An Bord Pleanála

Inspector's Report PL16. 249242

Development	Hostel
Location	Derreen, Achill, Mayo
Planning Authority	Mayo County Council
Planning Authority Reg. Ref.	P17/71
Applicants	John and Michael Patten
Type of Application	Permission
Planning Authority Decision	Grant permission
Type of Appeal	First Party vs. s48 contribution
Appellants	John and Michael Patten
Observers	None
Date of Site Inspection	16th November 2017
Inspector	Stephen J. O'Sullivan

1.0 Site Location and Description

1.1. The site is in a rural area on the east coast of Achill about 3km south of the bridge over Achill Sound. It has a stated area of 1.1ha. Most of the site lies between the sea and the road. That part of the site includes an area surfaced for car parking. However the site also includes a plot on the landward side of the road on which a building stands. The building has a stated floor area of 159m^2. It was being used for storage at the time of inspection, but it appears to have previously been a post office. A public house occupies another building beside it, on land that is within the same ownership but outside the application site.

2.0 Proposed Development

2.1. It is proposed to demolish the building on the site and build a hostel with a floor area of 346m^2. The hostel would have 9 bedrooms over two storeys. The submitted floorplans showed 29 or 35 bed spaces, depending on whether bunk beds are used in places where this is not specified. The development would be served by an upgraded septic tank and a new treatment system and soil polishing filter on the coastal side of the road. Car parking would be provided behind the hostel, requiring works to level the ground there.

3.0 Planning Authority Decision

3.1. Decision

The planning authority decided to grant permission subject to 11 conditions. Condition no. 2 required revised elevations in accordance with a sketch drawing prepared by the council.

Condition no. 11 required the payment of a €33,357 under the adopted scheme under following categories –

€4,819 for amenities

€3.213 for footpaths

€20,506 for roads

€4,819 for community open space and recreational facilities

€7,146 for car parking

3.2. **Planning Authority Reports**

3.2.1. Planning Reports

The planner recommended that permission be refused for the development because it would contravene the policy 58.2.2 of the development plan that tourist accommodation outside settlements should be involve the re-use or re-adaptation of existing buildings; and because the scale and suburban design of the proposed hostel would interfere with the views from a designated scenic route.

3.2.2. Other Reports

A handwritten report from the acting Director of Service recommended that permission be granted. It calculated the appropriate levy under the scheme as follows-

35 bedspaces in the authorised development / 2.6 (the average size of a household in Mayo in the 2016 census) means that it would be equivalent to 13.5 households.

The following categories of contribution should be applied –

Amenities @ €357/household - €4,819.50

Roads @ €1,519/household - €20,506.50

Footpath @ 238/household - €3,213

Community @ €357/household - €4,819.5

Which is €2,471 per household * 13.5 = €33,358

4.0 **Planning History**

No recent relevant applications on the site were cited by the parties

5.0 Policy Context

5.1. Guidelines for Planning Authorities on Development Contributions, 2013

Section 2 of the guidelines states *inter alia* that planning authorities are required to include in their schemes provision to charge only net additional development in cases of redevelopment projects.

5.2. Contribution Scheme

The planning authority adopted a scheme in 2004 and varied its rates in 2007. Section 10 .2(i) of the scheme states that the various categories of contribution are applied to a particular planning application only where they are relevant.

The categories of contribution for commercial development include

Amenities – charged at €357 per dwelling equivalent

Roads – with a charge that varies on the basis of the actual cost of road works apportioned pro rata to the development

Footpath – charged at €200 per linear metre

Community, Open Space and Recreational Facilities – charged at €357 per dwelling equivalent

6.0 The Appeal

6.1. Grounds of Appeal

- The appeal is against the financial contribution required by condition no. 11 of the planning authority's decision, which requires €33,357 to be paid under the adopted scheme. This amount is not based on the proper application on the terms of the scheme. It has been significantly exaggerated by the method the planning authority used to calculate the 'dwelling equivalent' of the authorised development which regarded it as equivalent to 13.5 dwellings. The appropriate equivalent for the development would be 2.3 dwellings. Allowance should also be made for the building that would be demolished, so the levy should be calculated equivalence to 1.25 houses. The board has

previously corrected similar exaggerations in other cases. Also, the element of the contribution referring to roads and footpaths should not have been included. The proper amount of the levy under the adopted scheme is therefore €892.50.

- The proposed development involves the demolition of a building of 159m^2 that was previously in commercial use as a post office and stores, and the erection of a new building of 346m^2 for use as a hostel. The hostel would have 9 bedrooms and the submitted plans showed 29 bedspaces. The revised elevations required under condition no. 2 of the planning authority's decision would not change these figures.
- The contribution scheme specifies that the categories of contribution are to be applied in particular cases 'only where they are relevant'. This narrows the scope of development contributions under the adopted to scheme to the categories that directly benefit the particular development in question, as opposed to allowing it to charge for categories that benefit development in the county as a whole. The High Court in O'Malley Cons. Co. Ltd. vs. Galway Co. Co. *(2011) IEHC 440* has stated that a council in not entitled to charge a contribution to works that do not benefit the development. The categories of water, sewerage and surface water are not applicable in this case and were not applied by the planning authority. The board has omitted contributions on the basis of the relevancy criteria under PL16. 224486 and PL16. 241209.
- The scheme does not prescribe how a 'dwelling equivalent' is to be calculated. The absence of a consistent and reliable method was referred to the board in PL16. 240133, and offends against the legal principles relating to taxation set out by the Supreme Court in Brennan vs. AG *1984 ILRM 355*. The planning authority has assumed different levels of occupation for commercial property with 1 person per 15m^2 being commonly used. IN this case an occupation of 1 person per 15m^2 would be acceptable, as was used by the board in PL16. 236955 where the inspector stated that this is the occupation that would be likely in a commercial development, which is in this case was a nursing home. So the proposed floor area of 346m^2 should be divided by 15 to give the number of occupants which should be divided by 10 to provide the number of dwelling equivalents, which in this case would

therefore be 2.3. Decisions by the planning authority under Reg. Ref. Nos. 10/940, 09/434 and16/56 have variously said that bedroom in a hotel as equivalent to 50% of a house. If this approach was employed in this case the gross figure for dwelling equivalents would be 4.5.

- In 16/56 the planning authority provided credit for existing development on a site, as did the board in PL16. 244269, and in other counties under PL25. 226507, PL25. 230257, and PL84. 233031. The decision in PL06F. 236363 removed a supplementary contribution and established the principle that a discount for existing development does not have to be stated in the contribution scheme to apply. The 2013 guidelines for planning authorities require schemes to have such discounts. So it is essential that credit for the existing floorspace on the site is given in the calculation of the levy payable under the adopted scheme. This floorspace is 159m^2, or 1.06 of a house, which should then be subtracted from 2.3, so that the net increase arising from the proposed development would be 1.25 dwellings, based on 150m^2 of commercial floorspace being equivalent to a dwelling. If each bedroom is regarded as being equivalent to 50% of a house, then the new increase in the development would be equivalent to 3.44 dwellings.
- The roads and footpaths categories in the adopted scheme are based *on actual cost of road works* and *cost per linear metre* respectively. There is no evidence that the council will be carrying out any road works or providing any footpaths to benefit the development so these categories are not applicable in this case. The board should omit these parts of the levy under the scheme as they did in the similar cases of PL16. 242571, PL16. 242332 and PL16. 243587.
- The proper levy under the adopted scheme should therefore be calculated as equivalent to 1.25 houses under the category of amenities and the category of community, open space and recreational facilities. The scheme charges €357 per dwelling in each category, so the proper levy is 357*2*1.25 = €892.50. Or if the other method of calculating dwelling equivalence is used, then the proper levy would be 357*2*1.25 = €2,456.16.

6.2. **Planning Authority Response**

The planning authority did not respond to the appeal.

7.0 Assessment

7.1. **Relationship between financial contributions and the authorised development**

7.1.1. Section 48 of the 2000 Act allows for the imposition of conditions requiring financial contributions in accordance with a scheme duly adopted by the elected members. The money has to be spent on public infrastructure and facilities, provided by or on behalf of the council, that benefits development in the area generally. The money collected under a permission does not have to be spent on works that benefit the particular development authorised by that permission. This is clear from the text of the section 48(1) of the act. The arguments to the contrary in this appeal are wrong. The precedents which it cites are not applicable. The court judgement in O'Malley vs. Galway Co. Co. *2011 IEHC 440* refers to a contribution under the 1963 planning act which had a very different regime for financial contributions, the deficiencies of which section 48 of the 2000 act sought to remedy. The board's decision in PL06F. 236363 referred to a contribution under a supplementary contribution scheme made under section 49 of the act. Section 49(1)(c) states that contributions supplementary schemes have to be for public infrastructure that benefits the particular development that is authorised by a permission. So contributions under section 49 schemes are different than those levied under section 48 schemes in this regard. The condition that is under appeal in this case refers to the scheme adopted by the council under section 48, so there is no requirement in law that the financial contributions it levies are used for purposes that specifically benefit the authorised development.

7.1.2. However, notwithstanding the clear and explicit position on this question in the planning act, section 10.2(ii) of the scheme adopted by Mayo County Council in 2004 introduces confusion on the matter by stating that the various categories of contribution would be applied in particular cases only where they are relevant. The authorised development does not require any particular works to public infrastructure in order to proceed. It could therefore be argued that none of the categories of

contribution set out in the scheme are relevant and so the financial contribution under it should be nil. This interpretation would defeat the purpose of the scheme and of section 48 of the act, and is so is unreasonable. The authorised development would not use public water or drainage services, so there were grounds for the planning authority to disapply those categories of contribution. The authorised development certainly does require public roads in order to operate. There are no reasonable grounds, therefore, to disapply this category of contribution *a priori* as sought by the applicant. However the question is moot. The basis on which the amount of the contribution under the category of roads is calculated is stated in the scheme to be the actual coast of road works. No actual road works have been specified by the planning authority and so the amount of the contribution would be nil. Similarly with regard to the contribution for footpaths, which is based on cost per linear metre, no actual linear metres of footpath were identified by the planning authority and so the amount of the contribution due under this category would also be nil. This conclusion is consistent with the board's decision PL16. 242571 that was cited in the appeal.

7.2. **Credit for existing development**

7.2.1. Under section 48(10) of the 2000 act, the board's role in the current case is restricted to considering whether the terms of the contribution scheme have been properly applied. The terms of the scheme do not provide for a reduction in the amount of a contribution due under a permission for a development in respect of buildings that the authorised development would replace. In this regard the appeal is inviting the board to import a term into a scheme which was not put there by the elected members who have the statutory power to make schemes. This would go beyond the powers given to the board under section 48(10) of the act. It may well be the case that the scheme should contain such a term, as advised by section 2 of the 2013 guidelines for planning authorities. However the merits of the scheme are not open to review by the board. If such terms could simply be imputed to schemes there would have been no need for the minister to give such clear and strong advice on the topic in the guidelines. The board is advised, therefore, that the amount of the contribution due under the scheme in respect of the authorised development, i.e. the

construction of a hostel of 346m^2 , should not be reduced by virtue of the fact that the development would replace a storage building of 159m^2.

7.2.2. The appeal cites numerous previous board decisions to support its argument that a credit for buildings to be replaced should be assumed to occur in the terms of contribution schemes even when it doesn't. Apart from PL16. 244269, they referred to decisions by the planning authority itself, supplementary contribution schemes or s48 schemes in other counties, and so would be of limited applicability in this case. In PL16. 244269 the board adopted the inspector's calculation with regard to the s48 contribution where the contribution had been appealed by the applicant and there was also a concurrent third party appeal. The inspector's report, at section 8.44, stated that it would be "reasonable" to reduce the amount of the levy to reflect the existence of 2 houses on the site that would be replaced, without further analysis. The report and board decision in that case do not provide adequate justification to establish a general principle that terms should be inferred from all contribution schemes that were not included by the elected members of planning authorities. The development of PL16. 244269 might be distinguished from the current case because the demolition of the two houses required a grant of planning permission and so was part of the authorised development. The demolition of the storage building on the current site would be exempted development. It was described in the notices of the application, but no fee was payable in respect of it. However my advice on the question does not rely on such a distinction.

7.2.3. More generally, I would advise the board that its consideration of planning appeals is not bound by precedent in the way that court proceedings are. Board decisions on appeals relate to the merits of the particular case in front of them. They do not propound legal or general principles which the board is bound to follow in the future. It is, of course, desirable that the decisions of the board achieve a degree of consistency and predictability. This is particularly the case in relation section 48(10) appeals which relate to the application and interpretation of schemes made by the planning authorities. However this imperative would not justify making a decision in any particular case that departed from the terms of the scheme. Even if one were to conclude that the doctrine of precedence should be applied to section 48(10) appeals, then it would still be open to the board to revisit its previous determinations if it considered it necessary to do so. Otherwise a plethora of contradictory or poorly

considered precedents could arise on a matter that would stymie, rather than promote, consistent and rational decision making. This would be a particular concern in relation to the Development Contribution Scheme for Mayo which has been the subject of much consideration by the board since it was adopted in 2004.

7.3. Dwelling equivalence

7.3.1. The adopted scheme does not specify how the dwellings equivalent of commercial development is to be determined, even though this is required to calculate the levy due under the scheme. The planning authority based its calculation on the maximum number of bedspaces in the hostel apparent from the floorplans divided by the average number occupants in a house in Mayo. This is a rational approach, but not one that is supported by the scheme. The alternative approach advocated in the appeal, equating 150m^2 of commercial floorspace to a dwelling, has been used in previous cases by the planning authority and the board, such as PL16. 236955. The applicant is correct to state that the absence of a consistent and reliable mechanism to determine the equivalent of a dwelling in the scheme fails to conform with the principle of certainty required in relation to charges in the nature of tax, which is what levies under s48 schemes are. In this circumstance the ambiguity should be resolved against the maker of the scheme, which is the planning authority. It would therefore be appropriate to use the standard of 150m^2 of commercial floorspace as sought in the appeal and previously used by the board.

7.4. Calculation of the appropriate contrition

7.4.1. The proper application of the terms of the scheme to the authorised development would therefore be based on a division of its floorspace of 346m^2 by 150m^2 to regard it as equivalent to 2.3 dwellings, which would attract a charge of €357 per dwelling under each of the categories of Amenities and Community, and a nil contribution for roads and footpaths. The contribution due under the scheme is therefore €1,642.20.

8.0 Recommendation

8.1. The planning authority should be directed to omit condition no. 11 of the planning authorities decision and replace it with the following condition –

The developer shall pay to the planning authority a financial contribution of € 1,642.20 (One thousand, six hundred and forty two euro and twenty cent) in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. The application of any indexation required by this condition shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine.

Reason: It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

9.0 Reasons and Considerations

Given the absence from the Mayo Development Contribution Scheme 2004, as amended, of a method to calculate the dwelling equivalent of commercial development, it is considered proper in this case to use a standard of 150m^2 of commercial floorspace being equivalent to a dwelling that was advocated in the appeal and has previously been used by the planning authority and the board in similar cases. The authorised development of 346m^2 would therefore be equivalent to 2.3 dwellings. The terms of the contribution scheme do not provide for a reduction in the amount of the contribution in respect of buildings that are to be replaced on a site, and the board's role in appeals under section 48(10) of the Planning and Development Act 200, as amended, is restricted to the application of the terms a contribution scheme rather than the imputation of terms into a scheme that might otherwise be considered reasonable. A charge of €357 per dwelling equivalent is

therefore due under each of the categories of Amenities and Community/Open Space/Recreational Facilities under Schedule 1 of the scheme. The charges due under each of the categories of Roads and Footpaths is nil, because the planning authority has not specified any actual road works or lengths of footpaths as a basis to calculate charges under those categories.

Stephen J. O'Sullivan
Planning Inspector

8th December 2017