summary, the Proposed Amendments would, if adopted, be unlawful. The Proposed Amendments to the draft Z15 zoning objective (and the draft Z15 zoning itself) are unwarranted, discriminatory and draconian.
- 6.2 Having regard to the fact that the statutory scheme limits our client to merely requesting the councillors to accept or reject the Proposed Amendments at this stage of the plan making process, and given the fundamental flaws with the Proposed Amendments and the Z15 zoning itself, our client is not requesting that the councillors either accept or reject the proposed material amendments to the draft Z15 zoning. Our client's previous submissions in respect of the inappropriateness of the proposed Z15 zoning stand.
- 6.3 It is respectfully submitted that if the Council adopts the land use zoning 'Z15' in the Draft Plan – with or without the Proposed Amendments thereto - it would be acting unlawfully and infringing our client's property rights for the reasons set out above.

ARTHUR COX LLP