OPINION

Re: **Development at New Wapping Street and Mayor Street, Block 2, North Lotts Planning Scheme**

Querist: **Ronan Group Real Estate**

Agents: **John Spain Associates, Planning and Development Consultants.**

Counsel: **Eamon Galligan S.C.**

SCOPE OF OPINION AND BACKGROUND FACTS

1. Agents have requested my opinion in relation to the jurisdiction of an Bord Pleanála to grant permission for a proposed development at the subject site at New Wapping Street and Mayor Street, Block 2, in the North Lotts area of Dublin Docklands, which is of a materially greater height than the maximum height set out in the SDZ Planning Scheme. Chapter 5 of the Planning Scheme provides for a maximum building height of 7 storeys residential or 6 storeys commercial. The issue essentially is as to whether the Board has power to grant permission for a development that would materially exceed the maximum permitted height under the Planning Scheme, in circumstances where Guidelines issued by the Minister pursuant to *Section 28* of the Planning and Development Act, 2000, as amended (*"the 2000 Act"*) would appear to support a substantially higher development at this location.

RELEVANT STATUTORY PROVISIONS

2. S*ubsections (1)* and *(2)* of *Section 170* of the Act of 2000 provide:

> *"(1)* ***Where an application is made to a planning authority under section 34*** *for a development in a strategic development zone, that section and any permission regulations shall apply,* ***subject to the other provisions of this section.***
>
> *(2) Subject to the provisions of Part X of Part XAB, or both of those Parts as appropriate* ***a planning authority*** *shall grant permission in respect of an application for a development in a strategic development zone where it is satisfied that the development, where carried out in accordance with the application or subject to any conditions which the planning authority may attach to a permission, would be consistent with any planning scheme in force for the land in question,* ***and no permission shall be granted for any development which would not be consistent with such a planning scheme".***

3. The question is whether the prohibition under *Section 170(2)* on granting permission that is inconsistent with the scheme is intended to apply to the Board in the case of SHD. This will be considered below. The first obvious observation to make, however, is that in the context of section 170(2) and the section as a whole, the only body to which an application can be made is the planning authority. It is difficult to see how the prohibition under section 170(2) could be regarded as applying to the Board in those circumstances.

4. The Planning and Development (Housing) and Residential Tenancies Act 2016 ('the 2016 Act') includes a provision in Section 4(4) whereby the applicant may elect to make the application to the Planning Authority rather than the Board for a development which qualifies as Strategic Housing Development ('SHD'), i.e., over 100 units and otherwise compliant with the relevant definition. However, there are no consequential amendments under the 2016 Act to Part IX of the 2000 Act (which deals with Strategic Development Zones or SDZs) to apply those provisions, *mutatis mutandis*[1], to applications made directly to the Board under the 2016 Act. In the present case, Querist intends to apply to An Bord Pleanála in respect of the proposed residential development. For ease of reference, *Section 4(4)* of the Act of 2016 Act provides as follows:

> *"(4) In the case of an application for a permission for a strategic housing development that is located in a Strategic Development Zone, the applicant may elect to make the application to the planning authority under section 34 of the Act of 2000 rather than under this section and,* ***accordingly****, section 170 of that Act applies to the application to which the said section 34 relates."*[2]

5. The use of the word "accordingly" is important. Two meanings are given for this adverb under the Oxford Dictionary: (i) "*in a way that is appropriate to the particular circumstances*"; and (ii) *"as a result; therefore*." The second meaning seems more apposite in the present context. In other words, it is as a result of an application in

[1] i.e. changing what has to be changed
[2] Bold added.

respect of a planning scheme being made to a planning authority under section 34 that the provisions of section 170 apply. On the other hand where an application is made directly to the Board under section 4(1)(a) of the 2016 Act, it is made under that section and is not regarded as having been made under section 34, so that there is no consequence or result that section 170 applies.

6. The *expressio unius est exclusio alterius* ("to express one is to exclude the other") rule of statutory interpretation also strongly supports this interpretation that section 170 is not intended to apply in circumstances where an application is made directly to the Board pursuant to Section 4 of the 2016 Act. There is no express provision to suggest that the highlighted portion of section 170(2), as shown above, applies to applications made directly to the Board. If the draftsman saw fit to apply section 170(2) to an SHD application which is made to the planning authority, he could just as easily have made such a stipulation in the case of SHD applications made directly to the Board. It is reasonable to infer that he did not intend to apply section 170(2) to SHD applications made directly to the Board.

7. Moreover, as already adverted to above, the only permission contemplated by section 170 is an application made to a planning authority under section 34. An application to the Board was simply not contemplated by section 170 or any other provision of Part IX of the 2000 Act, which relates to Strategic Development Zones, at the time the said provisions were enacted. In fact, at the time of its enactment, section 170 excluded any consideration being given by the Board to a planning application in relation to a planning scheme as an appeal to the Board is specifically ruled out by section 170(3) of the 2000 Act. It provides:

> *"(3) Notwithstanding section 37, no appeal shall lie to the Board against a decision of a planning authority on an application for permission in respect of a development in a strategic development zone."*

8. Therefore, it is very difficult to see how the highlighted portion of section 170(2) above could apply to applications made directly to the Board. While the words "*by the planning authority*" were not added in by the draftsman after the word *"granted"* in *"no permission shall be granted for any development which would not be consistent with such a planning scheme"* it is clear that in section 170(2) the only application that is being considered is that to be made to the planning authority under section 34.

9. It is relevant to note that *Section 169(9)* of the 2000 Act provides that a Planning Scheme for an SDZ is deemed to form part of the Development Plan for that area. It would appear to follow that where there is a material contravention of the Planning Scheme, this will almost certainly constitute a material contravention of the Development Plan. *Section 169(9)* provides as follows:

> *"(9) A planning scheme made under this section shall be deemed to form part of any development plan in force in the area of the scheme until the scheme is revoked, and any contrary provisions of the development plan shall be superseded*."

10. The relevant considerations to be taken into account by the Board in considering an application under *Section 4* of the Act of 2016, are set out under *Section 9* of that Act. In particular, *sub-section (2)* provides that the Board is obliged to have regard to the provisions of the Development Plan and any guidelines issued by the Minister under *Section 28* of the Act of 2000. The Board is also required to have regard to the matters referred to in *Section 143* of the Act of 2000. *Sub-section (2)* provides as follows:

> *"(2) In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to—*
>
> *(a) the provisions of the development plan, including any local area plan if relevant, for the area,*
> *(b) any guidelines issued by the Minister under section 28 of the Act of 2000,*
> *(c) the provisions of any special amenity area order relating to the area,*

(d) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact,

(e) if the proposed development would have an effect on a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact,

(f) the matters referred to in section 143 of the Act of 2000, and

(g) the provisions of the Planning and Development Acts 2000 to 2016 and regulations made under those Acts where relevant."

11. *Section 143* of the Act of 2000 provides as follows:

"143.— (1) The Board shall, in performing its functions, have regard to—
(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,
(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and (c) the National Spatial Strategy and any regional spatial and economic strategy for the time being in force.
(2) In this section 'public authority' means any body established by or under statute which is for the time being declared, by regulations made by the Minister, to be a public authority for the purposes of this section."

12. *Section 9(6)* of the Act of 2016 provides:

"(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."[3]

13. It follows from the highlighted portion of the foregoing provision that the Board does have jurisdiction to grant permission for a material contravention of the Development Plan provided that the contravention does not relate to the zoning of land and provided that it is satisfied that one or more of the criteria under *Section 37(2)(b)* of the Act of 2000 are applicable. *Section 37(2)(b)* of the Act of 2000 provides as follows:

> *"(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, in so far 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."*[4]

14. In *McEvoy v Meath County Council*[5] it was held that the obligation to "have regard to" statutory guidelines implies an obligation to have good planning reasons for departing from those guidelines.[6] Similarly, in the context of a material departure from the provisions of the development plan, the obligation to have regard to development plans under section 34(2) of the 2000 Act means that in departing from or contravening the development plan a similar duty to have good planning reasons applies. However, as

[3] Bold added.
[4] Emphasis added.
[5] [2003] 1 IR 2008.
[6] Other case law suggests that there must also be an obligation to *give* good reasons as otherwise the obligation cannot be policed by way of judicial review.

appears from section 37(2)(b)(iii) above, this can be discharged by relying on provisions of guidelines issued under section 28 or policies of government under section 143 of the 2000 Act.

JUDGMENT OF SIMONS, J. IN *SPENCER PLACE DEVELOPMENT COMPANY LIMITED*[7]

15. It is necessary to refer to the recent decision of Simon, J. in *Spencer Place Development Company Limited .v. Dublin City Council* (*"Spencer Place"*). At the outset, it is important to note that the judgment was concerned with the effect of Dublin City Council's interpretation of SPPR3 of the Guidelines in the context of the consideration of applications *made to the Planning Authority*, Dublin City Council, as distinct from an application to An Bord Pleanála. The Court's conclusion in this regard was that SPPR3(A) does not apply to a Planning Scheme.

16. The following conclusions of the Court appear at paragraphs 112-115 of the judgment and are in the following terms:

> *"112. SPPR 3 (A) does not apply to a planning scheme. The most that the guidelines do is to require a planning authority to review and amend a planning scheme. This is provided for under SPPR 3 (B). This process must be carried out in accordance with the statutory procedure prescribed. In particular, it may be necessary to undertake an environmental assessment of the amendments for the purposes of the SEA Directive. In any event, it will be necessary to seek the approval of An Bord Pleanála to any proposed amendments to an existing planning scheme. Thus, the fact that the Minister has issued guidelines is not necessarily conclusive of the outcome of the statutory process of amendment.*
>
> *113. In the event that a planning scheme is amended, then the policy under the guidelines is given effect through the medium of the amended planning*

[7] Unreported, 30th May, 2019.

scheme. The requirement to comply with SPPR 3 (B) is spent. Any planning applications will be determined in accordance with section 170(2). For the avoidance of doubt, SPPR (A) is still not applicable.

114. Pending the making of an amendment to a planning scheme, any planning application made in the interim falls to be determined under section 170 of the PDA 2000 by reference to the extant planning scheme. On their correct interpretation, therefore, the building height guidelines do not authorise a planning authority to disapply the criteria prescribed under a planning scheme for an SDZ.

115. In interpreting Ministerial guidelines, it is legitimate to have regard to the content of the SEA statement prepared pursuant to Article 9 of the SEA Directive and Regulation 16 of the 2004 Regulations."[8]

17. Although it is indicated by the Judge that pending the making of an amendment to a Planning Scheme *"any planning application made in the interim falls to be determined under Section 170 of the PDA 2000 by reference to the extant Planning Scheme,"* it is clear from the following sentence that this conclusion was reached only in the context of an application to the planning authority. As has been demonstrated above, different considerations apply to an application made under *Section 4* of the 2016 Act, which does not fall to be determined under *Section 170* of the PDA 2000. At the same time, I am of the opinion that it is appropriate for the Board to have regard to the terms of the Planning Scheme in considering any SHD application. For ease of reference, SPPR3 is in the following terms:

'SPPR 3

It is a specific planning policy requirement that where;

[8] Emphasis added.

(A) 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 or local area plan may indicate otherwise.

(B) In the case of an adopted planning scheme the Development Agency in conjunction with the relevant planning authority (where different) shall, upon the coming into force of these guidelines, undertake a review of the planning scheme, utilising the relevant mechanisms as set out in the Planning and Development Act 2000 (as amended) to ensure that the criteria above are fully reflected in the planning scheme. In particular the Government policy that building heights be generally increased in appropriate urban locations shall be articulated in any amendment(s) to the planning scheme

(C) In respect of planning schemes approved after the coming into force of these guidelines these are not required to be reviewed.'

18. I am further of the opinion that the effect of the *Spencer Place* judgment is that SPPR3(A) does not apply to An Bord Pleanála in the context of the consideration of this SHD application. Simons J held that the reference to "development plan" in SPPR 3A did not incorporate a reference to a planning scheme. Therefore neither the Board nor a planning authority are obliged to comply with SPPR 3A.

19. However, the *Spencer Place* judgment does not, in my opinion, affect the application of the Development Management Principles or Development Management Criteria set out at section 3.1 and section 3.2 of the Building Height Guidelines to the consideration by the Board of a SHD application which flow from national planning

policy and, in particular, the National Planning Framework. Of particular relevance is that the Guidelines state at section 3.1 that a planning authority must apply certain broad principles set out in that section in considering development proposals for building taller than prevailing building heights in urban areas. However, it is clear from *Section 28* and the introductory provisions of the Guidelines that both the planning authority and An Bord Pleanála are required to have regard to the Guidelines. *Section 28(1)* of the 2000 Act provides as follows:

> "*28.—(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions."*

20. *Section 28(2)* specifically applies to An Bord Pleanála and provides as follows:

> *"(2) Where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions."*

21. Section 3.1 of the Building Height Guidelines provides as follows:

> ***"Development Management Principles***
>
> *3.1 In relation to the assessment of individual planning applications and appeals, it is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility. Planning authorities must apply the following broad principles in considering development proposals for buildings taller than prevailing building heights in urban areas in pursuit of these guidelines:*

Does the proposal positively assist in securing National Planning Framework objectives of focusing development in key urban centres and in particular, fulfilling targets related to brownfield, infill development and in particular, effectively supporting the National Strategic Objective to deliver compact growth in our urban centres?

Is the proposal in line with the requirements of the development plan in force and which plan has taken clear account of the requirements set out in Chapter 2 of these guidelines?

Where the relevant development plan or local area plan pre-dates these guidelines, can it be demonstrated that implementation of the pre-existing policies and objectives of the relevant plan or planning scheme does not align with and support the objectives and policies of the National Planning Framework?"

22. It is clear also that the Development Management Criteria set out under section 3.2 apply to both the planning authority and An Bord Pleanála as section 3.2 commences as follows:

> *"3.2 In the event of making a planning application, the applicant shall demonstrate to the satisfaction of the Planning Authority/An Bord Pleanála, that the proposed development satisfies the following criteria: …"*.

23. Moreover, there are other provisions of the Building Height Guidelines which set out government policy in relation to building heights, to which An Bord Pleanála is obliged to have regard arising from its obligation under *Section 28* to have regard to the Building Height Guidelines and also having regard to *Section 143(1)* of the 2000 Act, which provides as follows:

> *"143.— (1) The Board shall, in performing its functions, have regard to—*
> *(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper*

planning and sustainable development of cities, towns or other areas, whether urban or rural,

(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and

(c) the National Planning Framework and any regional spatial and economic strategy for the time being in force."

24. It will be noticed that specific reference is made under section 143(1)(c) above to the National Planning Framework, and it is, therefore, clear that policies under that document relating to increased density and height at appropriate locations are applicable to the Board's consideration of this intended SHD application. Similarly, the other policy objectives relating to increased density and height, as referred to in the Consistency Statement being submitted with this application, are also applicable to the Board's consideration of this application.

CONCLUSIONS

25. Section 170 of the 2000 Act does not apply to an application made directly to the Board pursuant to Section 4 of the 2016 Act. Section 170 only applies in the context of an application made to a planning authority under section 34 for proposed development within an SDZ planning scheme. It follows that the Board is not prevented by the terms of Section 170(2) from granting permission for a proposed development that is inconsistent with a planning scheme.

26. Having regard to the foregoing, it is my opinion that the Board has jurisdiction to grant permission for a SHD which materially contravenes the height provisions of the planning scheme (and, by extension, the development plan).

27. The above conclusions are not affected by the judgment in *Spencer Place.* One of the findings of the judgment in *Spencer Place* is that SPPR 3A does not apply to proposed development within the area of a planning scheme. Simons J held that SDZ planning schemes are not incorporated within the expression "development plan", as used in SPPR 3A.

28. The judgment in *Spencer Place* does not, in my opinion, affect the application of the Development Management Principles or Development Management Criteria set out under section 3.1 and section 3.2 of the Building Height Guidelines (which flow from national planning policy and, in particular, the National Planning Framework) to the consideration by the Board of a SHD application. The Board is obliged to "*have regard*" to these provisions of the Building Height Guidelines. Similarly, the provisions of other relevant ministerial guidelines issued under section 28 of the 2000 Act apply to the Board's consideration of an SHD application and, together with the relevant provisions of the Building Height Guidelines and National Framework Plan may provide justification for an increase over maximum heights under the planning scheme in

appropriate circumstances where relevant performance criteria derived from the ministerial guidelines have been met.

Nothing further occurs at this time. I can advise further if required.

Eamon Galligan S.C.

Date: 14 June 2018

OPINION

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