

**RE: THE LEGAL POSITION WITH REGARD TO A VARIATION OF THE
DEVELOPMENT PLAN UNDER SECTION 13 OF THE PLANNING AND
DEVELOPMENT ACT, 2000.**

OPINION

I am asked by Agent to advise the County Council in relation to a number of matters which might arise in relation to a possible variation to the County Development Plan under Section 13 of the Planning and Development Act 2000.

There are a number of questions on which the Council would like guidance. I shall set out each of the questions and deal with them in turn.

1. Can the Members trigger a variation to the County Development Plan?

Section 13 of the Planning and Development Act, 2000 provides the mechanism to initiate the process whereby a variation to the Development Plan would be considered by the Council and following the procedure set out in the section, to either decide to make the variation or not make the variation.

The section is divided into 11 sub-sections.

It provides for the commencing of the process and the steps that are to be taken. Section 13 (2) provides for the notification of certain parties of the proposed variation and for the publication of the proposed variation in newspapers in the area. The public and the particular notified parties are given an opportunity to make submissions or observations on the proposed variation.

The Manager then is mandated to prepare a Report following receipt of those submissions or observations and to summarise in the Report the issues raised and to give a response to those issues.

The section is commenced by the following provisions in Section 13 (1):

“A Planning Authority may at any time, for stated reasons, decide to make a variation of a Development Plan which for the time being is in force”.

Section 13 (5) (a) provides as follows:

“The Members of a Planning Authority shall consider the proposed variation and the Report of the Manager under sub-section (4)”.

This is the first mention of the Members and their participation in the process.

Section 13 (6) (a) provides:

“Subject to paragraph (aa) and (ae), the Members of the Authority having

considered the proposed variation and the Manager's Report may as they consider appropriate, by Resolution, make the variation which would, if made, be a material alteration, with or without further modification or they may refuse to make it and paragraph (c) shall apply in relation to any further modification".

Section 13 (7) provides:

"In making a variation under this Section, the Members of the Authority shall be restricted to considering the proper Planning and sustainable development of the area to which the Development Plan relates, the statutory obligations of any Local Authority in the area and any relevant policies or objectives for the time being of the Government or any Minister for the Government".

Reserved Functions:

Under Section 131 of the Local Government Act, 2001, the Elected Members of a Local Authority are mandated to exercise and perform their functions by Resolution and those functions are referred to in Section 131 (b) as Reserved Functions. Section 131 (2) provides that the Section applies to every function which is designated as a Reserved Function or specified in Schedule 14, or designated as a Reserved Function by any provision of any other enactment relating to a Local Authority or Joint Body, is expressly made exercisable by Resolution under this Act or any other enactment.

From the recital of the provisions of Section 13, it is clear that the Members' obligations and duties under this Section come into play from Section 13 (5) in that they are obliged to consider the proposed variation and the Report of the Manager in the first place.

Section 13 (6) (a) provides that the Members having considered the proposed variation and the Manager's Report, may as they consider appropriate, by Resolution, make the variation.

This come within the provisions of Section 131 (2) (c) \ 2001. This is a function of the Members made expressly exercisable by Resolution. No other parts of Section 13 prior to Section 13, (6) is either designated as a Reserved Function or expressly made exercisable by Resolution under the Act. Therefore, any steps that have to be taken by the Planning Authority prior to that point in the Section are Executive Functions.

Therefore the initiation and commencement of the process under Section 13 (1) and thereafter under sub-section (2), (3), (4) are all Executive Functions.

Therefore the answer to question 1 is that the Members cannot trigger a variation to the County Development Plan under the Planning and Development Act, 2000.

2. Can the Members direct the Executive to commence the process?

Under the Local Government Act, (2001), as amended, the Members are given power under Section 140 of the Act, to direct by Resolution that any particular act, matter or thing, specifically mentioned in the Resolution and which the Local Authority or the Manager concerned can lawfully do or effect to be done or effected, in the performance of the Executive Functions of the Local Authority.

As the initiation of the variation of the Development Plan is an Executive Function then that would appear to come within the provisions of Section 140 (2).

However, Section 140 (10) provides that a Resolution under Section 140 does not apply or extend to the performance of certain Executive Functions and by an amendment to that Section, brought in under the Local Government Reform Act, 2014, a new sub-section (e) was added to sub-section 10 of 140.

This provides when read in conjunction with the commencement of sub-section 10 as follows:

“A Resolution under this Section does not apply or extend – (e) to any act, matter or thing to be done or effected in the performance of the Executive Functions of a Local Authority in respect of its functions as a Planning Authority under the Planning and Development Act, 2000”.

Therefore the Members have not got the power under the Local Government Act, 2001 to direct the Chief Executive to carry out an Executive Function under the Planning and Development Act, 2000. As we have seen, the commencement or initiation of the process under Section 13 to bring about a variation of a Development Plan is an Executive Function and therefore the Members do not have power to direct the Manager to initiate that process.

3. Can the Members bring an Ordinary Resolution, not under Section 140 to direct the Manager to initiate the procedure under Section 13 of the Planning and Development Act, to commence the process to vary Development Plan?

The mechanism provided under the Local Government Act, 2001, as amended, to allow the Elected Members direct the Manager in respect of the carrying out of Executive Functions is confined within the terms of Section 140. This is the power that has been granted by the Oireachtas. It is not possible to utilise some other mechanism, whether by Ordinary Resolution or otherwise, to attempt to effect the same result. Having been given the powers specifically under Section 140, they are then confined to the extent of those powers and in particular the restrictions set out in Section 140 (10). It is not possible for the Members, by some other mechanism, to get around the restricted provisions in Section 140 and are confined to the powers granted therein with the restrictions placed thereon.

Therefore, the Members are not entitled in law to attempt by an Ordinary Resolution, to direct the Manager to carry out a function under the Planning Acts, as that power has been specifically taken away under the amended Section 140 (10) (e).

4. When does a variation to a County Development Plan have the potential to have financial implications for the Council? In such a case, what are the obligations of the Executive in regard to proceeding with that variation?

If the Executive decided to initiate the process under Section 13, then it is possible that there might be financial consequences for the Council.

At this point in the process, the Chief Executive would have a duty over and above questions of planning and sustainable development to warn the Members of any potential claim and to accordingly object to the proposal in accordance with Section 112, of the Local Government Act 2001, (as amended) and make a decision not to proceed with the variation.

In general terms, and at the point of principle, where circumstances arise where it is decided in accordance with the proper planning and sustainable development of the area, that the zoning of a particular piece of land or pieces of land should be changed, then the power exists under Section 13 to effect that variation. Questions of title and ownership do not come into a consideration which is based on proper planning and sustainable development.

However, where the particular circumstances relating to a particular piece of land or pieces of land, coincide with those lands being either sold or being offered for, or open for sale, for development purposes under their existing zoning and a proposal is made to vary the Development Plan to change the zoning of those lands to a less valuable zoning and that has the necessary consequences that any contract entered into for the sale of the lands or the potential sale of the lands is interfered with, this could give rise to the possibility of a claim for damages against the Council for interfering with the rights of the landowners in respect of either the loss of their contract or the potential loss of contract.

Such a claim for damages is not be confused with a claim for compensation under Part XII of the Act, which arises out of the refusal of Planning Permission on an Appeal to An Bord Pleanala. What is at issue here is the possibility of a claim for damages where the landowner points to the targeted change in its zoning, for the specific purpose of interfering with their either contractual rights, or potential contractual rights. It is not by any means certain that such a claim would succeed, however, in the particular circumstances, where a landowner can point to targeted interference with its rights as a landowner, then the potential for such a claim does exist.

Nothing further occurs at present.

Dated this 28th day of June, 2017.

SIGNED:

Patrick A. Butler.