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MCCANN FITZGERALD

OUR REF

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DATE

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22 February 2021

Mr Tom Phillips
Tom Phillips + Associates
80 Harcourt Street
Dublin D02 F449

Private and Confidential

**Proposed Application for Strategic Housing Development permission at
The Goat, Goatstown, Dublin 14**

By Email

Dear Mr Phillips,

You have asked us to consider whether the proposed application for strategic housing development (“SHD”) permission at The Goat, Goatstown, Dublin 14 satisfies the definition of “strategic housing development” in section 3 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the “2016 Act”).

We are happy that it does.

Accordingly, section 4(1)(a)(i) of the 2016 Act requires that the application “shall” be made to An Bord Pleanála (the “Board”) and not to the planning authority.

There is no doubt that the number of “houses” proposed, at 299, exceeds the minimum of 100 prescribed in the definition of SHD. For completeness, the statutory definition of “house” for this purpose includes a flat or apartment.

The sole issue for attention is the proviso in the definition of SHD that limits “other uses”. The meaning and effect of that proviso is explained in the judgment of the High Court in *Dublin Cycling Campaign CLG v. An Bord Pleanála* [2020] IEHC 587 (“Dublin Cycling Campaign”).

As explained in the *Dublin Cycling Campaign*, the “other uses” cumulatively must not exceed 15 square metres gross floor space for each house in the proposed development subject to a maximum of 4,500 square metres gross floor space for such other uses. Where that “maximum

Barry Devereux (Managing Partner), Catherine Deane (Chair), John Cronin, Terence McCrann, Roderick Bourke, Niall Powderly, Kevin Kelly, Hilary Marren, Eamonn O’Hanrahan, Helen Kilroy, Judith Lawless, James Murphy, David Lydon, David Byers, Seán Barton, 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 Hart, 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, Stephen Holst, 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.

Consultants: Catherine Austin, Ambrose Loughlin, Eleanor MacDonagh (fCA), Lonan McDowell, Anna Moran, Peter Osborne, Tony Spratt (ACA).

allowable" is exceeded, "the proposed development cannot fall within the definition of 'strategic housing development' in [section] 3 of the 2016 Act". The court explained that an application under section 4 of the 2016 Act is "confined to applications for permission for a strategic housing development, which meet the statutory definition contained in [section] 3".

The maximum "other uses" for your proposed application is 4,485 square metres gross floor area (15 square metres times 299 no. houses). We understand that the total quantum of "other uses" is calculated to be 3,358.7 square metres, which therefore falls below the previously stated maximum.

The proposed development includes a hotel. The gross floor area for that has been included within the calculation of "other uses". The same goes for the proposed extension of the existing public house and retail commercial unit.

You have asked us to consider whether the existing public house and the car parking associated with it must both be included in the calculation of "other uses".

The existing public house is to be retained.

Strictly, no permission is required for development of same; it is existing.

However, that does not necessarily exclude the area of the existing public house from the calculation of "other uses". In *Dublin Cycling Campaign*, the application included a structure, but omitted the use of that structure from the calculation of "other uses". Even though permission was not sought for that use, it remained one of the "other uses on the land" included in the proposed SHD. When that use was included in the calculation of "other uses", the 4,500 square metre maximum was breached and the proposed development could not be considered SHD.

You will include the existing public house within the redline boundary of the proposed application, within the nature and extent of the proposed development and within the calculation of "other uses" for the purposes of comparison with the maximum allowable under the statutory definition.

That being so, the question arises whether the parking that is "incidental to the primary purpose" of the public house (existing and extended) must also be included in the definition of "other uses". The answer is yes, but there is a very important caveat. You are entitled to exclude "any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building".

Put simply, this means that car parking incidental to the public house (existing and extended) is included in the calculation, but entitled to a "nil" area quantum in the calculation of "other uses".

This is because the area of maximum allowable "other uses" is calculated by reference to gross floor space. The definition of "gross floor space" in section 3 of the 2016 Act is:

"the area ascertained by the internal measurement of the floor space on each floor of a building (including internal walls and partitions), **disregarding** any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building" (emphasis added).

Strictly, this definition of “gross floor space” was not relevant to the judgment in *Dublin Cycling Campaign*. The parking spaces were not incidental to any of the permitted buildings. The court explained:

“For completeness, it should be noted that [section] 3 of the 2016 Act makes clear that car parking space which is ancillary to a strategic housing development is to be disregarded for the purposes of ‘gross floor space’. However, all parties were agreed that this does not assist in terms of any car parking to be provided for the benefit of CIÉ. The definition of ‘gross floor space’ in [section] 3 only disregards floor space provided for the parking of vehicles by users of the building which can be said to be incidental to the primary purpose of the building (in this case a residential development). Thus, unless the car parking spaces were designed to be used by the residents themselves or by visitors to the residents, the car parking spaces would not be disregarded.”

Your application is materially different.

The parking spaces are incidental to the buildings comprising the existing public house and its proposed extension. Those spaces are “designed to be used by” the users of the public house, its staff, contractors and patrons. Those spaces are plainly incidental to the primary use of the building(s) as a public house. That being so, the area for that incidental parking must be disregarded from any calculation of “gross floor space”.

Once that area for car parking is disregarded, in accordance with the 2016 Act, the total of “other uses” proposed is less than the maximum allowable (3,358.7 square metres < 4,485 square metres). Accordingly, the proposed application satisfies the definition of “strategic housing development” in section 3 of the 2016 Act. It follows that section 4(1)(a)(i) of the 2016 Act requires that the application “shall” be made to the Board and not to the planning authority.

For completeness, we note that an application for appeal certificate against the judgment in *Dublin Cycling Campaign* was made on 4 February 2021. The outcome of that application and any possible appeal is not relevant to the definition of “gross floor area”, so cannot affect the analysis set out above.

Yours sincerely

(sent by email, so bears no signature)

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