

OPINION

Re: Proposed SHD application for 110 No. residential units (42 No. houses and 68 No. apartments) with associated site works at Sion House and adjoining lands, Sion Road, Co. Kilkenny (ABP Ref. 3050-12-19)

Querist: Torca Homes Limited

Agents: McGill Planning, Chartered Town Planners

Counsel: Eamon Galligan S.C.

SCOPE OF OPINION AND BACKGROUND FACTS

1. Agents have requested my opinion in relation to a zoning issue that has been raised by An Bord Pleanála in its notice of pre-application consultation opinion, signed by Rachael Kenny, Director of Planning, dated the 12th September, 2019 in relation to a Strategic Housing Development (“SHD”) comprising 110 No. residential units (42 No. houses and 68 No. apartments) with associated site works at Sion House and adjoining lands, Sion Road, Co. Kilkenny. The issue arises under paragraph 1 of the Board’s Notice under the heading “*Local Development Plan Policy*” and reads as follows:

“Further consideration of the documents as they relate to the planning rationale/justification for the proposed density on the subject lands which are zoned for “existing low density residential” and the provisions of the core strategy as provided for in the Kilkenny City Development Plan 2014-2020. In this regard consideration of section 3.3.1 and 11.4.1 of the Kilkenny City Development Plan should be evident in the design response on site.

*Notwithstanding national policy, consideration should be given to the nature and scale of development relative to the local zoning and zoning objective and the materiality or otherwise of the quantum of development proposed in this context. **Specific regard should be given to the provisions of section 9(6)(b) of the Planning and Development (Housing) and Residential Tenancy Act, 2016 as amended, whereby the Board shall not grant permission under paragraph (a) of section 9(6) where the proposed development or part of it contravenes materially the Development Plan or Local Area Plan relating to the area concerned, in relation to the zoning of the land.**”¹*

Further consideration of these issues may require amendment to the documents and/or design proposals submitted.”²

¹ Emphasis added.

² Emphasis added.

2. The wording of the first section of the Board's notice follows the recommendation contained in the *"Inspector's Report on recommended opinion"*, signed by Joanne Kelly, Senior Planning Inspector on the 11th September, 2019.

3. The Inspector notes that the lands comprise c. 5.38 ha. There are existing structures on the site including a two-storey residential structure. There are other structures which were used as a former retreat centre.

4. Section 5.2.1 of the Inspector's Report addresses the issue of density and land use zoning. I have set it out in full below for convenience:

"5.2.1 Kilkenny City and Environs Development Plan 2014"

Chapter 3 deals with the Core Strategy for the County. Section 3.3.1 which refers to land requirement set out that "In order to reflect that demand for housing on larger sites at lower than normal densities it is proposed to continue with the low-density zonings at selected locations in the environs of the City. An additional area for low density is identified at the Sion Road (1.95 ha.) and an additional area along the old Dublin Road (0.69 ha.)."

The lands contain two land use zonings "Existing Low Residential Density" to the north and a portion of lands zoned "Amenity/Green Links/Biodiversity" to the south along the banks of the River Nor.

Figure 7.2 of the City Development Plan identifies a portion of lands to the south as "key green infrastructure".

Section 11.4.1 pertains to "Density" and sets out inter alia: As in the preceding Development Plan it is not intended to prescribe maximum residential density standards. The emphasis will be on providing quality-housing environments based on innovation and a design led approach. A high standard of architectural design and layout will be required. The Planning Authority will

seek to ensure that new developments have individuality and a sense of place, which is generated by the interaction between the physical characteristics and features of the site and its surroundings and to the layout, landscaping and design of the new housing.”

5. The Inspector’s Report also refers to the planning authority’s submission at section 6.2.2, including the following matters:

- Zoning of site – *“Existing Low Density Residential”* with low density defined as a not more than 10 units per hectare.
- Southern portion of the site is zoned as *“Amenity, Green Links, Biodiversity, Conservation/Open Space/Recreation.”*
- Low density zoning to reflect pattern of existing development.
- Concerns about high density proposed.

6. I have considered also the *“Statement of Consistency”* (July, 2019) submitted by Agents. At page 29 of that report the issue of residential zoning and potential material contravention is addressed. It is noted that section 3.4.5.2 of the Development Plan refers to:

“Existing Low Density Residential: “To protect, provide and improve residential amenities at low density. Low Density Housing is defined as not more than 10 units per ha. (4 per acre) on average and must have regard to the character of the area. The proposed density (30 units per ha.) is higher than the 10 units per ha. referred to in the objective under section 3.4.5.2 “Existing Low Density Residential”.”

7. The permitted uses under the Development Plan are also set out.

8. The Report refers to section 11.4.1 which states that it is not the intention of the Development Plan to prescribe maximum residential density standards. Reference is also made to the Ministerial Guidelines issued under *Section 28* of the Planning and

Development Act, 2000, as amended (“the 2000 Act”) entitled “Sustainable Residential Development in Urban Areas – Guidelines for Planning Authorities (2009)” and to Chapter 5 which relates to “Larger Towns” such as Kilkenny. The McGill Planning Report states as follows:

“Sections 5.4 to 5.12 define appropriate locations for increased density within larger towns. Section 5.11 defines “Outer Suburban/Greenfield” sites as open lands on the periphery of larger towns and states that nett densities less than 30 dwellings per hectare should generally be discouraged in the interest of land efficiency, particularly on sites in excess of 0.5 ha. Section 5.12 also states that “Limited provision may be made for lower density schemes provided that within a neighbourhood or district as a whole, average densities achieve minimum standards recommended.”

The proposed development in this instance is at 30 units per ha. nett in accordance with section 5.11. We submit that the development should therefore be acceptable in principle having regard to the Sustainable Residential Development in Urban Areas Guidelines.”

9. It is interesting to note also that, in its pre-application planning reports, the Council raises concern about the density of the proposal but does not suggest that it is in material contravention of zoning. It is against the foregoing background that my opinion is sought as to whether the proposed SHD application materially contravenes the zoning objectives of the Development Plan.

RELEVANT STATUTORY PROVISIONS

10. Section 9(6) of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (“the 2016 Act”) provides that the Board may not grant planning permission

in material contravention of the Development Plan “in relation to the zoning of the land”. Section 9(6) provides as follows:

“(6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.

(b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.

(c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development.”³

11. To ascertain what is meant by “the zoning of the land” for the purposes of the 2000 Act, reference must be made to Section 10(1) of the 2000 Act and also to Section 10(2), to the extent that it is relevant. Section 10(1) provides as follows:

“10.—(1) A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question.”

12. Section 10(2) provides, in so far as relevant, as follows:

³ Emphasis added.

“(2) Without prejudice to the generality of sub-section (1), a Development Plan shall include objectives for –

(a) the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses), where and to such extent as the proper planning and sustainable development of the area, in the opinion of the planning authority, requires the uses to be indicate; ...”.

13. It is also of note that Section 10(3) provides:

“(3) Without prejudice to subsection (2), a development plan may indicate objectives for any of the purposes referred to in the First Schedule.”

14. Under Part 1 of the First Schedule and the heading “Control of Areas and Structures”, the following objective is referred to:

*“1. Regulation and controlling the layout of areas and structures, **including density**, spacing, grouping and orientation of structures in relation to roads. Open spaces and other structures.”*

15. It therefore appears that the Act makes provision for separate objectives to be included in a development plan relating to zoning and density, respectively.

16. It is worth noting that the issue of zoning features in a number of other sections under the 2000 Act and it is of some relevance in that context to refer to Section 96(1), which provides as follows:

“96.—(1) Subject to subsection (13) and section 97, where a development plan objective requires that a specified percentage of any land zoned solely for residential use, or for a mixture of residential and other uses, be made available for housing referred to in section 94(4)(a), the provisions of this section shall apply

to an application for permission for the development of houses on land to which such an objective applies, or where an application relates to a mixture of developments, to that part of the application which relates to the development of houses on such land, in addition to the provisions of section 34.”

17. In the context of that provision, the subject lands are zoned residential and Part V social housing is therefore required.

CONCLUSIONS

18. Having regard to the foregoing considerations, and subject to any qualifications or assumptions expressed above, my principal conclusions are as follows:

1. Separate provision is made under the Act for objectives relating to land use zoning and the density of structures. The *“Existing Low Density Residential”* objective which applies to the subject lands is in fact a rolled-up objective which contains two separate objectives.
2. The phrase *“the zoning of land”* in Section 9(6)(b) of the 2016 Act must be given an interpretation that is consistent with the use of the phrase in section 10(2)(a) of the 2000 Act:

“(a) the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses),”⁴

⁴ Emphasis added.

3. The density of the proposed development is not relevant to the question as to how the lands are “zoned” for the purposes of the 2000 Act. It follows that the proposed residential development cannot be regarded as being in material contravention of the residential zoning of the lands.

4. The proposed development undoubtedly falls within the definition of “strategic housing” for the purposes of Section 3 of the 2016 Act in so far as this includes the following meaning:

“(a) the development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses,”

Nothing further occurs at this time. I can advise further if required.

Eamon Galligan SC

15 October 2019

