

## **OPINION**

**QUERIST:** *Dublin City Council*

**AGENT:** *Terence O’Keeffe, Law Agent, Dublin City Council*

**SUBJECT:** *Draft Phibsborough LAP and motion to rescind resolution*

### **SCOPE OF QUERY**

1. Advices are sought in relation to a motion to rescind a resolution of the elected member of the Council to reject the draft Phibsborough LAP. A number of queries arise therefrom and are set out and addressed in this Opinion.

### **BACKGROUND**

2. The statutory process for the making of a Local Area Plan in respect of Phibsborough was conducted in accordance with the legalisation culminating with a Special Meeting of the Council held on the 23rd November 2015 to consider Report No. 349/2015 (Draft Phibsborough Local Area Plan 2015 – Chief Executive’s Report on Submissions from Display of Draft Plan) and Report No. 350/2015 – (Chief Executive’s Report on Motions from Members), which was taken in conjunction with Report No. 349/2015.
3. At the meeting held on 23<sup>rd</sup> November, the Assistant Chief Executive recommended acceptance of Report No. 349/2015 unless otherwise amended by Report No. 350/2015. He advised that there were 162 motions received which covered 52 topics outlined in the Draft Phibsborough Local Area Plan 2015. He pointed out that consideration of both reports must be concluded by the 8th December 2015 to comply with the statutory deadlines in accordance with the Planning & Development Act 2000 as amended. If there were no material alterations to the Draft Local Area Plan then a resolution passed by not less than half of the Members of the Council to adopt the LAP would be required and the LAP would come into effect 4 weeks thereafter. The Assistant Chief Executive further advised that if there were material alterations, a resolution passed by not less than half of the Members of the Council would be

required for the material alterations to go on public display in accordance with the statutory procedure under the Planning & Development Act 2000 as amended. The Council agreed to accept Report No. 349/2015 unless otherwise amended by Report No. 350/2015.

4. Members considered all the motions and it was agreed that a material alteration to the Draft Local Area Plan was required on foot of a vote on Motions 53, 81 and 116. These motions were put and carried. It was agreed that a resolution for the Phibsborough Local Area Plan 2015 would be submitted to the Council meeting on the 7th December 2015 as the required number of Members was not present in the Chamber at that time. At the meeting of the Council on the 7<sup>th</sup> December 2015 Report No. 391/2015 was listed on the agenda. At this meeting, an amendment to the Draft LAP was put forward by Cllr. Brendan Carr and was seconded by Cllr. Seams McGrattan relating to the height of buildings. This amendment was put to a vote and was carried. As the adoption of this amendment had the effect of removing any ‘material’ alteration from the draft LAP, it was then no longer necessary for it to be put out to public consultation and the Council could vote on the adoption of the Phibsborough Local Area Plan 2015. It was therefore proposed by Councillor B. Carr and seconded by Councillor S. McGrattan: “That Dublin City Council notes the contents of Report No 391/2015 and taking into consideration the agreed amendment, hereby adopts the Phibsborough Local Area Plan 2015”. The motion was put to a recorded vote and failed to achieve the majority support of all Councillors. Thirty-two Members were required to vote in favour for the draft LAP to be adopted, therefore the motion to adopt Phibsborough LAP was declared to be defeated.
  
5. A special meeting of Council was held on Thursday 17th December 2015 with the agenda item listed as follows: “To discuss and agree the need to initiate the statutory process for the compilation, delivery and implementation of a Local Area Plan for Phibsborough.” Another motion was submitted at the meeting, “That this Council agrees to initiate a new statutory process for the purpose of drafting and implementing a Local Area Plan for Phibsborough and that the content of the recently considered Local Area Plan be retained as the basis for the starting point of a revised LAP for Phibsborough. “ This motion was put and carried.

6. At that meeting a motion signed by 12 Members of the Council pursuant to Standing Order No. 30, was submitted by Cllr. Carr. The motions reads as follows, “Pursuant to Standing Order No. 30, Dublin City Council hereby rescinds the resolution of the 7th December 2015 in relation to the Phibsborough Local Area Plan; and further directs that a motion for the adoption of the Plan be placed before the Council at that Special Meeting to be held as soon as is possible.
  
7. The queries arise in relation to this motion and include as folllows:
  1. Is the motion a valid motion to be included on the City Council agenda for January?
  2. If it is a valid motion, what is the impact of the motion being passed at the City Council meeting?
  3. Does the motion purport to call a Special Meeting having regard to the provisions of Section 6 of Schedule 10 of the Local Government Act 2001 or will a separate requisition to have a Special Meeting be required in compliance with the strict requirements of that Section?

In addition a further query arises from the fact that during the course of the meeting, reference was made by a member to the use of section 140 to compel the Chief Executive to give priority to the initiation of the Phibsborough Local Area Plan. A query is raised as to whether this is precluded by virtue of section 52 of the Local Government Reform Act 2014 which amends section 140 of the Principal Act which prohibits the use of the section 140 procedures in relation to (e): “To any act, matter or thing to be done or affected in the performance of the Executive Functions of a local authority in respect of its functions as a planning authority under the Planning & Development Act 2000”.

8. It appears that the purpose behind the motion is that the members are seeking to overturn the outcome of the meeting on the 7th December in relation to the Local Area Plan, to have the Local Area Plan made by default in accordance with the purported provisions of the Planning & Development Acts. This raises the legal effects of the motion and as the most fundamental query raised, it is proposed to address this matter first and other the queries in the following order:

1. Impact and Legal effect of the Motion to rescind
2. Validity of the Motion on the Agenda
3. Whether the Motion purports to Call a Special Meeting
4. Use of Section 140 to compel the Chief Executive

### **III (1) IMPACT AND LEGAL EFFECT OF MOTION TO RESCIND**

9. Before addressing the substance of this query it is proposed to briefly set out the applicable statutory framework relating to the making of local area plans.
10. The procedure is principally set out in sections 19 and 20 of the Planning and Development Act 2000 as amended. Section 19(1)(c) states that a planning authority shall send a notice under section 20(3)(a)(i) of a proposal to make, amend or revoke a local area plan and publish a notice of the proposal under section 20(3)(a)(ii) at least every 6 years after the making of the previous local area plan. Section 20(3)(a) concerns giving notice that the planning authority proposes to make, amend or revoke a local area plan. Under section 20(3)(c), not later than 12 weeks after giving notice under paragraph (b), the Chief Executive of a planning authority shall prepare a report on any submissions or observations received. One the key provisions for present purposes is section 20(3)(d) further says:

*“(d) (i) The members of a planning authority shall consider the proposal to make, amend or revoke a local area plan and the report of the manager under paragraph (c).  
(ii) Following consideration of the manager’s report under subparagraph (i), the local area plan shall be deemed to be made, amended or revoked, as appropriate, in accordance with the recommendations of the manager as set out in his or her report, 6 weeks after the furnishing of the report to all the members of the authority, unless the planning authority, by resolution—  
(I) subject to paragraphs (e) to (r), decides to make or amend the plan otherwise than as recommended in the manager’s report, or]  
(II) decides not to make, amend or revoke, as the case may be, the plan”.*

Section 20(3) sets out a further procedure where there is a material alteration of the draft plan which requires notice to be given to the public and report drawn up by the Chief Executive on the submissions and consideration which is to be considered by the elected members.

12. In the context of the draft Phibsborough LAP, the key steps in the context of the above statutory framework were as follows:

- Members of the public were invited to make submissions on the Draft Plan during the period from 17th August – 28th September 2015.
- Report of the Chief Executive on submissions (349/2015) furnished to elected members on 27<sup>th</sup> October 2015.
- Consideration of Report of the Chief Executive by elected members on the 23<sup>rd</sup> November 2015 and on the 7<sup>th</sup> December 2015.

As noted in the earlier, there were certain proposed alterations contained in motions on the 23<sup>rd</sup> November 2015 which were considered to amount to material alterations but these were superseded by a further motion to amend which was adopted on the 7<sup>th</sup> December 2015 which meant that there were no proposed material alterations requiring re-advertisement.

11. As noted it has been suggested that the purpose behind the motion is that if the resolution rejecting the draft LAP on the 7<sup>th</sup> December 2015 is rescinded, then the recommendation in the Chief Executive’s Report concerning the Draft LAP will be adopted by default. However, I am of the view that rescinding that resolution will not have such legal effect for the reasons set out below.

12. Section 20(3)(d)(ii) provides that the default adoption of a plan after 6 weeks, applies

“...unless the planning authority, by resolution—

- (I) *subject to paragraphs (e) to (r), decides to make or amend the plan otherwise than as recommended in the manager’s report, or]*
- (II) decides not to make, amend or revoke, as the case may be, the plan

13. As a matter of fact, the elected members of the planning authority by resolution of 7<sup>th</sup> December 2015 decided not to make the plan and so the condition for the application of the default adoption simply does not exist. This deeming provision only applies at the end of the 6 week period and at such date there was a resolution in being rejecting the LAP. That remains the case even if a resolution is passed rescinding the earlier resolution as that would only take effect from the date of the rescission resolution. Any rescission of the resolution rejecting the draft LAP will take effect outside the 6

week period under section 20(3)(d). There would therefore appear to be no basis for such a deemed decision by operation of section 20(3)(d)(ii).

14. I am not aware of any authority to support a proposition that the rescission of a resolution on a later date such as, for example, the 11<sup>th</sup> January 2016, has the effect of transporting the legal position to the date of original resolution of the 7<sup>th</sup> December 2015. The rescission of the resolution may mean that the resolution ceases to have effect on the date of rescission, i.e. 11<sup>th</sup> January 2016 in the example above. It does not mean that the original resolution is entirely expunged as if it never happened. It is therefore not analogous, for example, to an order of certiorari made by a Court quashing a decision which means that it is void *ab initio* from the date it was made. The reason for this is that a decision so quashed was unlawful at the time it was made and so it logically follows that it was unlawful from the start. However, there is no suggestion that the resolution of the Council rejecting the draft LAP on the 7<sup>th</sup> December 2015 was in some way unlawful. Apart from the fact it would be for a Court and not the planning authority to determine whether a resolution was unlawful, a resolution rescinding an earlier order does not mean that the earlier resolution was void merely that it ceases to have force.

15. However, there is a more fundamental difficulty with the proposed motion, which is that it is highly questionable whether the Council has power or vires to rescind the earlier motion rejecting the draft LAP and so any such proposed motion would be ultra vires and could not have the effect of reviving the previous draft LAP.

16. While there are general Standing Orders concerning the rescission of resolutions, this does not confer a substantive power to rescind any resolution of the Council, but governs the procedures for the exercise of a substantive power to rescind. This is again notwithstanding that section 16(4)(d) of Schedule 10 of the 2001 Act requires standing orders to include provision for the revocation of resolutions subject to a requirement that such number of members as is specified in standing orders.

17. There is no general substantive power to rescind resolutions of the Council which would apply in all circumstances. Para. 6 of Schedule 14 of the Local Government Act 2001 as amended refers to reserved functions as including:

*“The making or revoking of an order or the passing or rescinding of a resolution by virtue of which an enactment is brought into operation in or is made to apply to the functional area or a part of such area of a local authority”.*

However, again this provision means that the rescinding of a resolution is a reserved function and does not necessarily confer a power to rescind a resolution in all circumstances. Furthermore, even if it confers a general power it only applies to a resolution bringing an “enactment” into effect into operation and it is doubtful that an LAP could constitute an “enactment”. In this regard it may be noted that for the purposes of the Interpretation Act 2005, section 2 provides that an “enactment” means an Act or a statutory instrument or any portion of an Act or statutory instrument;

18. There is no provision in sections 19 and 20 of the Planning and Development Act 2000 or that Act as whole, which confers a power to rescind a resolution rejecting the adoption of a draft LAP. Those sections set out detailed statutory steps and timeframe for the making and indeed amending or revocation of a LAP and which steps include a resolution rejecting, making or amending the draft LAP. The existence of such sequence of steps and timeframes would appear inconsistent with an implied general power to rescind a resolution rejecting, making or amending the LAP. In this regard it is well recognised that a local authority only has such powers as expressly conferred or necessarily implied such as incidental or consequential powers. See *Howard v. Commissioners for Public Works* [1994] 1 I.R. 101 and *Hazel v Hammersmith & Fulham LBC* [1991] 1 ALL ER 545

19. Subject to the caveat that there has been no guidance on this matter from the Courts, it would appear that any resolution to rescind the rejection of a LAP is on balance, likely to be ultra vires. Once the planning authority passes a resolution rejecting, amending or making the LAP, it would appear to be functus officio and there is not power to rescind that resolution. The appropriate approach is to go through the prescribed statutory process again. There is arguably good reason for this insofar as the rejecting or amending or making is to be conducted in accordance with the democratic process of consultation and an implied power to rescind a resolution with no consultation with the public is arguably inconsistent with the same. If a resolution

rescinding the rejecting a LAP plan could be passed, then it would seem to equally follow that a resolution rescinding the adoption of an LAP could be passed. However, this would be inconsistent with the fact that there is a detailed statutory procedure to be followed for the revocation of an LAP and such a implied power would undermine the statutory process and procedures.

#### **IV (2) VALIDITY OF MOTION**

20. The second query relates to the validity of the motion on the basis of Standing Order No. 30 which states that:

*“ A Motion to rescind or amend a Resolution of the Council can only be made on notice, inserted in the Notice Paper, and such notice shall specify the Resolution to be rescinded or amended, and furnish the terms of the motion to be made; but no motion to rescind any Resolution of the Council within 6 months of the date of its adoption, shall be in order unless the notice is signed by not less than 12 Members of the Council and at least not less than one half of the total number of Members of the Council vote in favour.”*

21. Before considering Standing Order No. 30, the motion itself may be set out which states:

*“Pursuant to Standing Order No. 30, Dublin City Council hereby rescinds the resolution of the 7th December 2015 in relation to the Phibsborough Local Area Plan; and further directs that a motion for the adoption of the Plan be placed before the Council at that Special Meeting to be held as soon as is possible.”*

The motion therefore appears to have two parts. The first is to rescind the resolution of 7<sup>th</sup> December 2015, and the second, is that a motion for the adoption of the plan is placed before the Council “at that special meeting”. This second part indicates that it is a motion about another motion. This is not entirely consistent with the thinking that the motion to rescind the earlier resolution, is to enable the default adoption of the plan in accordance with section 20(3)(d)(ii). If it is adopted by default, there would be no need for a further resolution adopting the plan. While it is not entirely clear, it appears that the reference to the motion to adopt the plan at “that special meeting” is the same meeting that the motion to rescind is to be considered.

22. Standing Order No. 30. must be seen in the context of other Standing Orders, which includes that a motion can be proposed and passed at a meeting of the Council/ Standing Order No. 30 means that motions seeking to rescind or amend a resolution of the Council cannot be proposed and passed at same meeting of the Council. Instead notice of such a motion to rescind or amend a resolution must be included in the Notice Paper in advance of the meeting of 11<sup>th</sup> January 2016. Where this is the case, then the condition of notice would appear to be met. However, the second part of Standing Order No. 30 is somewhat ambiguous where it says that “...*no motion to rescind any Resolution of the Council within 6 months of the date of its adoption, shall be in order unless the notice is signed by not less than 12 Members of the Council...*”<sup>1</sup> It may be noted that it states the the ‘notice’ must be signed by 12 members as opposed to the motion itself. However, the latter would appear to constitute a minor technical matter as if the Notice is accompanied by a copy of the motion it is of no substantive importance whether the motion as opposed to the Notice is signed by 12 members.

23. The motion to rescind the resolution of the Council of 7<sup>th</sup> December 2015 was submitted by Cllr. Carr at a meeting of 21<sup>st</sup> December 2015 and was signed by 12 other members. The motion was therefore merely submitted and was not voted on or passed at the meeting of 21<sup>st</sup> December 2015. The conditions of Standing Order No. 30 would therefore appear to be met if the motion is included in the Notice Papers which is accompanied by a copy of the motion signed by 12 members.

## **V (3) REQUISITIONING OF A MEETING**

24. A further query is raised as to whether the motion amounts to the requisition of a special meeting in accordance with section 6 of the Schedule 10 of the Local Government Act 2001 as amended, which states:

Special meetings.

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<sup>1</sup> As regards the reference to motions within the last 6 months, the purpose of a similar standing order was described in *Cantmell v Donegal County Council*, Unreported, High Court, Barron J. May 29, 1987 as “...an effort to prevent repeated discussions of identical resolutions”.

6.—(1) *A requisition to have a special meeting of a local authority convened (in this paragraph referred to as a “requisition”) may be made—*

*(a) by the Cathaoirleach,*

*(b) if the office of Cathaoirleach is vacant, or the Cathaoirleach is unable to act, by the Leas-Chathaoirleach, or*

*(c) by the Cathaoirleach on foot of a request presented to him or her by any 5 members.*

*(2) Where the Cathaoirleach refuses or neglects to act on foot of a request referred to in subparagraph (1)(c) within 7 days of it being presented to him or her, the members making the request may convene the meeting in accordance with this paragraph.*

*(3) A requisition shall be made in writing and be delivered by the Cathaoirleach, the Leas-Chathaoirleach or in a case where subparagraph (2) applies by the members making the requisition, as the case may be, to the meetings administrator.*

*(4) A requisition shall be signed by the person or persons making it, as the case may be, and shall—*

*(a) contain as an agenda a statement of the business which it is proposed to transact at the meeting, and*

*(b) specify a day, (other than an excluded day), which is not less than 3 clear days after the day on which it is received by the meetings administrator, for the holding of the meeting.*

*(5) On receipt of a requisition, the meetings administrator shall, unless it is a case to which subparagraph (6) applies, issue a notification under paragraph 7 and give public notice under paragraph 8 for the special meeting required by the requisition.*

*(6) Where—*

*(a) a requisition under subparagraph (1)(c) specifies a day for the holding of a special meeting, and*

*(b) an ordinary meeting of the local authority is to be held on a day within the period of 10 days after the day on which the meetings administrator receives the requisition.*

*the business stated in the requisition shall be considered at that ordinary meeting and the special meeting shall not be convened.”.*

25. I do not have instructions as to the nature of the meeting on the 11<sup>th</sup> January 2016, whether this is an ordinary scheduled meeting or monthly meeting or simply a

proposed meeting in the light of the motion. However, section 6(6) above makes clear that a requisitioning of a special meeting is not necessary where an ordinary meeting is to be held within 10 days of the receipt of the requisition.

26. However on the discrete issue of whether the motion is also in substance a request to requisition a special meeting, it does not expressly state this, although it arguably implied by the use the words at “that special meeting.”, although this is clear a very oblique way of a requisition. However, it would appear that strictly speaking the form of a requisition set out in section 6(4) would not appear to have been met insofar as it states:

*“A requisition shall be signed by the person or persons making it, as the case may be, and shall—*

*(a) contain as an agenda a statement of the business which it is proposed to transact at the meeting, and*

*(b) specify a day, (other than an excluded day), which is not less than 3 clear days after the day on which it is received by the meetings administrator, for the holding of the meeting*

The motion does not strictly set out a statement of business, although the substance of the motion includes a motion to rescind the resolution and the putting down of a motion to adopt the Plan. The request does not specify a day for the holding of a meeting but merely says “*as soon as possible*”. Therefore adopting a strict approach, the request for requisitioning a special meeting has not been made in accordance with Section 6 of Schedule 10.

## **VI (4) SECTION 140 OF THE 2001 ACT**

27. A final query relates to a reference made by a member to the use of Section 140 to compel the Chief Executive to give priority to the initiation of the Phibsborough Local Area Plan. Section 52 of the Local Government Reform Act 2014 amended section 140(10) of the Local Government Act 2001 which provides that A resolution under this section does not apply or extend to certain specified matters to which was the 2014 Act added a new subsection (e) to state:

*“To any act, matter or thing to be done or affected in the performance of the Executive Functions of a local authority in respect of its functions as a planning authority under the Planning & Development Act 2000”.*

While the motion is somewhat vague about the the precise acts involved in initiation of the Phibsborough Local Plan, it would appear to relate to preparatory work for the draft LAP. In this regard it is clear that this involves actions of the executive function of the Council under the Planning and Development Act 2000 and is covered by the the prohibition on the use of section 140 for purposes under section 140(4)(d).

## **CONCLUSION**

The following are the main conclusions set out above:

1. The rescission of the resolution of the 7<sup>th</sup> December 2015 which rejected the draft LAP, will not have the effect that an LAP will be adopted by default in accordance with section 20(3)(d)(ii)
2. It is highly questionable as to whether the Council has the power or vires to rescind the resolution rejecting the draft LAP and on balance it is likely any such proposed rescission would be ultra vires and could not have the effect of reviving the draft LAP.
3. The proposed motion will be valid and not in breach of Standing Order No. 30 so long as the motion is included in Notice Papers in advance of the meeting at which the motion is to be considered.
4. As a matter of strict construction the motion is not a valid request to requisition a special meeting, although it is clear that it in substance seeking to call the same. However, insofar a meeting is proposed for 11<sup>th</sup> January 2016, it is not entirely clear whether much turns on this matter.
5. Section 140 cannot be used to compel the Chief Executive to give priority to initiate the making of an LAP for Phibsborough as this would constitute an executive function under the Planning and Development Act 2000 as amended.
6. I can advise further if necessary.

Nothing further occurs.

**STEPHEN DODD BL**

