McCann FitzGerald LLP
Riverside One
Sir John Rogerson's Quay
Dublin 2
D02 X576

Tel: +353-1-829 0000
Email: inquiries@mccannfitzgerald.com
Dx 31 Dublin
www.mccannfitzgerald.com

McCann FitzGerald

OUR REF	YOUR REF	DATE
BNMS\45138005.1		31 March 2022

Trevor Sadler
Director
McGill Planning Ltd.
22 Wicklow Street
Dublin D02 VK22

Our mutual client – 1 Carrickmines Land Limited By Email

Proposed application for strategic housing development on lands at Priorsland located between the townlands of Carrickmines Great and Brennanstown, within the Cherrywood SDZ, Carrickmines, Dublin 18

Dear Mr Sadler

On 31 July 2020, our mutual client, 1 Carrickmines Land Limited, made a request to An Bord Pleanála (the "Board") to enter into consultation in relation to proposed strategic housing development on lands at Priorsland located between the townlands of Carrickmines Great and Brennanstown, Carrickmines, Dublin 18 (Board ref. TC06D.307784). The lands are located within the Cherrywood strategic development zone ("SDZ"), introduced by the Planning and Development Act 2000 (Strategic Development Zone: Cherrywood, Dún Laoghaire-Rathdown County) Order 2010 (SI No. 535 of 2010).

On 26 January 2021, the Board issued notice of its opinion under section 6(7)(b) of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the "2016 Act") that the documents submitted with the request require further consideration and amendment to constitute a reasonable basis for an application for SHD.

By virtue of the transition provision within section 17(2) of the Planning and Development (Large Scale Residential Developments) Act 2021 (the "2021 Act"), as a person that has been issued with such an opinion, our mutual client may proceed to apply for permission for SHD in accordance with the 2016 Act.

Three issues arise.

The *first* issue relates to unit numbers.

At the time of the request to enter consultation, the proposed development comprised 1,180 no. Build to Rent apartments, crèche and associated site works.

In its section 6(7) opinion, the Board highlighted issues for attention relating to the Cherrywood SDZ Planning Scheme, including "consistency with the planning scheme".

The significance of that requirement is clear from the High Court judgment in *Dublin City Council v An Bord Pleanála* [2020] IEHC 557. The judgment was delivered on 12 November 2020, after your request for consultation.

The case, as here, concerned an application for SHD on lands located within an SDZ. The court concluded that:

> "the Oireachtas has given a developer the option of applying either directly to the council with no appeal under normal SDZ rules or directly to the board under SHD rules. A conclusion that the board has no jurisdiction to depart from the planning scheme is in my view consistent with there being such an option in s. 4(4) of the 2016 Act, because it would be totally inconsistent and illogical if fundamentally different rules applied at the whim of the developer making the application. In a normal SDZ application the council is bound by the planning scheme (see s. 170(2) of the 2000 Act). It would be illogical to simply give an option that would fundamentally change the outcome, which would be the result if the board did in fact have jurisdiction to depart from the scheme."

Put simply, even where the application is made for SHD under the 2016 Act, the proposed development must be "consistent" with the relevant planning scheme. The Board's opinion under section 6(7) properly highlighted that amendment to the proposed development would be required to ensure compliance with the scheme.

For this purpose, our mutual client has made the necessary amendment. The scheme now comprises 443 no. residential units only and the reason for that reduction is to ensure consistency with the planning scheme.

That being so, you have asked us to consider whether our mutual client is free to reduce unit numbers, in this way, before making an application for SHD permission.

The answer must be yes.

Indeed, the High Court has accepted that an applicant for SHD permission may *increase* the number of units for which permission is sought from the number described during the pre-application consultation: *O'Neill & anor v An Bord Pleanala* [2020] IEHC 356. The reason given by the court was that section 6(7) of the 2016 Act "expressly envisages that there may well be differences between the development as originally proposed at the time of the pre-planning consultation and the development which is subsequently pursued by way of an application under s.4" (paragraph 106). The same logic applies with equal force to a reduction.

As explained in *O'Neill* (at paragraph 119), the answer might change where the proposed development in the application for SHD permission "was wholly different to the application

discussed (and in respect of which an opinion was issued) under s.6 *and where the difference was not attributable to a recommendation made by the Board during the consultation process*" (emphasis added).

Even if the reduction to unit numbers might, to some observers, first appear significant, the important point is that this reduction was required to ensure consistency with the planning scheme. This requirement for amendment to ensure consistency was expressed by the Board in its opinion under section 6(7) of the 2016 Act, and respects the High Court decision in the *Dublin City Council* case. The difference is attributable to a recommendation made by the Board during the consultation process.

Put simply, our mutual client was required to amend, and was not free to simply submit an application for the 1,180 unit scheme regardless.

The *second* issue relates to the description of the proposed units as "Build to Rent" during the consultation with the Board.

The intended application will not describe the proposed units as "Build to Rent". Accordingly, the additional design flexibility for such units under section 5 of the section 28 guidelines for planning authorities on "Sustainable Urban Housing: Design Standards for New Apartments" (published March 2018 and revised December 2020) is *not* available for the scheme.

Although the judgment in *O'Neill* does not deal with this precise change, the court did agree there was no difficulty with an increase in unit numbers and with the omission of all three-bed units. It appears to us that the proposed change from "Build to Rent" is less significant or material than those differences in *O'Neill*, which were considered lawful.

The *third* issue relates to the intermediate planning history.

On 23 July 2021, our mutual client made an application for permission to the planning authority under section 34 of the Planning and Development Act 2000, as amended (the "2000 Act") (Council ref. DZ21A/0677). That application was refused permission by the planning authority on 15 September 2021. No appeal to the Board is allowed. The validity of the decision of the planning authority has been questioned by way of judicial review in proceedings bearing the title *1 Carrickmines Limited v. Dun Laoghaire Rathdown County Council* and record number 2021 932JR. Leave has been granted and the proceedings have been adjourned to allow the planning authority to consider the matter.

The fact an application was made and refused on these same lands is wholly irrelevant to the process under the 2016 Act and the transitional provision at section 17 of the 2021 Act, and does not prevent our mutual client from making the intended application for SHD permission.

Yours sincerely

(sent by email, so bears no signature)

Brendan Slattery
McCann FitzGerald LLP

Direct Dial: +353 1 511 1672
Email: brendan.slattery@mccannfitzgerald.com