

Agenda Item 12

MEETING OF DÚN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

11 SEPTEMBER 2017

REPORT ON INDEPENDENT LEGAL ADVICE

The attached legal advice received from James Connolly SC is in response to the following motion adopted by the Members at the County Council meeting held on 3rd July, 2017:

"Amendment to Agenda Item No. 53:

To substitute for Agenda Item 53, the following:

That this Council resolves, pursuant to section 132(2)(a) of the Local Government Act 2001, as inserted by section 47 of the Local Government Reform Act 2014, to direct that a second legal opinion be obtained to answer the following questions:

1. Can the Elected Members of a planning authority trigger a variation to the County Development Plan?
2. Can the Elected Members direct the Executive to commence the process of a variation to the County Development Plan?
3. Does section 140(10)(e) of the Planning and Development Act 2000, as inserted by section 52(d) of the Local Government Reform Act 2014, operate to prevent the Elected Members from initiating the variation process, whether by way of a section 140 motion or an ordinary resolution?
4. Does (a) the triggering, or (b) the making, of a variation to the County Development Plan constitute an "Executive function of a local authority in respect of its functions as a planning authority"?
5. Does a variation to the County Development Plan have the potential to have financial liability for a planning authority? In the case that it does, what are the obligations of (a) the Executive, and (b) the Elected Members, of that planning authority, in regard to proceeding with such a variation?
6. Is there any circumstance in which a planning authority, having acted *intra vires*, or *ultra vires* where its actions amount to a nullity, can attract a liability in respect of a variation to the County Development Plan."

The report and advice is submitted for the information of the members.

Tom McHugh
Deputy Chief Executive and Director of Corporate, Communications and Governance

QUERIST: The Elected Members of
Dun Laoghaire-Rathdown County Council
("the Elected Members")

RE: Proposal to initiate procedures under
Section 13 of the Planning & Development Act, 2000
(as amended) to effect a variation of the existing
Development Plan of the County Council

AGENT: Eimear O'Doherty,
Acting Law Agent,
Dun Laoghaire-Rathdown County Council,
County Hall,
Dun Laoghaire,
Co. Dublin.

OPINION OF COUNSEL

Following a meeting of the Elected members of the Council of Dun Laoghaire-Rathdown (“the Elected Members”) on 13th July 2017 a Resolution was passed under Section 132(2)(a) of the Local Government Act, 2001 (as amended) to direct a second Legal Opinion be obtained from Counsel in relation to a series of specified questions, and Agent has requested Counsel to advise in relation to the questions raised, which are:-

- (1) Can the Elected Members of the Planning Authority trigger a variation to the County Development Plan?
- (2) Can the Elected Members direct the Executive to commence the process of a variation to the County Development Plan?
- (3) Does Section 140(10)(e) of the Planning & Development Act, 2000, as inserted by Section 52(d) of the Local Government Reform Act, 2014 operate to prevent the Elected Members from initiating the variation process, whether by a Section 140 Motion or an ordinary Resolution?
- (4) Does (a) the triggering, or (b) the making of a variation to the County Development Plan constitute an “*executive function of the Local Authority in respect of its functions as a Planning Authority*”?
- (5) Does a variation of the County Development Plan have the potential to have a financial liability for a Planning Authority? In the case that it does, what are the obligations of (a) the Executive, and (b) the Elected Members of that Planning Authority in relation to proceeding with such a variation?
- (6) Are there any circumstances in which a Planning Authority, (a) having acted *intra vires*, or, (b) *ultra vires* where its action amounts to a nullity, can attract a liability in respect of a variation to the County Development Plan?

It is proposed to deal with the questions set out above in the order in which they are raised:-

(1) Can the Elected Members of the Planning Authority trigger a variation to the County Development Plan?

The making of a County Development Plan under Section 13 of the Planning Code involves a two-step process: firstly, the initiation of the process to trigger the consideration of the making of a variation to the Development Plan, and, then, secondly, the decision of the Elected Members to make such a variation. The latter decision is based on consideration of making a variation by the Elected Members, but the former decision to trigger the second process is a matter exclusively for the Executive of the County Council.

The Elected Members cannot trigger a variation of the County Development Plan. The making of a Development Plan or any variation to it is a reserved function (see item 69 of Schedule 14A of the Local Government Act, 2001, as amended by Schedule 3 (Reserved Functions) in the Local Government Reform Act, 2014). Every function which is not expressly provided by Statute to constitute a reserved function is an Executive function to be carried out by the Chief Executive of the Local Authority (Section 149(4) of the Local Government Act, 2001). Accordingly, the triggering of the process to allow consideration by the Elected Members of a possible variation of the County Development Plan is an Executive function of the County Council.

(2) Can the Elected Members direct the Executive to commence the process of a variation to the County Development Plan?

Section 140 of the Local Government Act, 2001 allows for Elected Members of a Council by Resolution requiring that a particular act mentioned in the Resolution shall be carried out by the Chief Executive of the Local Authority provided that the matter be directed the Resolution can lawfully be done or effected in the performance of the Executive functions of the Local Authority (see Section 140(2)).

Section 140(10)(e) as inserted by Section 52 of the Local Government Reform Act, 2014, amends Section 140(10) so that it now reads as follows:-

*“A Resolution under this Section does not apply or extend (emphasis added) –
(e) to any act 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 & Development Act, 2000, ...”*

This exception to the powers available under Section 140 appears to apply in the instant case where the act or thing which is required to be done under a possible Resolution to be proposed by the Elected Members is an act or thing to be effected in the performance of the Executive functions of the Local Authority as a Planning Authority under the Planning Code, and therefore it appears to be covered by the disapplication of Section 140 as arises under Section 140(10)(e) (as inserted by Section 52(d) of the Local Government Reform Act, 2014). This provision prevents the putting in place of a Resolution which has the effect of directing the Chief Executive of the County Council to trigger and put in place the process allowing the Elected members from considering a proposed variation of the existing County Development Plan.

- (3) Does Section 140(10)(e) of the Planning & Development Act, 2000, as inserted by Section 52(d) of the Local Government Reform Act, 2014 operate to prevent the Elected Members from initiating the variation process, whether by a Section 140 Motion or an ordinary Resolution?**

See advices provided to Query No. (2) above.

A Section 140 Resolution (if applicable) is the only mechanism by which the Elected Members of the County Council can direct the Executive to take a particular course of action: such a direction cannot be effected by an Ordinary Resolution of the Elected Members.

- (4) Does (a) the triggering, or (b) the making of a variation to the County Development Plan constitute an “executive function of the Local Authority in respect of its functions as a Planning Authority”?**

As observed in the advices to Query No. 1 above, the triggering of the putting in place of a process to allow for consideration of a variation of a Development Plan is an Executive function to be discharged by the Executive of the Local Planning Authority, but the decision-making behind the making of a variation of a Development Plan is a reserved function to be discharged by the Elected Members.

- (5) **Does a variation of the County Development Plan have the potential to have a financial liability for a Planning Authority? In the case that it does, what are the obligations of (a) the Executive, and (b) the Elected Members of that Planning Authority in relation to proceeding with such a variation?**

As observed in the advices provided to Query No. 2 above, the Elected Members cannot lawfully pass a Resolution to require the Executive to trigger the putting in place of the process to allow them to consider the making of a variation of the existing County Development Plan. Accordingly, unless the Executive initiates the process to do so by putting in place the first step required under Section 13, the Elected Members cannot lawfully consider or decide upon the second step under Section 13 to make a variation of the existing County Development Plan. Any embarkation into the process to decide upon the making of a variation to the County Development Plan in the absence of a decision of the Executive to initiate the process is unlawful and can be quashed by way of a Judicial Review challenge which is likely to expose the County Council to incur legal costs of such a Court challenge.

Accordingly, in relation to the obligations of the Executive and the Elected Members, it is incumbent on the Executive to advise the Elected Members that any purported making of a variation without initiation of the process on the part of the Executive is unlawful, and it is incumbent on the Elected Members to desist from proceeding with such an unlawful course of action.

- (6) **Are there any circumstances in which a Planning Authority, (a) having acted *intra vires*, or, (b) *ultra vires* where its action amounts to a nullity, can attract a liability in respect of a variation to the County Development Plan?**

Lawful Variation.

- (a) Under Section 190 of the Planning Code compensation is recoverable where, on Appeal to Bord Pleanála, either Planning Permission is refused, or Planning Permission is subject to onerous conditions. Under Section 191 the general right to compensation in such a situation is restricted where an Applicant for Planning Permission is refused development of particular classes of development, or for particular reasons, which are set out in the Third and Fourth Schedules of the Planning Code, 2000 (as amended).

Under Section 191(2) of the Planning Code compensation is not payable in respect of refusal of Planning Permission based on any change of the zoning of lands arising from the making of a new Development Plan (emphasis added), but this exclusion of compensation does not apply to the making of a variation to the existing County Development Plan.

Section 190(2) provides that compensation shall not be payable for a refusal of Planning Permission based on any change of zoning of any land as a result of the making of a new Development Plan, and this is echoed in the exclusions set out in paragraph 20 of the Fourth Schedule of the Act. However, this exclusion of compensation does not apply in respect of a change of zoning arising under a variation of a Development Plan.

Section 10(8) of the Planning Code provides that there is no presumption in law that any land zoned under a particular Development Plan shall remain so zoned in any subsequent Development Plan, however, this exclusion of any legitimate expectation claims by landowners aggrieved at changes in the zoning of their lands do not apply to zoning changes arising under variations of the County Development Plan.

Accordingly, if a variation of the Development Plan is lawfully made there may arise possible financial exposure for the County Council (a) in claims for compensation arising from the refusal of Planning Permissions as sought on

applications for Planning Permission, where such refusal is based on zoning changes arising under such a variation (where the application for Planning Permission was made prior to the variation), or, (b) a claim of damages for breach of legitimate expectation of landowners that the zoning of their lands would not be changed during the life of the current County Development Plan.

Unlawful Variation.

- (b) There may be financial exposure for the County Council if, as a result of the making of an unlawful variation of the existing Development Plan, landowners suffer loss if intended sales of their land are undermined as a result of such rezoning. This can arise as a possible claim for damages brought by landowners claiming against the County Council for the causing of loss to them by unlawful means.

Furthermore, if it happens that a variation of the Development Plan is unlawfully put in place which is successfully challenged by way of Judicial Review there possibly might be financial exposure of the County Council itself or its Officials if an aggrieved party established a case in Misfeasance in Public office. There have not been many Irish cases on the recovery of damages against Public Authorities or Officials for Misfeasance of Public Office. Irish case law has determined that restrictive criteria have to be satisfied to succeed in a claim of Misfeasance in Public Office. To sustain such an action for damages it is necessary to establish that the Public Body (or Officials) being sued made an unlawful administrative decision which caused foreseeable loss to a party effected by the decision, and also that either the decision was actuated by targeted malice with the intention to injure a particular person, or else it involves making a decision in the knowledge that it is in excess of the powers granted to it. Any such damages claims, if successful, would also give rise to the County Council also being exposed to an award of legal costs.

Accordingly, the making of an unlawful variation of the existing County Development Plan by the Elected Members of the County Council is likely to expose the County Council to legal costs awards arising from a successful Court challenge to the unlawful variation, and also to possible damages awards in respect of losses arising from lost sales of land on the part of landowners impacted by purported revised zoning of their lands under such an unlawful decision to make a variation of the County Development Plan.

Under Section 112(1) of the Local Government Act, 2001 (as amended by Section 58 of the Local Government Reform Act, 2014), where a proposal is made at a meeting of the Elected Members which involves an intended Section 140 Resolution to do or effect any act or thing and which gives rise to a loss to the funds of the County Council, the Chief Executive (or County Council employee nominated to act in his place) shall object and state the grounds of the objection. If such a situation arises and a decision of the Elected Members is taken on the proposal then the names of the Members present shall be recorded in the Minutes of the Meeting, which shall identify the names of the Members present and voting for and against (or abstaining from voting) on the decision.

Nothing further occurs.

JAMES CONNOLLY S.C.

(4th September 2017)

BAR OF IRELAND,
LAW LIBRARY,
FOUR COURTS,
DUBLIN 7.

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("the Elected Members")

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