

1.0 SCOPE OF OPINION AND BACKGROUND FACTS

- 1.1 Agents have requested me to provide an opinion in relation to certain legal issues arising on foot of the decision of Dun Laoghaire Rathdown County Council dated the 10th August, 2017 to refuse permission for a proposed residential development at Castle Park School, Castle Park Road, Dalkey, Co. Dublin.
- 1.2 Permission was refused for three reasons, but it is only the third reason for refusal with which this opinion is concerned. It provides as follows:

“3. Section 8.2.3.4 (xi) of the 2016-2022 Dun Laoghaire-Rathdown County Development Plan sets out development management guidance with respect to development on institutional lands. It advises that where existing school uses are to be retained, any proposed residential development shall have regard to the future needs of the school and allow sufficient space to be retained adjacent to the school for possible future school expansion/redevelopment. The submitted details do not however include any assessment or consideration of the future needs of Castle Park School. Section 8.2.3.4 (xi) of the 2016-2022 Dun Laoghaire-Rathdown County Development Plan also indicates that to promote a high standard of development and take account of the built heritage and natural assets of a site, a comprehensive masterplan should accompany a planning application for development on institutional lands. The applicant however has not demonstrated that the proposed development would not undermine the existing educational use on these lands. The proposed development does not therefore satisfy the requirements of Section 8.2.3.4 (xi) of the 2016-2022 Dun Laoghaire-Rathdown County Development Plan and would be contrary to the proper planning and orderly development of this area.”

- 1.3 The Planning Officer’s report upon which the decision was based refers to a number of policy provisions under the Dun Laoghaire-Rathdown County Development Plan, including section 2.1.3.5 (Policy RES5), section 7.1.3.3 and section 8.2.3.4 (xi). In relation to Policy RES5, it is stated as follows:

“Policy RES5 as set out in section 2.1.3.5 of the current County Development Plan indicates that in cases of rationalisation of an existing institutional use, as opposed to the complete cessation of that use, the possible need for the future provision of additional facilities related to the residual retained institutional use (sic) retained on site

may require to be taken into account. Policy RES5 notes that this particularly applies to schools where a portion of the site has been disposed of but a school use remains on the residual part of the site. This is considered to be particularly relevant with respect to the subject application where a school use remains on the residual part of the site.”¹

- 1.4 The application site was the subject of a contract for sale dated the 1st November, 2004 between Castle Park School Limited (vendor) and David Arnold, Mark O’Brien, Michael McCarthy, John Lombard and Robert McCarthy (Purchasers). A further contract of sale was entered into on the 18th May, 2007 between Castle Park School Limited (vendor) and the same purchasers. The second contract was described as being supplemental to the first contract for sale made on the 1st November, 2004. The matter “*rested in contract*” until a Deed of Conveyance dated the 21st December, 2016 was signed by the original parties, with Curve DevCo Limited acquiring the property as a sub-purchaser.
- 1.5 I am instructed that the consideration for the purchase of the property was paid in 2009. The making of this payment is evidenced by a limited recourse mortgage granted by the school to Anglo Irish Bank in 2009, on the same date as the Bank advanced a loan to the original purchasers. As a consequence, the beneficial ownership (or “*true ownership*”) was divested by the school to the original purchasers then. This beneficial ownership in turn transferred to Querist when it signed the sub-sale contract in 2016. Since 2009, Castle Park School Limited has held a bare legal interest in the property. The legal implications of these transactions is considered in more detail below.
- 1.6 On foot of section 4.6 of the 2007 contract for sale, the agreement between the parties contemplated a “*residential development*” defined as “*a residential development on the subject property comprising in aggregate not more than 6,500 sq. m. of Residential Floor Area complying with the criteria set forth in the special conditions.*” The 2007 contract for sale also refers at section 4.10 to the “*school development*” as comprising “*the redevelopment of the vendor’s*

¹ Underlining added.

school buildings and the property retained by the vendor in accordance with the school planning permission.” The school planning permission is defined under section 4.11 of the contract as planning permission No. PL06D.215520 (**Reg. Ref. No. D05A/0762**). This permission related to the redevelopment and extension of the existing Castle Park School, which is a protected structure, to provide replacement classrooms and school facilities. The development comprised the following:

- (a) Internal alterations and refurbishment of the castellated house (Protected Structure) which includes the demolition of ancillary outbuildings, removal and alterations to internal walls;
- (b) The demolition of existing extensions and ancillary structures outside the curtilage of the Protected Structure to include 19 No. classrooms and ancillary accommodation;
- (c) The construction of part 1-storey, part 2-storey extensions, to include;
- (d) 14 No. new classrooms;
- (e) 6 No. Montessori classrooms;
- (f) Assembly Hall with kitchens;
- (g) Indoor swimming pool with changing rooms;
- (h) PE hall with changing rooms;
- (i) Caretaker’s flat with balcony; and
- (j) Ancillary accommodation, including administration, storage, lockers, maintenance; with
- (k) 19 No. surface car-parking spaces;
- (l) Landscaping and associated works;

All located at Castle Park School.

1.7 It is clear from the foregoing that the 2007 contract for sale specifically provided for a development by the school.

1.8 Special Condition 6 of the said Contract for Sale set out the requirements agreed by Castle Park School for the nature and extent of the planning application to be made by the purchasers for the residential development in accordance with a layout plan attached to the Contract for Sale. To give a flavour of these requirements of Special Condition 6 are in the following terms:

“6.1 The Purchasers shall apply for planning permission which application, at the option of the Purchasers, may be lodged in the name of the Vendor, for the Residential Development substantially in accordance with the attached layout plan and any development of the subject property shall satisfy the following criteria:

(a) No permitted development (other than roads, footpaths and services) will be allowed on the area shown coloured pink on the Plan “A” annexed hereto.

(b) On the area coloured purple, the maximum height will be 4 residential storeys.

(c) On the area coloured green, the maximum height will be 5 residential storeys but restricted to 3 storeys in the area coloured blue at the Castlelands Gate end of the site where the proposed plan is for 4 houses. Notwithstanding that it is the Purchasers’ present intention to locate 4 houses on such part of the Subject Property, the Vendor acknowledges that the Purchasers shall be entitled to amend such plan subject only to complying with the terms of this agreement ...”.

1.9 Furthermore, it is clear from Special Conditions 6.4 and 6.5 that Castle Park School Limited agreed to the erection of an appropriate site boundary wall and that it was a requirement of the Contract of Sale that the Purchasers *“shall carry out a tree felling and tree planting programme so as to ensure maximum screening between the two Developments between the points “G” and “H” on Plan “A” annexed hereto.”*

1.10 It is quite clear from the foregoing provisions of the special conditions of the 2007 Contract of Sale that Castle Park School Limited sought to protect the

interests of the school in terms of its own need for redevelopment of the school and in terms of restricting the nature and extent of the development that could be carried out by the Purchasers. I am instructed that the school receives no State funding and is a fee-paying private school. It is a co-educational inter-denominational private day school for primary children. The school, which is a private entity operating on a commercial basis, chose to sell part of its lands, a decision which has no doubt assisted in funding the expansion of school facilities.

- 1.11 This concern to control the “*Residential Development*” (again defined as “*a residential development on the subject property comprising in aggregate not more than 6,500 sq. m. of Residential Floor Area*”) is evident in the Deed of Conveyance signed by Castle Park School Designated Activity Company, of the first part, David Arnold, Mark O’Brien, Michael McCarthy, John Lombard and Robert McCarthy, of the second part, and Curve DevCo Limited (the sub-purchaser), of the second part. It is reflected in the terms of the sub-purchaser covenants, which provide, *inter alia*, as follows:

“1. The sub-purchaser shall apply for planning permission which application, at the option of the sub-purchaser, may be lodged in the name of the vendor, for a residential development or any development which shall satisfy the following criteria:

1.1 No permitted development other than roads, footpaths and services, will be allowed on the area shown coloured pink on the Plan.

1.2 On the area coloured purple the maximum height will be four residential storeys.

1.3 On the area coloured green the maximum height will be five residential storeys but restricted to three storeys on the area coloured blue at the Castlelands Gate end of the Property.

1.4 All residential structures referred to shall be of normal acceptable residential height.”

1.12 It is against the foregoing background and against the policies of the current County Development Plan in relation to “*Institutional Lands*” that I am requested to advise as to the validity of the considerations that the Council took into account in its third reason for refusal, which imply an onus on Querist to ascertain the needs of the school for the expansion of its facilities and to cater for these needs in any development of the subject lands of which it is the owner.

2.0 TITLE ISSUE

2.1 Section 32 of the Land and Conveyancing Law Reform Act, 2009 provides that the entire beneficial interest in land passes to the purchaser on the making, after the commencement of the relevant chapter of the Act, of an enforcement contract for the sale or other disposition of land.

2.2 The 2004 and 2007 Contracts for Sale pre-dated the commencement of *Section 52* and are therefore governed by the pre-existing law as set out in *Tempany .v. Hynes*², in which it was held that the amount of the beneficial interest that passes to the purchaser is proportionate to the amount of the consideration that had been paid. I am instructed that the entire consideration for the purchase of the subject lands was paid by the purchasers as far back as 2009. It follows that the beneficial interest in the subject site was transferred by the school to the original purchasers then. This beneficial ownership in turn was transferred to Curve DevCo when it signed the sub-sale contract in 2016. Since 2009, the school has held a bare legal interest in the land, which does not entitle it to exercise any control over the land or to occupy same. The school has had no ability to develop the subject lands since 2009 and any development aspirations it might have had in respect of these lands are not capable of implementation.

3.0 COMPLIANCE WITH DEVELOPMENT PLAN POLICIES

3.1 Policy RES5: Institutional Lands is described as follows:

² [1976] IR 101.

“Where distinct parcels of land are in institutional use (such as education, residential or other such uses) and are proposed for redevelopment, it is Council policy to retain the open character and/or recreational amenity of these lands wherever possible, subject to the context of the quantity of provision of existing open space in the general environs.”³

3.2 The policy goes on to state (at section 2.1.3.5 of the Plan) as follows:

“Where a well-established institution plans to close, rationalise or relocate, the Council will endeavour to reserve the use of the lands for other institutional uses, especially if the site has an open and landscaped setting and recreational amenities are provided. Where no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the zoning objectives of the area and the open character of the lands being retained.”⁴

3.3 In my opinion, the Contracts for Sale in 2004 and 2007, which make specific provision for the development of the school and development for residential purposes, respectively, demonstrate that there was at that time no demand for an alternative institutional use or for an extension of the existing educational use into the lands under sale. Now that the lands have been sold, it is difficult to see how the planning authority can have any entitlement “to reserve the use of the lands for other institutional uses” on the basis that there may be a demand for an alternative institutional use, as there is no reasonable likelihood of the lands being put to such alternative institutional uses. The only relevant institutional use is that of the school, but it decided to divest itself of the subject site thereby ensuring that it could have no further involvement in developing the site. In my opinion, it is irrational in these circumstances for the planning authority to seek to reserve the use of the subject site or part thereof for use by the school or to suggest that the developer has to prove that such a reservation is not required to cater for the school’s expansion.

3.4 It is worth observing also that Policy RES5 is addressing circumstances where distinct parcels of land are in institutional use (such as education, residential or other such uses). However, the lands the subject of the current planning

³ Underlining added.

⁴ Underlining added.

application are not in institutional use currently and the school has divested itself of any control over the lands the subject matter of the planning application.

- 3.5 Policy SIC8, as set out in section 7.1.3.3 of the current County Development Plan, states that it is Council policy to support the provisions of school facilities and the development/redevelopment of existing schools throughout the county. It also indicates that the Council would support the appropriate development/redevelopment of existing schools within the county that will enhance existing facilities – including sports facilities on site.
- 3.6 However, the lands the subject matter of the application have already been sold and it is difficult to see how in these circumstances any of the provisions of the Development Plan enable the planning authority to effectively lay a “*dead hand*” on the development of the subject lands.
- 3.7 The provisions of the Development Plan directly relied upon by the planning authority in the context of the third reason for refusal relate to section 8.2.3.4 (xi) of the current County Development Plan. This provision commences as follows:

“Where no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the areas zoning objectives and the open character of the lands being retained.”

- 3.8 There is substantial evidence from the 2007 Contract of Sale and the Deed of Conveyance dated the 21st December, 2016 that the school, a private commercial entity, had no further requirement for the lands under sale to fulfil the school needs. Indeed, it would appear that the funds raised by the sale of the lands were used to finance the school’s redevelopment plans, on foot of the planning permission granted under **Reg. Ref. No. D05A/0762**. Therefore, the sale of the lands has been used to facilitate the extension of school facilities rather than being used as a vehicle to frustrate the expansion of the school to cater for student needs. This would appear to be recognised also by the fact that the school agreed not to object or to procure any objection to the “*Residential*

Development” referred to in the 2007 Contract for Sale and the Deed of Conveyance dated the 21st December, 2016

- 3.9 Section 8.2.3.4 (xi) also refers to the requirement for a Master Plan in certain circumstances. It states:

“There is still a number of large institutions in the established suburbs of the County which may be subject to redevelopment pressures in the coming years. The principal aims of any eventual redevelopment of these lands will be to achieve a sustainable amount of development while ensuring the essential setting of the lands and the integrity of the main buildings are retained. In order to promote a high standard of development a comprehensive Master Plan should accompany a planning application for institutional sites. Such a Master Plan must adequately take account of the built heritage and natural assets of a site and establish recreational use patterns. Public access to all or some of the lands may be required. Every planning application lodged on institutional land shall clearly demonstrate how the conform with the agreed Master Plan for the overall site. Should any proposed development deviate from the agreed Master Plan then a revised Master Plan shall be agreed with the planning authority.”⁵

- 3.10 The application of this provision is confined to “*institutional sites*”. However, as already pointed out the school has divested itself of any interest in the application site and, in my opinion, it can no longer be regarded as an “*institutional site*” or a site in institutional use having regard to the ordinary meaning of these expressions. For this reason the Council’s reliance on section 8.2.3.4(xi) in the third reason for refusal is misconceived. In this regard, it is relevant to refer to the principles for interpreting planning documents, such as development plans. In *XJS Investments Ltd v. Dun Laoghaire Corporation*,⁶ McCarthy J. stated in the Supreme Court:

“Certain principles may be stated in relation to the true construction of planning documents:

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as

⁵ Emphasis added.

⁶ [1987] I.L.R.M. 659.

by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning . . .”

3.11 I note also that appendix 10 (Development Management Thresholds Information Document) of the County Development Plan 2016-2022 specifically refers to the fact that in the context of both the RES 5 Objective and Section 8.2.3.4 (xi) of the Plan the need to submit a Masterplan is to “*be dealt with on a case by case basis through the pre-planning process.*” In my opinion, it is irrational and unreasonable for the planning authority to suggest that the developer should have to prepare a Masterplan to include provision for the expansion of a private fee paying school on lands which it chose to sell. The planning authority is critical both in its planning report and in the third reason for refusal of the fact that “*no details have been submitted to enable the Planning Authority to consider the future needs of the existing school use at Castlepark...*”⁷ However, the implications of such a requirement where lands have been sold is to put the developer completely at the mercy of the school or other institution that has divested itself of lands and effectively puts a developer in a “*ransom*” situation. Unless the school co-operates by providing up to date details of its future needs, the developer will not be in a position to develop its lands. There is, of course, no evidence of such an intention on the part of the school in the present case, but this potential ransom situation, in circumstances where the developer has no control over the lands that have been retained in institutional use, does serve to underline the irrationality in the approach of the planning authority.

3.12 The last paragraph in section 8.2.3.4 (xi) specifically relates to the future needs of an existing school. It states:

“In addition to the provision of adequate open space, on institutional lands where existing school uses will be retained, any proposed residential development shall have regard to the future needs of the school and allow sufficient space to be retained adjacent to the school for possible future school expansion/redevelopment.”

⁷ DLRCoCo Planning report (at p. 26).

3.13 In relation to this aspiration of the development plan policy, there are two observations to be made. First, as already discussed above, the lands the subject of the application cannot be regarded as “*institutional lands*” within the ordinary meaning of that expression. Second, the proposed residential development specifically had “*regard to the future needs of the school*” in that the residential development directly arose from and was facilitated by an agreement with the school as to the form and layout of that residential development.

4.0 CONCLUSIONS

4.1 In my opinion, and for the reasons set out above, the considerations that the planning took into account in its third reason for refusal of permission were irrelevant considerations and ought not to have been taken into account. To that extent, the planning authority acted irrationally and unreasonably in imposing the third reason for refusal and it ought not to be adopted by An Bord Pleanála.

4.2 The assumption underlying the third reason for refusal is that the planning authority is entitled to refuse permission to a developer by reference to the stated needs of another private landowner to further develop its lands notwithstanding the fact that it has sold the land to the developer. Furthermore, if the developer is unable to ascertain what those needs are so as to provide for those needs, the implication of the third reason is that this in itself is a justification for refusal of permission. It seems to me that such radical propositions would need to be firmly provided for by way of express statutory provision, but no such provision has been made. Moreover, the contracts for sale in the present case specifically took into account the school’s needs in relation to its own expansion plans and also restricted the manner in which the residential development has to be carried out having regard to the school’s requirement.

4.3 The application of section 8.2.3.4 (xi) is confined to “*institutional sites*”. However, as already pointed out the school has divested itself of any interest in the application site and, in my opinion, it can no longer be regarded as an

“*institutional site*” or a site in institutional use having regard to the ordinary meaning of these expressions. For this reason the Council’s reliance on section 8.2.3.4(xi) in the third reason for refusal is misconceived.

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

Eamon Galligan S.C.
1st September, 2017.