

Planning Law Update Strategic Housing Development

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Introduction

- ▶ Series of judgments which consider term “other uses” used in definition of “strategic housing development”
 - ▶ Morris v An Bord Pleanála [2010] IEHC 529
 - ▶ Dublin Cycling Campaign Clg v An Bord Pleanála [2020] IEHC 587 (Substantive judgment)
 - ▶ Dublin Cycling Campaign Clg v An Bord Pleanála (Unreported, High Court, McDonald J., 25 February 2021) (application for certificate judgment)
- ▶ Material contravention of the “zoning of land”
 - ▶ Highlands Residents Association v An Bord Pleanála [2020] IEHC 622



Definition

- ▶ “‘strategic housing development’ means—
 - ▶ (a) the development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses,
 - ▶ (b) ...
 - ▶ (ba) ...
 - ▶ (c) ...
 - ▶ (d) ...,
 - ▶ each of which may include **other uses** on the land, the zoning of which facilitates such use, but only if—
 - (i) the cumulative gross floor space of the ... houses comprises not less than 85 per cent ... of the gross floor space of the proposed development ... , and
 - (ii) the other uses cumulatively do not exceed—
 - (1) 15 square metres gross floor space for each house ... in the proposed development or to which the proposed alteration of a planning permission so granted relates, subject to a maximum of 4,500 square metres gross floor space for such other uses in any development, ...”
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Morris v An Bord Pleanála

- ▶ Issue related to the scope of “other uses”
 1. Development of 512 apartments along with a total area of other uses of 2,873 sq m
 2. The other uses included – supermarket; creche; shop; restaurant and a cafe
- ▶ Applicant argued that “other uses” should be concomitant to and restricted to the intended use of the housing development rather than for a wider purpose
 1. Possible uses – a gym; meeting room etc



Morris v An Bord Pleanala

- ▶ Hyland J. held:
- ▶ No definition of “other uses” in the 2016 Act
- ▶ Only requirements for “other uses” are that
 - ▶ The zoning of the land must facilitate the “other uses” and
 - ▶ The scale of the “other uses”
- ▶ No statutory requirement that the “other uses” are intended to serve solely the residents of the development
- ▶ In this case the scale of “other uses” was below the cap of 4,500 sq metres for “other uses” and all of the “other uses” were permitted in principle within the zoning



Dublin Cycling Campaign v Bord Pleanála

- ▶ SHD application for 741 build to rent apartment; retail space and site works at site to the rear of Connolly Station
- ▶ 3,142 sq m of “other uses” – retail and other
- ▶ Surface car park at Connolly Station used by Irish Rail staff and public
- ▶ Planning application site took in part of this car park
- ▶ Planning application site also extends above the existing sidings – sidings to be kept in situ with development constructed above them
- ▶ Block B extends over the existing railway sidings – supported by steel truss support arrangement



Dublin Cycling Campaign v Bord Pleanala

- ▶ As part of Block B, a concrete deck will be constructed which will accommodate 135 spaces for the purpose of CIE parking
- ▶ Deck would be accessed by series of ramps leading from Oriel Street
- ▶ Fact that car parking which is ancillary to a SHD is to be disregarded for purpose of gross floor space was not relevant as the car parking is to be provided for benefit of CIE



Dublin Cycling Campaign v Bord Pleanala

▶ Applicant's case was that

- ▶ it was intended that part of the site would be used for non-residential purposes (i.e CIE car park)
- ▶ the area of land to be occupied by the CIE car park and related ramp (when taken with other non-residential uses) exceeds the maximum 4,500 sqm of other uses
- ▶ CIE car park was erroneously regarded as a pre-existing use and was not counted for the purpose of “other uses”
- ▶ Development doesn't fall within definition of “strategic housing development”



Dublin Cycling Campaign v Bord Pleanala

- ▶ **Board / Developer case was**
 - ▶ Accepted plans showed a “void” which might in the future be adapted for use as a car park
 - ▶ BUT the application made to the Board did not seek permission for a car park in this “void”
 - ▶ And no permission was granted for the car parking
 - ▶ As the CIE parking was an existing use on site and the proposed development involves a rationalisation of that use it does not fall within “other uses”



Dublin Cycling Campaign v Bord Pleanala

- ▶ **Construction of planning documents**
 - ▶ Planning documents should not be construed as complex legal documents but rather in the way in which reasonably informed persons might understand them (*XJS*)
 - ▶ In considering what use has been permitted, it is possible to look at the development for which permission is granted along with documents submitted with the application (*Lanigan v Barry*)
 - ▶ Planning permission should be interpreted objectively – it is a public document, not personal and enures for the benefit of the land
 - ▶ Where the permission incorporates other documents, those documents must be looked at in determining the proper scope of the permission



Dublin Cycling Campaign v Bord Pleanala

- ▶ **What was permission sought / granted for?**
 - ▶ Description of the development does not refer to the CIE parking
 - ▶ However, the deck which will accommodate the car parking is an integral element of Block B1 to B3
 - ▶ Fact that the “other uses” described as forming part of the development does not include the parking is diluted by fact that the car parking is shown on the drawings



Dublin Cycling Campaign v Bord Pleanala

- ▶ **What was permission sought / granted for?**
 - ▶ Nothing in the Order which suggests that the permitted development includes the car park
 - ▶ BUT when read in conjunction with the drawings there are a number of references to the deck as a car park and to the access ramp as a car park access
 - ▶ Board order requires the development to be built in accordance with plans and particulars



Dublin Cycling Campaign v Bord Pleanala

How would a reasonable person construe the Board Order

- ▶ No doubt that pp was granted for a development that includes construction of deck and ramp to it and the deck is shown laid out as a car park
- ▶ PP has to be constructed as per plans and particulars
- ▶ Did not accept that it would be obvious that the application was just to construct the deck and not to use the deck as car parking
- ▶ Application included the proposed use of deck as car park



Dublin Cycling Campaign v Bord Pleanala

How would a reasonable person construe the Board Order

- ▶ BUT didn't believe that the reasonable person would conclude that the Board went so far as to grant permission for the use of the deck as a car park
- ▶ This was based on Inspector's Report re: car parking – established use; didn't form part of the application



Dublin Cycling Campaign v Bord Pleanala

How would a reasonable person construe the Board Order

- ▶ Overall concluded that
 - ▶ Developer had not sought pp for the use of deck as car park
 - ▶ Board had not granted pp for the use of deck as car park
 - ▶ But documents conveyed the intention to use deck as car park



Dublin Cycling Campaign v Bord Pleanala

- ▶ McDonald J. held:
- ▶ To the extent that the development includes “other uses” the conditions set out in (i) and (ii) of the definition must be strictly observed
 - ▶ This is because of the use of the words “but only if”
 - ▶ Convey message that Oireachtas was concerned to ensure that for purpose of 2016 Act non-residential uses are permissible only to the extent set out in paras (i) and (ii) of the definition



Dublin Cycling Campaign v Bord Pleanala

- ▶ Nothing in the definition of “strategic housing development” which means that the development must always be considered by reference to the scope of the permission sought
- ▶ “Other uses on the land” is not confined to other uses for which planning permission is required
- ▶ Nothing to suggest that “other uses on the land” excludes existing use of land



Dublin Cycling Campaign v Bord Pleanala

“In each case, it is necessary to consider whether the elements of the definition are met. This requires a consideration as to whether the development in question falls within one of the forms identified in paras. (a) to (d) of the definition and, if so, whether the development also includes one or more non-residential uses. If it does include any such non-residential (or “other uses” to use the language of the definition) it then becomes necessary to consider, in any individual case, whether the conditions set out in paras. (i) and (ii) of the definition have been satisfied. Thus, in any particular case, in order to form a view as to whether a development falls within the definition, it is necessary to consider the underlying facts in order to determine whether a non-residential use is to be made of any part of the development to be constructed and, if so, the gross floor space which will be devoted to that use.” (para 89)



Dublin Cycling Campaign v Bord Pleanala

- ▶ **Does the development include “other uses” on the land?**
 - ▶ Yes – deck is to be used for car parking
 - ▶ The deck is a structural element of the development – if no intention to use it as a car park for non-residents no issue would arise
 - ▶ As deck is to be used for car parking then its floor area cannot be discounted for purpose of “other uses”



Dublin Cycling Campaign v Bord Pleanala

- ▶ Where the floor area of car park in conjunction with other non-residential uses exceeds 4,500 sq m gross floor space the condition as to the maximum allowable gross floor space permitted for other uses has been exceeded
- ▶ Not a strategic housing development
- ▶ Not entitled to apply to the Board



Dublin Cycling Campaign

- ▶ Application for a certificate for leave to appeal
- ▶ Brought by the developer
- ▶ Sought certification of the following point of law
- ▶ Application was granted
- ▶ 3 questions certified for Court of Appeal

Whether, in reckoning the quantum of “other uses” for the purposes of the definition of “strategic housing development” in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, “other uses” may include a use for which planning permission is neither sought nor granted



Dublin Cycling Campaign

- 1. Whether, in reckoning the quantum of “other uses” for the purposes of the definition of “strategic housing development” in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, “other uses” may include a use for which planning permission is neither sought nor granted*
- 2. Is the answer to that question any different where it is clear from the materials submitted with the application for permission that, in addition to the non-residential purposes expressly included in the application, the applicant for permission either (a) intends and/or (b) is contractually obliged to make use of part of the structure of the proposed development for a non-residential purpose?*
- 3. Is it correct to apply the test set out in Re. X.J.S. Investments Ltd [1986] I.R. 750 and Lanigan v. Barry [2016] 1 I.R. 656 without modification where the available materials contain contradictions of the kind described in paragraphs 65 to 70 of the judgment of the High Court in these proceedings [2020] IEHC 587 or is it necessary to adjust that test in such circumstances?*



Highlands v An Bord Pleanála

- ▶ Strategic housing development on lands on outskirts of Drogheda
- ▶ Applicants alleged that the Proposed Development was a material contravention of the zoning objective in Meath CDP
- ▶ Section 9(6)(b) of 2016 Act – Board precluded from granting permission for a development that is a MC of DP “in relation to the zoning of the land”



Highlands v An Bord Pleanala

- ▶ Meath CDP – came into effect on 22 January 2013
- ▶ Included a Core Strategy as required
- ▶ Variation adopted – 19 May 2014
 - ▶ Introduced an order of priority for release of residential lands for five centres, including Drogheda
 - ▶ Purpose was to ensure quantum of land required to meet household projections is identified for release during the lifetime of the CDP
 - ▶ Applied the land use zoning objectives contained in the Core Strategy to the land use zoning objective maps



Highlands v An Bord Pleanála

- ▶ Application site was zoned residential
- ▶ BUT significant portion of application lands had as a “specific objective” – “Residential Phase II (Post 2019)
- ▶ Text of relevant strategic policy (SPI) which was included in the Variation is :
 - ▶ “the lands identified with an A2 “New Residential’ land use zoning objective but qualifies as ‘Residential Phase II (Post 2019) are not available for residential development within the lifetime of this Development Plan”



Highlands v An Bord Pleanála

- ▶ Applicants argued that the lands were not zoned residential at the time the Board made its decision and would not become so zoned until after 2019
- ▶ Use of the lands for residential purposes was suspended for duration of CDP
- ▶ Residential development could not be carried out in a manner consistent with the CDP
- ▶ As such Board precluded from granting pp for the development – material contravention of the zoning of land



Highlands v An Bord Pleanála

- ▶ Board argued that “Residential – Phase II (Post 2019)” was a designation related to the order of priority
- ▶ Order of priority is a separate and distinct concept to the zoning of land
- ▶ It was the land use zoning objectives that was concerned with the zoning of land



Highlands v An Bord Pleanala

- ▶ McDonald J
- ▶ Zoning relates to the use for which lands are designated
- ▶ Question is whether under the terms of CDP as varied the lands are zoned for residential use
- ▶ The labels adopted by a planning authority are not to be treated by the Court as conclusive
- ▶ Court will consider the substance of the relevant development plan policy or objective to determine its true nature
- ▶ Should be construed by reference to test of a reasonable person



Highlands v An Bord Pleanála

- ▶ Purpose of the variation was to ensure that only the quantum of land required to meet household projections should be identified
- ▶ Further purpose was to ensure that land use zoning objectives in Core Strategy were achieved
- ▶ Purpose of variation was to present a strategy to deal with excess zoned residential land
- ▶ SPI refers to land not being available for residential development within the life of the CDP
 - ▶ That plainly prohibits the use of such lands for residential development for the duration of the CDP



Highlands v An Bord Pleanála

“I believe that such a person would discount the notion that the lands in question have been zoned for residential use but that such use has simply been postponed, by reference to an order of priority. That conclusion might well make sense if the development plan was intended to subsist for more than six years and in particular was intended to subsist beyond 2019. That is, however, plainly not the case. The final year of the duration of the current Development Plan is 2019. Thus, the designation on the land use zoning objectives map of “Residential Phase II (Post 2019)” means, in substance, that the lands cannot be used for residential purposes during the currency of the 2013-2019 Plan. This is stated in stark terms in the passage quoted above which makes it clear that any further release of land for residential purposes will be assessed following the making of the next County Development Plan” (para 40)



Highlands v An Bord Pleanála

In light of the considerations outlined in para. 42 above, I have come to the conclusion that, in substance, the lands in issue could not be said to have been zoned for recreational use at the time the Board made its decision granting planning permission for the proposed development by Trailford. Thus, the distinction made on the land use zoning objectives map for Drogheda Southern Environs between “land use zoning objectives” on the one hand and “specific objectives”, on the other, does not seem to me to be material. As Simons J. in Redmond made clear, the labels used by a planning authority are not determinative. The court, in considering an issue of this kind, is entitled to form its own view based on the substance of the terms of the relevant county development plan. Accordingly, in circumstances where the lands were not all zoned for residential purposes at the time of the decision made by the Board, I am of the view that the Board was precluded by s. 9 (6) of the 2016 Act from granting planning permission in this case for the proposed development by Trailford. (para 43)

