Querist: Lagan Homes Limited

Agent: John Begley, Lagan Homes[1]

Re: Intended LRD application to amend SHD permission

(ABP Ref. No. 311678-21)

Date: 3 April, 2024

OPINION OF COUNSEL

FACTUAL BACKGROUND

1. By order dated 9 February 2022, An Bord Pleanála granted permission for a strategic housing development at Old Slane Road, Mell/Tullyallen, Drogheda, County Louth (ABP-311678-21), comprising 237 no. residential units (86 no. houses, 151 no. apartments), creche and associated site works ("**the SHD permission**").

2. I am instructed that by the time the permission was granted, it was not economically viable to implement the development scheme the subject of the permission and the lands were placed on the open market. Querist purchased the site on a date in 2023 and soon thereafter commenced works on 30 no. houses. Following commencement of works, Querist began considering an application to amend the permission in order to render it viable in order to finance the completion of a development scheme on the lands.

3. On 15 January 2024, the Minister for Housing, Local Government and Heritage published the "Sustainable Residential Development and Compact Settlements Guidelines for Planning Authorities" (hereinafter "**the 2024 guidelines**"). The new guidelines set national planning policy and guidance in relation to the planning and development of urban and rural settlements, with a focus on sustainable residential development and the creation of compact settlements.

4. Relevantly, the 2024 guidelines include specific planning policy requirements ("**SPPRs**") which override the development management criteria of the current Louth

[1] Counsel is instructed directly through the Direct Professional Access Scheme operated by the Bar of Ireland.

County Development Plan 2021 – 2017, pursuant to which plan the SHD permission was first granted.

5. Querist intends to apply to Louth County Council ("**the planning authority**") to amend an existing planning permission for strategic housing development, where it has become necessary to do so in order to render the implementation of the development scheme viable.

6. Querist is obliged to follow the statutory process prescribed in section 34 of the Planning and Development Act 2000 ("**the 2000 Act**"), as amended in this regard by provisions inserted into section 34 by the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 (No. 40 of 2021) ("**the LRD Act**").

7. In essence, Querist intends, and is obliged to, apply to amend the existing SHD permission by using the LRD provisions governing amendments to an existing SHD permission. Querist intends to apply to amend the scheme by reference to the development management criteria now required to be applied by the 2024 guidelines.

8. On 31 January 2024, Querist met with representatives of the planning department of Louth County Council to discuss the intended application for permission for a large scale residential development ("**LRD**") scheme in Drogheda. I am instructed that this was a formal LRD meeting for the purposes of the section 32C of the 2000 Act, with Querist as a prospective LRD applicant.

9. On 21 February 2024, LCC issued an LRD Opinion

ADVICE SOUGHT

10. The issue which arises for consideration in these advices is whether the development management criteria specified in the SPPRs of the 2024 guidelines ought to be applied by the planning authority when considering the intended application for LRD permission, notwithstanding any apparent inconsistency with the existing county development plan ("**CPD**").

DISCUSSION

(A) Application of the 2024 Guidelines

11. It will be observed that the 2024 guidelines issued under section 28 of the 2000 Act. The 2024 guidelines contain several specific planning policy requirements, which Querist intends to rely upon in its LRD application.

12. First, it will be noted that the law in respect of the application of SPPRs is well settled. A planning authority or the Board is *required* to apply any relevant SPPR to a given planning application. That this is the case arises from the 2000 Act itself, and from jurisprudence of the Superior Courts.

13. First, section 28(1C) of the 2000 Act provides that:

    "Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply."

14. Further, section 34(2) of the 2000 Act, as amended, provides as follows:

    (2) (a) When making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to—

    (i) the provisions of the development plan,
    (ia) any guidelines issued by the Minister under section 28,
    (ii) the provisions of any special amenity area order relating to the area,
    (iii) any European site or other area prescribed for the purposes of section 10(2)(c),
    (iv) where relevant, the policy of the Government, the Minister or any other Minister of the Government,
    (v) the matters referred to in subsection (4),
    (va) previous developments by the applicant which have not been satisfactorily completed,
    (vb) previous convictions against the applicant for non-compliance with this Act, the Building Control Act 2007 or the Fire Services Act 1981, and
    (vi) any other relevant provision or requirement of this Act, and any regulations made thereunder.

    (aa) When making its decision in relation to an application under this section, the planning authority shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28.

    [Emphasis supplied]

15. Second, the Courts have consistently held that SPPRs expressed in mandatory terms are lawful when they are clearly drafted, andthat planning authorities and the Board are required to apply them. The first consideration of this arose in the matter of **Spencer Place Development Company v An Bord Pleanála** [2019] IEHC 384 where Simons J considered a challenge to the application of SPPRs in the *Urban Development and Building Heights, Guidelines for Planning Authorities 2018* ("**the Building Height**

guidelines") to a development proposal in a Special Development Zone ("**SDZ**"). At §21, discussing the Building Height Guidelines, the Court said:

> "21. For introductory purposes, the overall objective of the building height guidelines might be summarised as follows. In accordance with government policy to support increased building height and density in locations with good public transport accessibility, particularly town/city cores, planning authorities are required to explicitly identify areas where increased building height will be actively pursued, and not to provide for blanket numerical limitations on building height. Planning authorities are also required to ensure an appropriate mixture of uses, such as housing and commercial or employment development. The guidelines identify development management criteria which are to be taken into account in assessing individual planning applications. Where the relevant planning authority considers that such criteria are appropriately incorporated into development proposals, then the planning authority is required to apply SPPR 3."
>
> [Emphasis supplied]

16. At §54, Simons J held:

> "54. The status of Ministerial guidelines has since been enhanced as a result of the introduction of the concept of a "specific planning policy requirement" under the Planning and Development (Amendment) Act 2018. Such a requirement is defined as follows under section 34(2)(d) of the PDA 2000.
>
>> "(d) In this subsection 'specific planning policy requirements' means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development."
>
> 55. A planning authority is required to comply with a specific planning policy requirement. See section 28(1)(C) of the PDA 2000 as follows.
>
>> "(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply."

17. The key finding of Mr Justice Simons is found at §82 of the judgment:

> "82. On its ordinary meaning, SPPR 3 treats differently of development plans and local area plans under paragraph (A), and planning schemes under paragraphs (B) and (C). In the case of the former, the effect of the guidelines is

<u>to authorise a planning authority to approve development even where specific objectives of the relevant plan indicate otherwise. Put shortly, the planning authority can rely on the guidelines to disapply objectives of the development plan or the local area plan.</u>

18. The above case was not concerned with the application of SPPR 3 to development plans, rather the developer was attempting to persuade the Court that the SPPR also applied to an SDZ. The Court found that the said SPPR did not apply to a planning scheme of an SDZ.

19. On appeal, the Court of Appeal considered whether SPPRs in the *Urban Development and Building Heights, Guidelines for Planning Authorities 2018* applied to the North Lotts SDZ. In first setting out the application of SPPRs generally, the Court held:

> "3. The Guidelines contain a number of specific planning policy requirements ("SPPRs"). <u>In contrast with Ministerial guidelines generally – to which planning bodies must "have regard" but which do not impose binding obligations as such – planning authorities, regional assemblies and An Bord Pleanala ("ABP") are statutorily required to "comply" with SPPRs in the performance of their functions."</u>
>
> [Emphasis supplied]

20. In <u>**O'Neill v An Bord Pleanála**</u> [2021] IEHC 158 the High Court (McDonald J) cited paragraph 3 above and then went on to discuss its application to the SHD case before it. At §69, the Court said:

> "In paras. 22-26 of his judgment, Collins J. expanded upon what was said in para. 3. In those paragraphs, he traced the amendments made to the 2000 Act by the 2018 Act including the insertion of s.28(1C). Later, at para. 44 of his judgment, he described the effect of these amendments as permitting the Minister to "*issue what are, in effect, mandatory planning requirements*" and that this was not in dispute in the proceedings."

21. The Court then discussed the example given by Collins J in **Spencer Place** and went on to conclude:

> "70. It is clear from the language used by Collins J. in that paragraph that he envisaged that, <u>in cases where SPPR3(A) applies, this requires a planning authority to undertake the assessment of a development proposal against the development management criteria contained in Chapter 3 of the Guidelines</u> – namely the criteria specified in detail in para. 3.2 of the Building Height Guidelines.
>
> 71. It would seem to follow that, <u>where the Guidelines contained an SPPR, the planning authority or, where applicable, the Board must carry out an</u>

assessment of any proposal for development against the specific development management criteria set out in para. 3.2 and that the ability to simply have regard to guidelines applies only in the context of requirements that fall short of constituting SPPRs."

[Emphasis supplied]

22. Accordingly, it is clear that if Querist seeks to rely on SPPRs of the 2024 guidelines where they differ from the Louth County Council Development Plan 2021 – 2027, the planning authority is mandatorily required to *apply* the development management criteria of the relevant SPPR(s): **Spencer Place**, High Court, §82.

23. Indeed, as the Court of Appeal made clear, the local authority will be required to *comply with* the development management criteria of the relevant SPPR (where that is expressed in clear terms): **Spencer Place**, Court of Appeal, §§3.

24. As McDonald J held in **O'Neill**, where the Guidelines contained an SPPR, the planning authority or, where applicable, the Board must carry out an assessment of any proposal for development against the specific development management criteria set out in [*the relevant SPPR paragraphs*].

25. For the sake of completeness, we must also consider the possible scenario whereby a planning authority might consider that to apply, and to comply with, SPPRs in the 2024 guidelines would materially contravene the CDP, that view would be wrong in law.

26. First, such a position would run contrary to the statutory obligation to give effect, and also to the requirements identified in the case law cited above.

27. Second, to subject a planning application which relies on any clearly expressed, applicable SPPR in the 2024 guidelines to the material contravention procedure under section 34(6) of the 2000 Act, would subjugate the mandatory obligation to comply with SPPR(s) to a vote by elected members, requiring a three-quarters majority to succeed. This would defeat entirely the mandatory nature of the detail of the SPPR(s) in question, it would overrule the guidelines, and it would run *contra legem* to the clear purpose and context of section 28(1C) of the 2000 Act. In short, if the planning authority was to take that course, it would stray in to legal error and its decision likely vulnerable on an application for judicial review.

28. Considering the latter scenario, it will be noted that an application to challenge such a decision by way of judicial review would not have to wait the outcome of an appeal to the Board. This is because if the planning authority's decision would be unlawful in the first place, and the Board would be deprived of jurisdiction to deal with the appeal and any decision it might make, could prejudice the developer where:

a. If permission was granted by the Board, the developer would be exposed to a risk of judicial review, with all attendant consequences including delays and costs, and it would have incurred a significant time delay merely by being in the Board process in the first instance.
b. If permission was refused, the developer would be forced to challenge that refusal on the basis that the Board had no jurisdiction to deal with it in the first place, the planning authority having reached a decision by elected members to refuse permission, in the absence of lawful authority to do so where the referral of the application for LRD permission to the elected members would be unlawful.

(B) Discussion of the application of the 2024 Guidelines in the LRD Opinion

29. In its LRD Opinion the planning authority has reached findings or determinations in resect of several issues. This opinion address only the discrete issue identified above.

30. With regard to **Private Open Space**, the planning authority has accepted that all houses meet or exceed the minimum requirement for private open space, in accordance with SPPR 2 of the "*Sustainable Residential Development and Compact Settlements – Guidelines for Planning Authorities 2024*". The planning authority also accepts that the quantitative standards are "significantly below" the minimum standards provided at 13.8.7. of the County Development Plan. In light of this, the planning authority has determined that

- to permit such standards would constitute a material contravention of the CDP, and
- that would be premature, pending a variation to the CDP to aligning it with SPPR 2 of the *"Sustainable Residential Development and Compact Settlements – Guidelines for Planning Authorities"*.

31. In my view, the planning authority was incorrect in opining that a planning application *is premature* in circumstances where the CDP has not been updated. There is no support for that in the application of the case law on SPPRs. To the contrary, a decision to refuse permission on this basis would be unlawful, and present a potential substantial ground to challenge that finding by way of judicial review.

32. However, such a step may not be necessary in circumstances where the planning authority can revise its position to the correct, lawful one, as described herein, upon any application for LRD permission under section 34.

33. There are errors here that require discussion. For example:

(a) The first error is where it has not accepted that the SPPR 3 of the 2024 Guidelines require to be applied and complied with, and override the development management provisions of the CDP in this respect.

(b) The second error is that its finding on Public Open Space is inconsistent with its finding on Private Open Space. Whilst that does not provide a standalone, substantial ground for challenge by way of judicial review, it does at least indicate that the planning authority has demonstrated an (unresolvable) inconsistency as and between its treatment of public and private open space.

34. Further in this regard, it might reasonably be inferred that the planning authority does not consider that an amendment to the CDP is necessary and it wants the prospective applicant to comply with the existing CDP criteria. That would, if it was actually the case, be an erroneous application of the 2024 guidelines. However I do not consider this further in the limited context of advice in this opinion.

CONCLUSION

35. Assuming that any SPPR(s) relied upon are expressed in clear terms, and are not subject to any later step, the planning authority may lawfully grant permission, relying on the existing permission and the consideration given to the essential common parameters, and ensuring the particulars of the planning permission shall comply with the new development management criteria in any SPPR(s) sought to be relied on. Finally, as stated above, it is incorrect to treat the planning application application as premature and that can be overcome by the planning authority in revisiting this upon a planning application.

36. Nothing further occurs.

Niall Handy SC

3 April, 2024