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**McCann FitzGerald**

OUR REF

YOUR REF

DATE

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6 April 2022

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

**Torca Developments Limited**

By Email

**Proposed Strategic Housing Development ("SHD") on lands located to the East of Carley's Bridge, Enniscorthy, E.D. Enniscorthy Rural, Co. Wexford**

**Whether an application for SHD permission may be made further to, or consequent upon, the opinion given by the Board on 26 January 2021 (Board ref. ABP-307305-20)**

Dear Mr Sadler

You have asked us to consider whether your client, Torca Developments Limited, is free to make an application for permission for Strategic Housing Development ("SHD") on lands located to the East of Carley's Bridge, Enniscorthy, E.D. Enniscorthy Rural, Co. Wexford further to, or consequent upon, an opinion given by the Board on 26 January 2021 (Board ref. ABP-307305-20).

We are satisfied the answer must be yes.

On 5 June 2020, your client made a request to An Bord Pleanála (the "Board") to enter into consultation in relation to proposed SHD on the subject lands (Board ref. ABP-307305-20).

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.

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**Consultants:** Catherine Austin, Deirdre Barnicle, Seán Barton, Ambrose Loughlin, Eleanor MacDonagh (FCA), Lonan McDowell, Anna Moran, Peter Osborne, Tony Spratt (ACA).

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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, your client may proceed to apply for permission for SHD in accordance with the 2016 Act.

There are only two pre-conditions that your client must satisfy.

First, your client must notify the Board of its intention to proceed with the application. I understand from you that it has given notice of that intention.

Second, the application must be made within the period of 16 weeks beginning on 17 December 2021. Ordinarily, that period would expire on 7 April 2022. However, section 251 applies so that the 9-day period from 24 December to 1 January, inclusive, is excluded. This extends the period under section 17(2)(b) to 16 April 2022. As that is a Saturday, and the next day the offices of the Board are open is 19 April, there is an argument to be made that the pre-condition is satisfied provided the application is made on or before 19 April. It is better for the application to be made before the Board closes its offices for Easter.

There is only one possible complication.

Further to the Board’s opinion, on 19 October 2021, your client made an application to the Board for SHD permission (Board ref. ABP-311699-21). That application was refused on 16 February 2022.

In essence, the question you now ask is whether the Board’s opinion was “spent” by making that application, so is no longer relevant to our analysis of section 17 of the 2021 Act.

We are satisfied that the opinion is not, as a matter of fact or law, spent.

First, section 17, in terms, does not make any distinction between Board opinions that have been used or not used. The relevant part is worth setting out in full:

“(2) Notwithstanding the repeal of section 4(1) of the Act of 2016, a prospective applicant who on the date on which subsection (1) comes into operation has been issued with a notice under section 6(7)(b) of the Act of 2016 in relation to a proposed strategic housing development may, subject to complying with Part 2 of the Act of 2016, proceed to apply for permission in relation to such development in accordance with that subsection provided that —

(a) the prospective applicant notifies the Board of the prospective applicant’s intention to proceed with the application as soon as practicable after the date on which subsection (1) comes into operation, and

(b) the application is made within the period of 16 weeks beginning on the date on which subsection (1) comes into operation.”

The relevant question is only whether your client has or has not “been issued with a notice under section 6(7)(b) of the Act of 2016 in relation to a proposed strategic housing development”. If yes, your client may proceed to apply for SHD permission notwithstanding the repeat of section 4(1) of the 2016 Act.

Second, there is nothing in the 2016 Act, either, to suggest the opinion formed under section 6(7) of the 2016 Act is spent by the making, or determination, of an application for SHD.

Upon receipt of the notice of the Board's opinion, under section 6(7), the prospective applicant may, under section 6(8)(b)(i), "subject to complying with section 8(1) proceed to apply for permission under section 4(1)".

Section 8(1) prescribes certain requirements for an application to the Board. None of those are relevant to this question. There is nothing expressed in section 8(1), or the balance of the 2016 Act, to suggest the opinion is spent when used.

Third, the Minister for Housing &c. made regulations, under section 12 of the 2016 Act, regarding matters of procedure and administration. The relevance of the Board's opinion to an application for SHD permission is addressed article 297(3) of the Planning and Development Regulations 2001, as amended (the "2001 Regulations"). This provides that where, as here, the Board's opinion was that "further consideration and amendment" was required, the application shall be accompanied by "of the proposals included in the application to address the issues set out in the notice".

Fourth, some might expect that your client should not have a "second bite at the cherry". However, while perhaps superficially attractive to some, as explained, there is no legal basis in the 2016 Act, the 2021 Act or the 2001 Regulations for the expectation that only one application is allowed to be made.

The structure of the legal provisions is to force pre-application consultation, terminate those with an opinion and leave the prospective application free to apply for permission.

Until section 17(2) was introduced, there was no deadline for the prospective applicant to "use" the opinion: the opinion would never go stale. This is in stark contrast with the successor to SHD, large-scale residential development ("LRD"), where the equivalent LRD opinion from the planning authority must be used within 6 months (see section 3 of the 2021 Act and, in particular, the insertion of section 32A(2)(b) to the Planning and Development Act, 2000, as amended (the "2000 Act")).

Before section 17(2), the opinion given by the Board under section 6(7) of the 2016 Act was useful for the entire of the "specified period" during which SHD would be relevant to the planning code.

Under section 17(2), any person, like your client, with an opinion in hand, used or unused, is entitled to the benefit of the provision. The benefit is temporary only. Subsection (2)(b) introduces a clear sunset, so those opinions certainly wither after 19 April 2022. There is no mischief or risk of floodgates of second or subsequent applications.

Fifth, we are aware that the Board has, in the past, accepted a second application made further to, or consequent upon, the same opinion under section 6(7). For example, the applications bearing Board ref. nos. TA06F.305459 and TA06F.307979 were both made consequent upon the same opinion under section 6(7), given under Board ref. no. TC06F.302888. The second bite at the cherry was not a concern for the Board, on that file. Indeed, it was not a concern for the public interested, including the person that questioned the validity of the permissions granted. Specifically, the validity of the SHD permissions granted by the Board for the two applications were both questioned in the High Court, but the second proceedings do not complain that the prospective applicant was prohibited from using the same opinion for the second application.

For all of the foregoing reasons, we are satisfied that your client is free to make an application for SHD permission further to, or consequent upon, the opinion given by the Board on 26 January 2021 (Board ref. ABP-307305-20).

Yours sincerely

*(sent by email, so bears no signature)*

**Brendan Slattery**

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