



An
Bord
Pleanála

Inspector's Report 05E.247770

Development	Change of house type previously under reg. ref. 07/70956.
Location	Luden, Bunrana, Co Donegal
Planning Authority	Donegal County Council
Planning Authority Reg. Ref.	16/51292
Applicant	James Donaghey
Type of Application	Permission
Planning Authority Decision	Grant Permission
Type of Appeal	First Party
Appellants	James Donaghey
Date of Site Inspection	4 th April 2017
Inspector	Dolores McCague

1.0 Site Location and Description

- 1.1. The site is located in the townland of Luden, Buncrana, Co Donegal. The site is within the very extended outskirts of the town where it adjoins a scheme of low density housing to the north-east farmlands to the south-east and south-west and a local road to the north-west. On the opposite site of the local road there is low density residential development. The local road has been designated an outer relief road for the town but is largely unchanged following the designation.
- 1.2. The site falls from the road and then rises towards the rear. It is crossed by a land drain within the lower ground. This part of the site is boggy and wet. An access road to the residential development to the north east runs the site boundary and is about 1½ to 2m higher than the site. The public roadway and surrounding land is higher than the site. The site is roughly square in shape. A driveway extends from the road across the site to serve two dwellings and land to the north east. The proposed development road follows the same route as the driveway.
- 1.3. The site is given as 2.88ha.

2.0 Proposed Development

- 2.1. The proposed development is change of house type to that previously permitted under reg. ref. 07/70956 and minor changes to the site layout. The 07/70956 permission is for the construction of 6 x 5 bed detached dwellings, 9 x 4 bed detached dwellings, 12 x 4 bed semi-detached dwellings 12 x 3 bed semi-detached dwellings: 39 houses in total; on foot of an application for 19 x 4 bed detached dwellings and 20 x 4 bed semi-detached dwellings.

3.0 Planning Authority Decision

3.1. Decision

The planning authority decided, 25/11/2016, to grant permission subject to 3 conditions:

- 1: Compliance with the details lodged as revised by later details.

2: Development shall otherwise be carried out in strict accordance with conditions No. 2 – 9 and 13 – 20 of parent permission Plan.Reg. Ref.No. 07/70956 save as hereinunder otherwise required.

Reason: To define the terms of the permission.

3: S 48 Contribution.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The first planning report of 24/10/2016

- The history is outlined.
- Third party submission raises concerns regarding obstruction of right of way and is supported by land registry maps identifying the registered right of way. Requires revision of overall layout.
- Zoned 'established development' and is abutted to the north east by the reserved route of the Outer Relief Road, accordingly the principle of development is accepted.
- Housing policies noted. Road policies in relation to Outer Relief Road noted.
- The subject site comprises low lying agricultural grazing lands, bisected in an east west direction by an existing road serving existing developments. The subject site rising gradually in an eastern direction along the full extent of the subject site, while the adjoining lands rise considerably in an eastern direction into the foothills of Gransha. The site is adjoined to the north and west by multiple developments, sporadic piecemeal one-off residential developments to the west and south. The north eastern boundary is abutted by an estate service road serving the adjoining multiple residential developments to the north and fronts onto the adjoining L-1741-1 local road to the north west designated route of the Outer Relief Road.
- The subject application is acceptable in principle however modification of the revised internal access road will be required, to address third party concerns raised regarding impact on established right of way.

- No objection is had to the revised house types and housing mix in general. However, proposed house type A on plot 12 to be replaced with house type B to improve road beyond. North western roadside setback to be conditioned consistent with the 16m setback from the centreline of the adjoining public road to facilitate the future Outer Relief Road.
- The site is located 0.2km east of the closest Natura 2000 site, Lough Swilly SAC (site code 002287). However, having regard to the amending nature of the subject application to a previously approved multiple residential development, to the scale of existing residential developments surrounding the site and within the environs of Buncrana, to the existence of multiple residential developments and other commercial developments and the regional road network located between the subject site and the a Natura site it is considered that the development will not impact on the SAC and therefore does not require screening.
- Further information requested.
 - Layout showing revisions:
 - Which does not impact on registered third party RoW.
 - Omission of house type A on plot 12 to be replaced with house type B providing a minimum setback of 7m from the adjoining north eastern boundary.
 - Setback of the entire roadside boundary with the 16m setback from the centreline of the adjoining road L-1741-1 together with the provision of a 2m wide footpath along the entire roadside boundary (footpath kerbline shall be a minimum of 14m from the centreline of the public road).

The second planning report of 21/11/2016

- Re. specific development charge of €90,000 to be levied to allow for improvement to local water courses and culverts to improve drainage; this charge is not appropriate given the change of house type and amending nature of the current application; relevant conditions of the parent permission reapplied.

- Development charge – based on floor areas – floor areas 104-130 sq m, and 178 sq m – total charge €53,376.44.
- Permission recommended.

3.2.2. Other Technical Reports

3.3. Area Engineer Carndonagh – that a specific development charge of €90,000 be levied to allow for improvement to local water courses and culverts to facilitate proper drainage; details of locations are given.

3.4. Prescribed Bodies

3.5. Irish Water – Condition re. connection to water and wastewater services.

4.0 Planning History

07/70956 – full planning permission for erection of 39 dwellings granted 2008 was due to expire 27/3/2013.

12/50502 – extension of duration to 27th March 2018.

5.0 Policy Context

5.1. Development Plan

Buncrana and Environs Development Plan 2014-2020 is the operative plan.

Relevant provisions include:

Zoned Strategic Residential Reserve (map 1A) – arising from the core strategy and the assessment of housing need the amount of land zoned for housing development was reduced vis a vis the previous plan. The land zoned Strategic Residential Reserve is not intended for development during the current plan.

Part of the site is identified as at risk of flooding, (Map 2 Build & Natural Heritage).

5.2. Planning and Development Act 2000

Section 48

(2) (a) Subject to paragraph (c), the basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section, and a planning authority may make one or more schemes in respect of different parts of its functional area.

(c) a planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development.

(10) (b) an appeal may be brought to the Board where an applicant for permission under section 34 considers that the terms of the scheme have not been properly applied in respect of any condition laid down by the planning authority.

(10) (c) Notwithstanding section 34(11), where an appeal is brought in accordance with paragraph (b), and no other appeal of the decision of a planning authority is brought by any other person under section 37, the authority shall make the grant of permission as soon as may be after the expiration of the period for the taking of an appeal, provided that the person who takes the appeal in accordance with paragraph (b) furnishes to the planning authority security for payment of the full amount of the contribution as specified in the condition.

(12) where payment of a special contribution is required in accordance with subsection (2) (c), the following provisions shall apply –

(a) the condition shall specify the particular works carried out, or proposed to be carried out, by any local authority to which the contribution relates,

(b) where the works in question –

(i) are not commenced within 5 years of the date of payment to the authority of the contribution,

(ii) have commenced, but have not been completed, within 7 years of the date of payment to the authority of the contribution, or

(iii) where the local authority decides not to proceed with the proposed works or part thereof,

The contribution shall, subject to paragraph (c), be refunded to the applicant together with any interest that may have accrued over the period while held by the local authority.

(13) (a) Notwithstanding sections 37 and 139, where an appeal received by the Board after the commencement of this section relates solely to a condition dealing with a special contribution, and no appeal is brought by any other person under section 37, of the decision of the planning authority under that section, the Board shall not determine the relevant application as if it had been made to it in the first instance, but shall determine only the matters under appeal.

(b) Notwithstanding section 34(11), where an appeal referred to in paragraph (a), is received by the Board, and no appeal is brought by any other person under section 37, the authority shall make the grant of permission as soon as may be after the expiration of the period for the taking of an appeal, provided that the person who takes the appeal furnishes to the planning authority, pending the decision of the Board, security for payment of the full amount of the contribution as specified in the condition referred to in paragraph (a).

Section 139

(1) Where (a) an appeal is brought against a decision of a planning authority to grant a permission, (b) the appeal relates only to a condition or conditions that the decision provides that the permission shall be subject to, and (c) the Board is satisfied, having regard to the nature of the condition or conditions, that the determination by the Board of the relevant application as if it had been made to it in the first instance would not be warranted, then, subject to compliance by the Board with subsection (2), the Board may, in its absolute discretion, give to the relevant planning authority such directions as it considers appropriate relating to the attachment, amendment or removal by that authority either of the condition or conditions to which the appeal relates or of other conditions.

(2) In exercising the power conferred on it by subsection (1), apart from considering the condition or conditions to which the relevant appeal relates, the Board shall be

restricted to considering—(a) the matters set out in section 34 (2)(a), and b) the terms of any previous permission considered by the Board to be relevant.

5.3. **Natural Heritage Designations**

Lough Swilly SAC (Site Code 002287) and Lough Swilly SPA (Site Code 004075), are located c250m from the site.

6.0 **The Appeal**

6.1. **Grounds of Appeal**

The grounds of appeal states that the special development contributions imposed originally under conditions 13 and 14 of planning permission 07/70956 and most recently re-imposed under condition 2 of planning decision 16/51292, have not been properly applied and the Board is requested to delete these conditions from the decision.

The conditions referred to are:

16/51292

Condition 2 - Development shall otherwise be carried out in strict accordance with conditions no. 2 – 9 and 13- 20 of the parent permission plan. Reg. ref. no. 07/70956 save as otherwise required.

Reason: to define the terms of the permission.

07/70956

conditions 13 and 14

condition 13 - The applicant (or person at the relevant time entitled to the benefit of the permission) shall pay a contribution of €117,000.00 (€3,000 per dwelling in respect of the Westbrook pumping station works, which will facilitate the proposed development. Where the works in question –

(i) are not commenced within 5 years of the date of payment to the authority of the contribution, or

(ii) have commenced, but have not been completed, within 7 years of the date of payment to the authority of the contribution, or

(iii) where the local authority decides not to proceed with the proposed works or part thereof,

the contribution shall be refunded to the applicant together with any interest that may have accrued over the period while held by the local authority. Where a local authority has incurred expenditure within the required period in respect of a proportion of the works proposed to be carried out, any refund shall be in proportion of those works, which have been carried out.

Reason: To defray costs of public infrastructure which shall facilitate the proposed development.

condition 14 - The applicant (or person at the relevant time entitled to the benefit of the permission) shall pay a contribution of €39,000.00 (€1,000 per dwelling in respect of the required upgrade works to mains water infrastructure, which will facilitate the proposed development.

Where the works in question –

(i) are not commenced within 5 years of the date of payment to the authority of the contribution, or

(ii) have commenced, but have not been completed, within 7 years of the date of payment to the authority of the contribution, or

(iii) where the local authority decides not to proceed with the proposed works or part thereof,

the contribution shall be refunded to the applicant together with any interest that may have accrued over the period while held by the local authority. Where a local authority has incurred expenditure within the required period in respect of a proportion of the works proposed to be carried out, any refund shall be in proportion of those works, which have been carried out.

Reason: To defray costs of public infrastructure which shall facilitate the proposed development.

The grounds deals in more detail with conditions 13 and 14 of 07/70956:

The reference to 'Westbrook pumping station' in condition 13 is a reference to works which would not facilitate the proposed development being works to a pumping station which is not on the sewer serving the proposed development.

The reference to 'required upgrade works to mains water infrastructure' in condition 14, fails the criteria test of not identifying the specific infrastructural works

The grounds states that these works are included in the general development contribution scheme as they are based on policy UB1 and in this regard the grounds refers to on 'control points', and to the development being within a control point.

6.2. **Planning Authority Response**

6.3. The Planning Authority has responded to the grounds of appeal, which includes:

The subject application sought permission solely for the change of house types from those previously granted planning permission under Plan. Reg. No. 07/70956 together with minor alterations to the site road layout. Accordingly, in determining this particular application the planning authority were confined to considering the new house types proposed and the changes to the arrangement of the internal access road and therefore only new conditions pertaining to these specific aspects of the development could be applied in this instance otherwise the development is required to be carried out in accordance with all terms and conditions of the parent permission.

7.0 **Assessment**

7.1. The issues which arise in relation to this appeal are condition no. 2, Section 48 and Section 139 and the following assessment is dealt with under these headings.

7.2. **Condition no. 2 of the decision**

7.3. The grounds of appeal refers to condition no. 2 and to conditions 13 and 14 attached to of 07/70956. The grounds also refers to a payment having been furnished to Donegal County Council in the sum of €156,000 'the full amount of the special

contributions.’ It is apparent from the details submitted, although not specifically stated, that the appeal is being made under Section 48 subsection 13 of the Planning and Development Act rather than Section 139 of the Act. However, the appeal is not against a condition which refers solely to contributions. The condition in question is a condition which includes the terms and conditions attached to the previous permission, except those conditions which the planning authority considered required amendment arising from the setting up of Irish Water. It is a matter to be determined by the Board whether it is valid to consider this appeal as one under S 48(13) or whether it should be considered as an appeal against a condition under Section 139. In the latter circumstances the Board would have to consider whether or not, having regard to the nature of the condition, it should restrict itself to considering the condition, or should consider the application de novo.

7.4. It is clear from the grounds that the matters which give rise to the appeal are the payments required under Conditions 13 and 14 of 07/70956. These would have been subject to appeal under S 48(13) immediately after the planning authority decision was made on 22nd February 2008. However, the current appeal is against a condition of the current application. Were the Board to direct the planning authority to remove condition no. 2 it would not remove or amend conditions 13 and 14 of 07/70956. The fact that reliance is placed on 07/70956 appears to me to require compliance with the terms and conditions of that permission whether or not it arises as a requirement of a condition attached to any permission for the change of layout and house plans.

7.5. **Appeal under Section 48**

7.6. If the Board were to follow the logic laid out in the grounds of appeal, it might consider seeking clarification from the planning authority regarding the justification of the special development contributions in terms of the specific works required to facilitate the proposed development together with details of the costs of the works and how they are apportioned to the proposed development. I note from the grounds of appeal that the Westbrook pumping station, named in one of the conditions, does not facilitate the proposed development, but that the Area Engineer’s report, on which the condition was based, refers to a pumping station at Derry Road.

7.7. **Appeal under Section 139**

- 7.8. In my opinion this appeal against condition 2 is not a valid application of the S48 procedure. As an appeal under S 139 of the Act the Board must consider whether or not, having regard to the nature of the condition, it should restrict itself to considering the condition, or should consider the application de novo.
- 7.9. The condition attaches the permission to the existing permission. It does not fundamentally alter any element of the proposal. The existing permission for housing development at this location is capable of being implemented; and enures for the benefit of the land until the 27th March 2018. Since the proposed development relies on the existing permission, the permission will similarly expire on the 27th March 2018, for this reason, in my opinion, de novo consideration of the application is not warranted in this case.
- 7.10. Least there be any lack of clarity in relation to the matter, I consider that a condition should be attached specifying the expiry of this permission as of the 27th March 2018, when the permission which supports the change of layout and house types expires.

8.0 **Recommendation**

- 8.1. In the light of the above assessment, I recommend that the planning authority be directed to replace condition 2. and the reason attached, with the following condition and reason:

Condition no. 2 This permission will expiry on the 27th March 2018 when the permission which supports the change of layout and house types expires.

Reason: To clarify the terms of this permission.

Planning Inspector

13th April 2017

Appendices

- 1 Photographs
- 2 Extracts from the Buncrana and Environs Development Plan 2014-2020
- 3 Extracts from the County Donegal Development Plan 2012-2018