

MATERIAL CONTRAVENTION STATEMENT

In respect of

**PROPOSED RESIDENTIAL DEVELOPMENT AT A SITE LOCATED AT
CITYWEST SHOPPING CENTRE, FORTUNESTOWN, DUBLIN 24**

Prepared on behalf of

OBSF(I) Limited
10 Earlsfort Terrace,
Dublin 2
D02 T380

By

TOM PHILLIPS + ASSOCIATES
Town Planning Consultants
80 Harcourt Street
Dublin 2
D02 F449

in association with

John Fleming Architects

Park Hood Landscape Architects

DBFL Consulting Engineers

AXISENG Consulting Engineers

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1.0 INTRODUCTION

1.1 Legislative Context

Tom Phillips + Associates¹ have been instructed by OBSF(I) Limited², to prepare this *Material Contravention Statement* to accompany this application for planning permission in respect of a proposed Strategic Housing Development (SHD) at Citywest Shopping Centre, Fortunestown, Dublin 24.

This Statement provides a justification for the material contravention of the *South Dublin County Council Development Plan 2016 – 2022* (hereinafter *Development Plan*) in relation to height parameters as a result of the following objective:

“H9 Objective 4:

*To direct tall buildings that exceed five storeys in height to strategic and landmark locations in Town Centres, Mixed Use Zones and Strategic Development Zones and subject to an approved **Local Area Plan** or Planning Scheme³”.*

The relevant approved Local Area Plan is the *Fortunestown Local Area Plan 2012* (Extended 2017), which will expire on 13th May 2022.

The proposed mixed used residential scheme, which is the subject of this planning application, proposes densities of 100 units per hectare with heights of up to seven storeys. This exceeds the parameters set out by the Fortunestown Local Area Plan (hereinafter Fortunestown LAP), which identifies the subject site as suitable for densities up to 50 units per hectare and heights of a maximum of three storeys with exceptions only in limited circumstances. There are only a number of additional deviations from LAP policies as set out in Table 1 of this Report.

The *Planning and Development (Housing) and Residential Tenancies Act, 2016* states the way in which, An Bord Pleanála may grant permission for a development which materially contravenes a Development Plan or Local Area Plan, other than in relation to the zoning of land. It is stated,

(6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.

(b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.

(c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development.

¹ 80 Harcourt Street, Dublin 2, D02 F449

² 10 Earlsfort Terrace, Dublin 2, D02 T380

³ *South Dublin County Development Plan 2016 – 2022*, p. 35

The referenced Section 37(2)(b) of the *Planning and Development Act, 2000 (as amended)* states:

“(2) (b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—

(i) the proposed development is of strategic or national importance,

(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or

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

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.”

It is submitted that recent National Policy provides justification for the proposed increased density and building heights within the subject scheme due to the strong encouragement of higher densities on appropriately zoned and serviced lands adjacent to town centres, employment hubs and high quality public transport. It is, therefore, considered that sufficient justification exists for An Bord Pleanála to grant permission for the proposed development notwithstanding the material contravention of the *Development Plan*.

It should be noted that, notwithstanding the adoption of *Urban Development and Building Heights – Guidelines for Planning Authorities* in December 2018, it has been confirmed by both An Bord Pleanála and the Department of Housing, Planning and Local Government that these *Guidelines* do not supersede policies within statutory Local Area Plans, and therefore, until such time as a Development Plan is varied to align with the requirements of the *Guidelines*, a material contravention is still considered to have occurred.

2.0 SOUTH DUBLIN COUNTY DEVELOPMENT PLAN 2016 - 2022

The *Development Plan* discusses the concept of Residential Building Height within Section 2.2.3 where it is stated that *“varied building heights are supported across residential and mixed use areas in South Dublin County to promote compact urban form, a sense of place, urban legibility and visual diversity⁴”*.

⁴ *South Dublin County Development Plan, 2016 – 2022*, p. 35

A number of Objectives are listed with regard to acceptable building heights within the County as shown below:

HOUSING (H) Policy 9 Residential Building Heights
It is the policy of the Council to support varied building heights across residential and mixed use areas in South Dublin County.
H9 Objective 1: To encourage varied building heights in new residential developments to support compact urban form, sense of place, urban legibility and visual diversity.
H9 Objective 2: To ensure that higher buildings in established areas respect the surrounding context.
H9 Objective 3: To ensure that new residential developments immediately adjoining existing one and two storey housing incorporate a gradual change in building heights with no significant marked increase in building height in close proximity to existing housing (see also Section 11.2.7 Building Height).
H9 Objective 4: To direct tall buildings that exceed five storeys in height to strategic and landmark locations in Town Centres, Mixed Use zones and Strategic Development Zones and subject to an approved Local Area Plan or Planning Scheme.

Fig. 1: Residential Building Height Objectives (Source: SDCC Development Plan, 2016, p.35)

As noted by H9 Objective 4, there is a two stage test to confirm the acceptability of tall buildings (five storeys or above) whereby they must, first, be located in strategic or landmark locations in Town Centres, Mixed Use zones and Strategic Development zones, and secondly, be subject to an approved Local Area Plan or Planning Scheme.

With regard to the former criterion, the subject site is located within a District Centre adjacent to Citywest Shopping Centre, with the land use objective *'to protect, improve and provide for the future development of District Centres'* which permits a wide range of uses and activities. It is, therefore, considered to satisfy this requirement.

With regard to the latter, it is acknowledged that the Fortunestown LAP provides a density limit of 50 units per hectare for the site with a three storey height limitation. It is noted that the LAP identifies a 'District Landmark' which is located at the north east corner of the subject site. The LAP states that *"gateway and landmark buildings/structures do not necessarily mean high buildings, but buildings/treatments that are unique in terms of architectural design, finish and visual impact"*⁵. The proposed development provides a densities of 100 per hectare with heights of four to seven storeys which exceeds the LAP's limitations.

In addition to the above stated deviations, there are a number of additional policies and objectives which the proposed development is not strictly in accordance with. These are set out in Table 1 of this Report overleaf and generally relate to building mix, type and minimum floor areas.

⁵ Fortunestown LAP (2012), p.27

LAP Objective	Proposed Development	Comment
Ensure that no more than 10% of dwellings in any residential scheme are of the one bedroom type (Objective LUD8)	The proposed development of 290 units will provide 36% one bedroom apartments (with 50% and 14% two and three bedroom apartments respectively).	Specific Planning Policy Requirement 1 of the <i>Apartment Guidelines</i> states that apartment developments may include up to 50% one bedroom or studio type units. A unit mix may be specified within statutory plans, however this must be subject to an evidence based Housing Need and Demand Assessment (HNDA) which has not been undertaken for the Fortunestown LAP. Therefore it is considered that, in the interests of providing an overall mix of units in the LAP area, and the need to provide for a sustainable density of development, the proposed percentage of one bedroom units is appropriate.
Ensure that a minimum of 85% of all dwellings be provided as own door houses on their own site and that a maximum of 15% of all dwellings across the Plan Lands be provided as apartments / duplexes with such dwellings limited to appropriate areas (Objective LUD 10)	The proposed development does not provide own – door units and comprises 100% apartments.	Recent National Policy recognises the need to increase housing output and particularly, apartment type development. The <i>Apartment Guidelines</i> state that <i>“It is therefore critical to ensure that apartment living is an increasingly attractive and desirable housing option for a range of household types and tenures, building on and learning from experience to date, and that the economic and regulatory conditions are such that apartment development attracts both the investment and the seeking out of this crucial form of housing by households, that will then result in greater delivery of apartments in Ireland’s cities and towns and other appropriate locations”</i> .
The minimum average floor area of all developments throughout the Plan Lands shall be 110 sq. metres. (Objective FC6b)	The proposed development provides a minimum average floor area of 74 sq m.	Minimum floor areas are set out in Specific Planning Policy Requirement 3 of the <i>Apartment Guidelines</i> , – the proposed development is fully compliant with these floor areas. In addition, 51% of the proposed apartments exceed the minimum floor area by 10%.

Table 1: Overview of Fortunestown LAP Objectives

Therefore, it is evident that the proposed development materially contravenes the *Fortunestown LAP*, however it is considered that sufficient justification for this is available with regard to recent National Policy and Objectives.

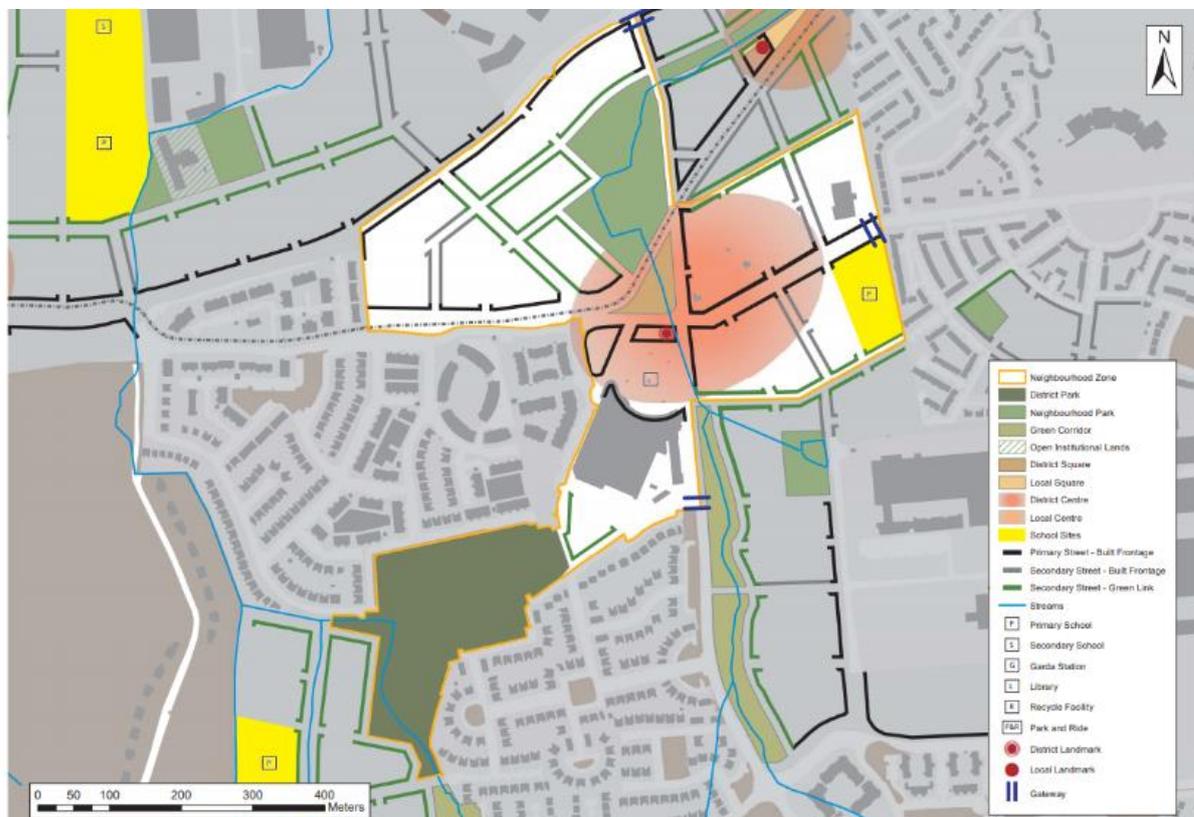


Fig. 2: LAP Framework Strategy with Landmark locations indicated in red (Source: www.sdcc.ie)

3.0 JUSTIFICATION FOR MATERIAL CONTRAVENTION

3.1 Conflicting *Development Plan* Policies

The Development Plan provides a number of policies and objectives which seek to provide for higher residential densities and ensure the efficient use of zoned lands. It is submitted that these policies are contrary to the height limitations imposed by H9 Objective 4 of the Development Plan and Section 5.5.4 of the *Fortunestown LAP*, as discussed in Section 2.0 above. These Policies include the following:

Policy 8 Residential Densities

"H8 Objective 1:

To ensure that the density of residential development makes efficient use of zoned lands and maximises the value of existing and planned infrastructure and services, including public transport, physical and social infrastructure, in accordance with the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009)

H8 Objective 2:

To consider higher residential densities at appropriate locations that are close to Town, District and Local Centres and high capacity public transport corridors in accordance with the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009)⁶.

It is submitted that the above policies seek to increase densities within appropriate locations, and this cannot be fully achieved where there are co-existing limitations on height within the *Development Plan* as per H9 Objective 4 and the limit of three storeys (except for identified exceptional circumstances) as per the *Fortunestown LAP*.

3.2 National Planning Policy

A number of National Planning policy documents and Section 28 Guidelines have been published recently which seek to increase residential densities on zoned serviced lands adjacent to high quality public transport corridors. These include:

- *Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities* (2018)
- *Project Ireland: National Planning Framework 2040* (2018)
- *Urban Development and Building Heights, Guidelines for Planning Authorities* (2018)

3.2.1 National Planning Framework 2040

The *National Planning Framework 2040* (hereinafter NPF) states that there is a serious need to avoid urban sprawl and the associated pressure that it puts on the environment and infrastructure demands through increasing residential densities in urban areas.

The NPF identifies the need to consolidate development in existing urban areas in order to meet the housing needs of our growing population. In line with this, National Policy 13 and 35 state:

“National Policy Objective 13

*In urban areas, planning and related standards, including in particular **building height and car parking will be based on performance criteria** that seek to achieve well-designed high quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected⁷”.*

“National Policy Objective 35

*Increase residential density in settlements, through a range of measures including reductions in vacancy, re-use of existing buildings, infill development schemes, **area or site-based regeneration and increased building heights**⁸”.*

⁶ South Dublin Development Plan, 2016, p.34

⁷ *National Planning Framework*, 2018, p. 67

⁸ *National Planning Framework*, 2018, p. 93

It is clear from the above that increasing densities of residential developments is a clear strategy of the NPF and that increased heights are seen as a primary mechanism in achieving this.

3.2.2 ***Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities (2018)***

The *Design Standards for New Apartments Guidelines for Planning Authorities* (hereinafter *Apartment Guidelines*) build upon the provisions of the NPF in signalling a move away from blanket restrictions on heights in certain locations in favour of an evidence based approach based on performance criteria.

The *Apartment Guidelines* do not go as far as to detail these performance criteria but note that this will be provided by forthcoming Section 28 Guidelines (as recently published in the *Urban Development and Building Heights, Guidelines for Planning Authorities, 2018*).

Notwithstanding this, the *Apartment Guidelines* provide clear guidance with regard to the types of location which are considered suitable for higher density developments that may wholly comprise apartments, referred to as Central and /or Accessible Locations. It is clear from the review overleaf that the subject site generally meets the identified criteria for such developments.

Criterion	Response
Sites within within walking distance (i.e. up to 15 minutes or 1,000 - 1,500m), of principal city centres, or significant employment locations, that may include hospitals and third-level institutions.	The subject site is located within a designated District Centre comprising Citywest Shopping Centre.
Sites within reasonable walking distance (i.e. up to 10 minutes or 800 - 1,000m) to/from high capacity urban public transport stops (such as DART or Luas);	The site is located with a two to four minute walk of the Fortunestown Luas stop.
Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) to/ from high frequency (i.e. min 10 minute peak hour frequency) urban bus services.	The site is located to a bus route providing services to and from Dublin City Centre and University College Dublin. These services operate on a 20 minute frequency.

Table 2: Demonstration of compliance with Central / Accessible Area criteria

In consideration of the appropriateness of the site to accommodate higher density development, it is clear that the height limitation provided by the *Development Plan* and *Fortunestown LAP* is in direct conflict with the provisions set out by the *Apartment Guidelines*.

3.2.3 ***Urban Development and Building Heights, Guidelines for Planning Authorities (2018)***

The *Urban Development and Building Heights, Guidelines for Planning Authorities 2018* (hereinafter *Height Guidelines*) were published in December 2018. The *Height Guidelines* were prepared in response to the publication of *Project Ireland 2040* and the *National Planning Framework*, which signalled the preparation of new Section 28 guidelines regarding building height.

The *Height Guidelines* note Local Authorities have set generic height limits within their functional areas and state the following:

“Such limits have resulted from local-level concerns, like maintaining the character of an existing built-up area, for example. However, such limits, if inflexibly or unreasonably applied, can undermine wider national policy objectives to provide more compact forms of urban development as outlined in the National Planning Framework and instead continue an unsustainable pattern of development whereby many of our cities and towns continue to grow outwards rather than consolidating and strengthening the existing built up area. Such blanket limitations can also hinder innovation in urban design and architecture leading to poor planning outcomes⁹”.

The *Guidelines* state that it is appropriate to support heights of at least six storeys at street level with scope for greater height subject to design parameters. This is contrary to the three storey height limitation provided by the *Fortunestown LAP*.

It is further stated that in some cases Development Plans have set out overly restrictive maximum heights limits which leads to development being displaced to less suitable locations resulting in a lost opportunity for key urban areas. Section 2.11 of the *Guidelines* identifies examples of locations with potential for comprehensive urban development which includes low density urban shopping centres. This is wholly applicable to the subject site which represents a serious underutilisation of zoned and serviced land within a District Centre environment.

The *Guidelines* include criteria against which proposals for taller buildings can be assessed for suitability. It is clear that the proposed development aligns with the identified criteria which include proximity to good public transport, positive contribution to placemaking and legibility and maximising access to daylight. It is then stated that where the relevant authority considers that the criteria have been incorporated into development proposals, the following Strategic Planning Policy Requirement will apply:

“It is a specific planning policy requirement that where;

- 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and*
- 2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;*

then the planning authority may approve such development, even where specific objectives of the relevant development plan, local area plan or planning scheme may indicate otherwise¹⁰”.

It is considered important to apply the provisions of the *Height Guidelines* to the proposed development as they clearly reflect the intention of National Policy to move towards higher density developments in the interests of sustainable development.

⁹ *Urban Development and Building Heights: Guidelines for Planning Authorities* (December 2018), p.1

¹⁰ *Urban Development and Building Heights: Guidelines for Planning Authorities* (December 2018), p.15

3.2.4 *Eastern & Midland Regional Assembly Regional Spatial & Economic Strategy (June 2019)*

The *Regional Spatial & Economic Strategy* (hereinafter RSES EMRA) has been published by the Eastern and Midland Regional Assembly and covers nine counties including twelve Local Authorities. The purpose of the RSES EMRA is to provide a long term strategic planning and economic framework in order to support the implementation of Project Ireland 2040.

The RSES EMRA includes the Dublin Metropolitan Area Strategic Plan (MASP) which aims to unlock the development capacity of strategic areas within the metropolitan area.

With regard to housing and generation, Regional Policy Objective 5.4 states,

RPO 5.4: Future development of strategic residential development areas within the Dublin Metropolitan area shall provide for higher densities and qualitative standards as set out in the 'Sustainable Residential Development in Urban Areas', 'Sustainable Urban Housing; Design Standards for New Apartments' Guidelines, and 'Urban Development and Building Heights Guidelines for Planning Authorities'.

It is clear from the above referenced documents that the development of strategic residential sites, such as the subject site, should ensure that higher densities are delivered. Restrictions on allowable building heights, such as is provided by the *Fortunestown LAP*, are clearly in conflict with objectives for higher density development.

4.0 CONCLUSION

The proposed development of 290 no. apartments with ancillary commercial uses and childcare services, presents an important opportunity to complete and revitalise established urban site in a prime location. The proposal which provides of heights of four to seven storeys and a density of c.100 units per hectare is clearly in line with National Policy. National Policy has set out the need for increased residential densities in appropriate locations. The current limitation of building height as included in the *Fortunestown LAP* acts as a barrier against this, as a higher density development cannot be achieved without the provision of taller buildings.

Given the importance of housing delivery in order to meet the ongoing serious underprovision of dwellings, it is critical that an allowance for the contravention of inappropriate height restrictions can be facilitated where it has been demonstrated that a scheme, such as the subject development, comprises a high quality proposal which will create an exemplary living environment for future residents.

It is evident that *Development Plan* policy which restricts building height is in direct conflict with the *National Planning Framework* and the objectives set out within.

In consideration of the fact that the subject site meets many, if not all, criteria set out by National Policy in terms of suitability for a high density development incorporating taller buildings, it is submitted that there is ample justification for An Bord Pleanála to permit a material contravention of the *Development Plan* and *Local Area Plan* in terms of allowable heights having regard to Section 37(2)(b)(ii) and Section 37(2)(b)(iii) of the *Planning and Development Act, 2000 (as amended)*.