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MCCANN FITZGERALD

OUR REF	YOUR REF	DATE
BNMS\45240440.3		11 May 2022

Mr Stephen Barrett
Director
Tom Phillips + Associates
80 Harcourt Street
Dublin D02 F449

Private and Confidential

Our mutual client – Tetrarch Residential Limited

By Email

Intended application for permission for proposed Strategic Housing Development at Stradbroke House, Stradbroke Road, Mountashton, Blackrock, County Dublin

Dear Mr Barrett,

You have asked us to consider two related questions:

- (A) whether proposed strategic housing development (“SHD”) on lands zoned objective “E” under the Dún Laoghaire-Rathdown County Development Plan 2022-2028 (the “Plan”) would constitute a material contravention of the Plan in relation to zoning. The Plan came into force on 21 April 2022; and,
- (B) whether certain policies relating to zoning objective “E” under the Plan have any bearing on the answer to the query set out above, and whether the approach you have proposed to address those policies is appropriate.

These queries arise because section 9(6)(b) of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended, (the “2016 Act”) prohibits An Bord Pleanála (the “Board”) from granting SHD permission where the proposed development or 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*” (emphasis added).

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

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

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In that context, the Board, in its opinion issued following pre-application consultation (the “Board Opinion”), expressly requested further consideration in relation to both the zoning of the site and certain policies under the Plan.

For reasons explained in more detail below, we do not think that the proposed development would constitute a material contravention of the Plan in relation to zoning.

The policies identified relating to zoning objective “E” do not form part of the zoning objective for the lands in question. Of course, to the extent that the proposed SHD would not accord with these policies, we agree that it is necessary and appropriate to address this as a possible material contravention of the development plan *other than* in relation to zoning.

Before addressing the legal principles, the relevant parts of the Board Opinion and the Plan are described below.

1. The Board Opinion

The Board Opinion identifies issues that the Board considers need to be addressed to constitute a reasonable basis for an application for SHD. The first is relevant and worth setting out in full:

“1. Principle of Development

Further consideration of the documents as they relate to the use zoning objective that applies to the site. The documents must demonstrate that the proposed development would not materially contravene the zoning of the site.

Further consideration of the documents as they relate to Policy E8 of the Dun Laoghaire-Rathdown County Development Plan 2016-2022, or Dun Laoghaire-Rathdown County Development Plan 2022-2028, whichever is relevant. The applicant shall ensure the further consideration/justification includes the following detailed information:

- a) Justification for a Senior Living Build To Rent scheme having regard to the requirement for assisted living, the parameters of the proposal and the need to support employment uses within the immediate catchment area.
- b) Justification for any Material Contravention of the development plan (other than in relation to the zoning of the site) having regard to the location and the circumstances of the surrounding area, including those relating to the availability or otherwise of infrastructure, employment, retail, commercial or social services. These should be based on verifiable facts.”

2. The Zoning Objective in the Plan

2.1 The Plan comprises a written statement, consisting of a series of chapters dedicated to particular issues, and a number of maps. Chapter 13 relates to Land Use Zoning Objectives. Table 13.1.1 of the Plan describes the 19 no. zoning objectives (five of which apply only to the area of the Sandymount Urban Framework Plan).

- 2.2 The lands the subject of the intended application are located on land use zoning map no. 3 of the Plan, and shaded purple. The legend to the map indicates that this colour is used to designate the land use zoning objective “E”, where the objective is “[t]o provide for economic development and employment”.
- 2.3 Table 13.1.13 of the Plan elaborates the uses of land that are “Permitted in Principle” and “Open for Consideration” on lands zoned objective “E”.
- 2.4 Section 13.1.3 of the Plan explains the designation “Permitted in Principle”, as follows:
- “Land uses designated under each zoning objective as ‘Permitted in Principle’ are, subject to compliance with the relevant policies, standards and requirements set out in this Plan, generally acceptable.”
- 2.5 Section 13.1.4 explains the designation “Open for Consideration”, as follows:
- “Uses shown as ‘Open for Consideration’ are uses which may be permitted where the Planning Authority is satisfied that the proposed development would be compatible with the overall policies and objectives for the zone, would not have undesirable effects, and would otherwise be consistent with the proper planning and sustainable development of the area.”
- 2.6 Section 13.1.5 sets out which uses are “Not Permitted”, as follows:¹
- “Uses which are not indicated as ‘Permitted in Principle’ or ‘Open for Consideration’ will not be permitted.”
- 2.7 The use “Residential” is listed as “Open for Consideration”.
- 2.8 “Residential” is defined in section 13.2 of the Plan as follows:
- “The use of a building or part thereof including houses, apartments, flats, bed sitters, etc., designed for human habitation.”
- 2.9 The definition includes two elaborations, marked with sub-headings in smaller font that commence with roman numerals, including “(i) Residential - Build to Rent Accommodation”. The implication is that Build to Rent (“BTR”) accommodation is an identifiable class of residential accommodation. The same is confirmed by the definition of “Residential - Build to Rent Accommodation”, as follows:
- “(i) Residential - Build to Rent Accommodation
- Purpose-built *residential accommodation* and associated amenities built specifically for long term rental that is managed and serviced in an institutional manner by an institutional landlord. (Definition taken from section 5.2 of the DHPLG Section 28 Guidelines, Sustainable Urban Housing: Design Standards for new Apartments” (2018)” (emphasis added.)

¹ Section 13.1.5 also acknowledges that there may be uses not specifically mentioned in the use tables that may be considered on a case-by-case basis.

- 2.10 That “Residential – Build to Rent Accommodation” is a class of Residential use, rather than a separate land use, is confirmed by the fact that, in other instances, related but separate use classes are given separate definitions. For example, there are several industrial land use objectives, including: “Industry: Extractive”, “Industry: General”, “Industry: Light” and “Industry: Special”. Unlike the sub-categories of Residential use, these are not listed in roman numerals in sub-paragraphs under a single common heading. Rather, they are set out as separate definitions. The same is true for retail uses, e.g., “Shop – Neighbourhood”, “Shop – District”, “Shop – Major Convenience”. By contrast, the sub-categories of Residential use have deliberately been included as a list under the definition for Residential.
- 2.11 Volume I of the Chief Executive’s Report on Proposed Amendments to Draft Plan Consultation (the “Report”) confirms this logic. At page 112, the Report notes that a number of submissions raised the issue that “Build To Rent should be omitted as a separate use class and reference the fact that the Apartment Guidelines state that the Department may give consideration to ‘establishing build-to-rent projects as a specific use class under the Planning and Development Regulations, 2001 (as amended)’, thus indicating that this was not included in the Plan, as drafted, as a separate use class.”
- 2.12 The Report states that it is for that reason that references to “Build to Rent Accommodation” were amended to read “Residential – Build to Rent”:

“To address the issues raised on the Draft Plan, a number of proposed amendments including 211, 215, 224, 230, 233, and 240 recommend that Build to Rent be subsumed back into residential as a use class, and that the tables be amended to indicate the areas where specific ‘Residential - Build to Rent’ as a residential use class, is considered suitable. Amendments 251 and 252 amend the definition.

This approach whereby the Planning Authority gives clear guidance on where Build to Rent is appropriate is consistent with the Guidelines which state that, ‘The promotion of BTR development by planning authorities is therefore strongly merited through specific BTR planning and design policies and standards’. ...It also has regard to the strategic direction received from the members at pre-draft stage”

- 2.13 As such, BTR accommodation is “subsumed” into the Residential use.
- 2.14 There might be some confusion because there are certain zoning objectives where both “Residential – Build to Rent” and “Residential” are listed among the uses. For example, zoning objective “A” includes Residential as permitted in principle, but Residential – Build to Rent as open for consideration. Some might consider that confusion to be amplified by the written statement after Policy Objective PHP28, at page 91 of the Plan, where it states, as follows:

“Build-to-rent (BTR) accommodation will be facilitated at appropriate locations across the County in accordance with land use zoning objectives. For the avoidance of doubt, BTR is:

- permitted in principle in areas zoned objective MTC (major town centre) and DC (district centre)
- open for consideration in areas zoned objective NC (subject to retaining an appropriate mix of uses), A, A1, and A2.”

- 2.15 We read this to elaborate policy objectives that highlight areas where the planning authority considers particularly suited for BTR accommodation. This is consistent with the requirement of the Apartment Guidelines (the Sustainable Urban Housing: Design Standards for New Apartments (revised 2020)) for “promotion” of BTR accommodation and with the Policy Objective PHP28 “to facilitate” provision of BTR accommodation.
- 2.16 The fact remains that BTR accommodation is merely “residential accommodation” of a specific kind and “subsumed” within Residential, so that reference to Residential use in Table 13.1.13 of the Plan incorporates, as “Open for Consideration”, use of buildings designed for human habitation, whether purpose built for long-term rental, management and servicing in an institutional manner or not.
- 2.17 For completeness, there is a footnote, marked with superscript “b”, in Table 13.1.13. This footnote is attached to the word “Residential” only. The footnote states: “[i]n accordance with Policy Objective E15: Securing Employment Growth”. That policy objective is addressed separately below, but, for completeness, we do not consider the footnote to give that policy any greater status. The footnote does not dilute or otherwise limit the significance of the inclusion of Residential within Table 13.1.13. It does no more than draw the reader’s attention to the paragraph, which would be of relevance, as a policy, in any event.

3. **The Policies in the Plan**

Employment-related policies

- 3.1 The mentioned Policy Objective E15 is set out at section 6.4.2.14 of the Plan, as follows:

“It is a Policy Objective to ensure that employment zoned land facilitates its primary objective which is to provide for economic development and employment. The Council will apply a restrictive approach to residential development on employment zoned lands.”

- 3.2 The written text after section 6.4.2.14 elaborates, as follows:

“The Core Strategy of this Plan concludes that there is a sufficient supply of zoned land for primarily residential purposes to meet allocated future population growth and to provide for the projected demand for housing over the Plan period. The Employment Strategy concludes there is a sufficient quantum of employment zoned lands available to facilitate continued economic development and employment growth in the County over the Plan period, however, it is highlighted that the extent of the employment landbank in DLR is quite low in comparison to adjoining Counties in the Dublin MASP area and it is therefore necessary to protect such lands for employment uses.

- 3.3 The Policy then sets out the restrictive approach to be taken for residential development on employment-zoned lands in specific areas of the County, Cherrywood and Sandycroft, that are not relevant.

3.4 The approach to be taken elsewhere in the County, like in Blackrock, is explained, as follows:

“At employment zoned lands elsewhere in the County, a minor element of residential use may be considered in appropriate locations where a proposed development makes a positive contribution to the area in terms of adding to the richness and diversity of uses and/or significantly contributes to the public realm. The appropriate location for residential use would generally be in close proximity to public transport nodes and adjacent to facilities such as shops, crèches, restaurants and hotels and other community and recreation infrastructure. Generally, any residential development proposals on such ‘E’ zoned lands must ensure that the employment element on site in terms of floor space is no less than that on site prior to redevelopment and must ensure that the employment element on site in terms of overall floor space remains the primary land use and doesn’t undermine the use of adjoining lands for employment use.”

BTR-related policies

3.5 Policy Objective PHP28 of the Plan, at page 90, relates to “Build-to Rent and Shared Accommodation/ Co-living Developments”, which states:

“It is a Policy Objective to facilitate the provision of Build-to-Rent in suitable locations across the County and accord with the provisions of ‘Sustainable Urban Housing: Design Standards for New Apartments’, 2020 (and any amendment thereof). Proliferation of Built to rent should be avoided in any one area. As the HNDA does not support provision of shared accommodation there shall be a presumption against granting planning permission for shared accommodation/co-living development.”

3.6 As explained, the text under Policy Objective PHP28 goes on to state:

“Build-to-rent (BTR) accommodation will be facilitated at appropriate locations across the County in accordance with land use zoning objectives. For the avoidance of doubt, BTR is:

- permitted in principle in areas zoned objective MTC (major town centre) and DC (district centre)
- open for consideration in areas zoned objective NC (subject to retaining an appropriate mix of uses), A, A1, and A2.”

3.7 We read this to elaborate policy objectives that highlight areas where the planning authority considers particularly suited for BTR accommodation. This is consistent with the requirement of the Apartment Guidelines (the Sustainable Urban Housing: Design Standards for New Apartments (revised 2020)) for “promotion” of BTR accommodation and with the Policy Objective PHP28 “to facilitate” provision of BTR accommodation.

3.8 For completeness, we note the reference to BTR at section 12.3.6 of the Plan (at pages 241-242) which states:

“BTR accommodation will only be permitted in suitable locations in accordance with Policy Objective PHP28.”

3.9 This does not change our analysis of Policy Objective PHP28, above, and there is nothing in this additional text that precludes the delivery of BTR development in areas open to consideration for Residential use.

3.10 Finally, we note that the proposed development is specifically a *senior living* build to rent development. In that regard, other policies of the Plan are relevant, such as Policy Objective PHP30: Housing for All, at page 91, which states:

“It is a Policy Objective to:

- Support housing options for older people and persons with disabilities/mental health issues consistent with NPO 30 in the NPF, RPO 9.1 and 9.12 of the RSES.
- Support the provision of specific purpose-built accommodation, including assisted living units and lifetime housing, and adaptation of existing properties.
- Promote ‘aging in place’ opportunities for ‘downsizing’ or ‘right sizing’ within their community.”

4. Material Contravention - Zoning Objective

4.1 As noted, section 9(6)(b) of the 2016 Act prohibits the Board from granting SHD permission where the proposed development or 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*” (emphasis added). In the case of a non-zoning objective, i.e., an objective other than one in relation to the zoning of land, the Board has jurisdiction to grant planning permission in material contravention of the objective provided that certain prescribed statutory criteria are fulfilled.

4.2 The High Court considered the special significance of section 9(6) of the 2016 Act in *Redmond v. An Bord Pleanála* [2020] IEHC 151. The Court acknowledged the important difference between material contravention of a zoning objective and a non-zoning objective, stating:

“The significance of the distinction between zoning objectives and non-zoning objectives is that An Bord Pleanála is precluded from granting planning permission for strategic housing development under the PD(H)A 2016 if the proposed development would constitute a material contravention of the development plan or local area plan in relation to the zoning of the land (section 9(6)(b)).”

4.3 We do not consider that residential development on lands zoned “E” would constitute a material contravention of the Plan. Therefore section 9(6)(b) does not preclude the Board from granting planning permission in these circumstances.

- 4.4 The Plan makes clear that zoning category “E” is a mixed-use category. Table 13.1.3 lists residential use among the particular purposes that may be permitted. Indeed, in addition to listing residential use as “open for consideration” on lands zoned “E”, the Plan.
- 4.5 Insofar as Policy Objective E15 might be considered relevant to the zoning objective, even that policy explicitly contemplates circumstances where residential use may be permitted on such lands. This remains true, even where the “primary” policy objective, as opposed to zoning, objective (under Policy Objective E15) is to provide for economic development and employment.
- 4.6 It follows that use for residential purposes should not be considered material contravention.
- 4.7 This is clear from the High Court judgment in *Byrnes v. Dublin City Council* [2017] IEHC 19, which determined that an “open for consideration use” is one contemplated by the development plan. The case concerned a proposed change in use from a former hotel to supported temporary accommodation for single persons and couples to be operated by Dublin Simon Community. The development plan distinguished between mere “hostels” and “hostels where care is provided”. The former was “permissible”, but the latter was merely “open for consideration” under the Dublin City Development Plan 2011-2017. The Court concluded that, even where care services were to be provided, there was no material contravention. It was sufficient that the use be “open for consideration”.
- 4.8 The same logic applies with equal force to proposed SHD within lands zoned “E”. Residential use is contemplated by the zoning objective. Residential use is part of the mixture of uses for which the land is zoned. Where that is so, there cannot be material contravention of that zoning objective.
- 4.9 As explained, this includes BTR accommodation, which is merely “residential accommodation” of a specific kind and “subsumed” within Residential use, so that reference to Residential in Table 13.1.13 of the Plan incorporates, as “Open for Consideration”, use of buildings designed for human habitation, whether purpose built for long-term rental, management and servicing in an institutional manner or not.
- 4.10 A related point arises in the context of section 3 of the 2016 Act, which defines SHD, for current purposes, to mean “the development of 100 or more houses on land *zoned for residential use or for a mixture of residential and other uses*” (emphasis added).
- 4.11 The High Court considered the meaning of that phrase in two recent judgments. *Balscadden Road SAA Residents Association Limited v. An Bord Pleanála and Morris v. An Bord Pleanála* [2020] IEHC 586 and *Clonres CLG v. An Bord Pleanála and Conway v. An Bord Pleanála* [2021] IEHC 303. In *Clonres*, the Court stated:

“I do not see any basis for an interpretation of the 2016 Act that limits the term ‘zoned for residential use’ so as to exclude lands zoned for residential use being open for consideration. Whether one thinks in terms of the literal wording, the context of the Act as a whole, or consideration of its purpose, or ideally all three mutually informing each other, it does not seem to me that there is anything warranting such a narrow interpretation. That is also the conclusion arrived at in *Balscadden Road SAA Residents Association v. An Board Pleanála* (No. 1) [2020] IEHC 375 (Unreported, High Court, 25th November, 2020), albeit with less detailed argument on the point.”

4.12 The interpretation of the phrase “zoned for residential use or for a mixture of residential and other uses” to include zoning where residential use is open for consideration support our view that, in relation to the proposed SHD, residential use is a use contemplated on lands zoned objective “E” and that such use would therefore not constitute a material contravention of zoning.

5. **Material Contravention – Policies**

5.1 You have asked us to consider whether relevant policies in the Plan have any bearing on the zoning query addressed above, in particular Policy Objective E15.

5.2 In our view, those policies do not form part of the zoning objective for lands zoned “E”; rather they are part of the policy to be assessed when weighing the proper planning and sustainable development merits of any proposal.

5.3 It is clear from the wording and organisation of the Plan that these policies do not form part of the zoning objective. These are explicitly referred to as “policy” and do not appear in the land use zoning objectives sections of the Plan. The land use zoning objectives are found in one chapter (Chapter 13 of the Plan (entitled Land Use Zoning Objectives), but other relevant policies appear in other chapters, including the “Enterprise and Employment” chapter of the Plan (Chapter 6 of the Plan).

5.4 According to the judgment in *Redmond*, the labels applied by a planning authority are not conclusive, and that the substance of the relevant development plan policy or objective must be considered. In *Redmond*, the Court had to ascertain the zoning objective for the land. That was “clear-cut”: the lands were zoned “to protect and/or improve residential amenity”. The additional designation of the lands for institutional purposes was not a zoning objective. It did not override the residential objective:

“Rather, the policies and objectives triggered by the designation expressly recognise that residential development may in principle be permissible, but seek to regulate the precise circumstances in which residential development might be authorised and the conditions, for example, in respect of open space, which might be attached to a grant.”

5.5 As explained in *Redmond*, these policies “govern the release” of the lands for residential development.

5.6 Here, Policy Objective E15 does the same thing by seeking to regulate the circumstances in which residential development might be authorised on lands zoned “E”, in circumstances where residential use is listed as open for consideration.

5.7 As explained, there is a footnote, marked with superscript “b”, in Table 13.1.13. This footnote is attached to the word “Residential” only. The footnote does no more than draw the reader’s attention to the paragraph, which would be of relevance, as a policy, in any event. It does not dilute or otherwise limit the significance of the inclusion of Residential within Table 13.1.13.

5.8 Regarding the appropriate approach to the relevant policies, you have instructed that to the extent the proposed development does not accord with Policy Objective E15 of the Plan you intend to address this as a possible material contravention of the development plan. As this

would amount to a possible material contravention of policy, as opposed to zoning, we agree that this approach is appropriate.

6. **Conclusion**

6.1 On lands zoned objective "E" in the Plan, residential use is listed as "open for consideration" and is therefore contemplated by the zoning objective. Residential use is part of the mixture of uses for which the land is zoned. Where that is so, there cannot be material contravention of that zoning objective. This is line with the approach of the High Court in *Byrnes v. Dublin City Council* [2017] IEHC 19. Further, where "Residential" use is listed as open for consideration, this does not exclude build to rent accommodation. Rather, "Residential - Build to Rent" is subsumed within the broader use class of Residential. In those circumstances, section 9(6)(b) of the 2016 Act does not preclude the Board from granting permission for SHD on lands zoned "E".

6.2 With regards to Policy Objective E15 of the Plan, we do not consider that those policies form part of the zoning objective for lands zoned "E". However, where the proposed SHD would not accord with the relevant policies we agree that it is appropriate to address this as a possible material contravention of the development plan *other than* in relation to zoning.

Yours sincerely

(sent by email, so bears no signature)

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