



An
Bord
Pleanála

Inspector's Report 301992-18

Referral	Point of detail regarding condition number 2 of Planning Authority Register Reference: 06/1145 (PL13.223356)
Location	Units 1-28, The Crescent, Ros Mor, Kilmallock Road, Crossagalla, Co. Limerick
Planning Authority	Limerick City & County Council
Planning Authority Reg. Ref.	06/1147
Referrer	Jana Developments Ltd.
Type of Application	Point of Detail
Type of Appeal	First Party
Observer(s)	None
Date of Site Inspection	29 th December 2018
Inspector	Mary Kennelly

1.0 Introduction

- 1.1. This is a referral under Section 34(5) of the Planning and Development Act, 2000 (as amended) requesting a determination on the appropriate implementation of points of detail relating to Condition 2 (S48 Financial contribution) attached to permission register reference 06/1147. An appeal against Condition 2 (PL13.223356) was subsequently determined by the Board in respect of that condition.

2.0 Site Location and Description

- 2.1. The site is situated approximately 2.5km to the southeast of Limerick City Centre in the suburb of Crossagalla. Kilmallock Road (R512) links the M7 (Limerick Bypass) with the R509 (Childers Road) at Galvone. The site consists of a substantially complete housing estate which was originally permitted as part of a mixed-use development in 2007, but was the subject of an extension of duration of permission until 2017. The appeal site relates to a small section of the overall development, comprising Nos 1-28 The Crescent.

3.0 Planning Permission

- 3.1. The development permitted under planning register reference 06/1145 (PL13.223356) relates to planning permission for the development of a mixed-use scheme comprising 8 no. commercial/retail units in two blocks and 251 residential units, a creche, an ESB substation and vehicular access. Permission was granted by Limerick County Council on 18th April 2007. An appeal against Condition 2 was submitted to the Board, Ref. PL13.223356.

Condition 2 reads as follows:

Prior to the commencement of development, a contribution of €3,490,197.26 shall be paid to Limerick County Council in accordance with the provisions of the Development Contribution Scheme made by Limerick County Council on the 19th December, 2003 in respect of public infrastructure and facilities benefitting development in the area of the Planning Authority and that is provided or, that is intended will be provided, by or on behalf of Limerick County Council.

Reason: - The developer shall contribute towards the expenditure incurred, or intended to be incurred, in the provision of public infrastructure and facilities benefitting development within County Limerick

The Board decided, on 20th March 2008, to ATTACH Condition No. 2, on the basis that the terms of the adopted Limerick County Development Contribution Scheme had been properly applied.

4.0 **Planning History**

06/1145 PL13.223356 - Permission granted for a mixed-use development of 8 no. commercial/retail units, 251 no. residential units, a creche, an ESB substation and a vehicular entrance. Permission was subject to 49 conditions. As stated above, the appeal against the development contribution condition was unsuccessful

11/7084 - Extension of the appropriate period for 06/1145 (PL13.223356) to 16/06/2017.

15/463 - Permission granted by P.A. on 16/09/15 for amendments to permitted road layout, change of house types for 45 dwelling houses, amendments to landscaping layouts granted under 06/1145 and extended under 11/7084. Note condition 2 of this permission required that the development be subject to the terms of the governing permissions which expire on 16/06/17. It should also be noted that no further development contribution charges were levied under this permission.

16/623 – Permission granted by the P.A. on 31/08/16 for change of house types at Site Nos. 13-18 and 23-28 The Crescent, Ros Mor. Note condition 2 of this permission required that the development be subject to the terms of the governing permissions which expire on 16/06/17. It should also be noted that no further development contribution charges were levied under this permission.

5.0 **The Referral**

- 5.1. The referral submission is by Adrian Doyle & Associates on behalf of the first party. The grounds of referral regarding this point of detail are summarised as follows:

- The current 2017-2021 Limerick City and County Development Contribution Scheme allows for a reduction of 5% in the contribution payable in respect of houses that achieve a BER rating in excess of A.
- The Council’s decision which states that the reduction in contribution does not apply because the houses in question were permitted prior to the adoption of the 2017 Development Contribution Scheme is disputed, as it fails to take account of S29 of the Urban Regeneration and Housing Act 2015.
- Section 29 of the Urban Regeneration and Housing Act entitles a developer to a reduced contribution where the current Development Contribution Scheme contains rates of charge that are lower than that which applied at the time of the grant of permission. This section states “*and where the BASIS for the determination of the contributions under Section 48 has changed, the lower rate will apply*”.
- The current Limerick GDCCS sets out the basis for determination of the contribution at Section 4 and Subsection (e) states:

“Exemptions and reduced rates in the current scheme were reviewed and amended consistent rates have been incorporated into the scheme having regard to the Guidelines issued by the Department of the Environment”.
- Section 9 of the current development contribution scheme 2017-2021 sets out where the reductions will apply. Bullet Point 5 states:

“Residential and commercial buildings that achieve a BER rating in excess of A shall receive a discount of 5%”
- It is clear, therefore, that the BASIS of Determination has changed and that as part of that change, a reduction for building in excess of A rating is to be applied.
- As this matter relates to the interpretation of and application of the General Development Contribution Scheme, it falls within the remit of the Board to determine the matter.

6.0 Planning Authority Submission

- 6.1. The Planning Authority response (14/08/18) to the grounds of referral is summarised as follows

- The position of Limerick City and County Council is that the development contribution scheme that was applicable at the date of the grant of permission remains pertinent in calculating the rate of contribution as per condition 2 of 06/1645 (PL13.223356).
- The BER reduction is contained only in the current scheme (2017-2021). The previous schemes which were in place at the time that permissions relating to the development at 1-28 The Crescent, (i.e. 06/1145, 15/463, 16/623), did not contain any provision for a reduction in the rate of contribution in respect of BER rating.
- As the units were originally decided, levied and paid for under an older permission, the P.A. is of the view that there is no facility for a BER reduction under the current scheme.

It is further noted from the correspondence between the parties that the P.A. had provided the following response to the developer in an email on 21st May 2018

- The Council has examined the applicability of Section 29 of the Urban Regeneration Act 2015 in respect of the BER reduction and is satisfied that Section 29 is not applicable in this instance.

7.0 **Planning Policy**

- 7.1. The Permission was granted under the then Operational Limerick County Development Plan and the Southern Environs Local Area Plan 2005. The current plan for the area is the Limerick City and County Development Plan 2010-2016 (as extended).

8.0 **Relevant Legislation and Guidelines**

- 8.1. Planning and Development Act 2000 (as amended).
- 8.1.1. Under Section 34 (1) where (a) an application is made to a planning Authority in accordance with permission regulations for permission for the development of land, and (b) all requirements of the regulations are complied with, the authority may decide to grant the permission subject to or without conditions, or to refuse it.

8.1.2. Section 34(5) states that ‘...the conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person to whom the permission is granted and that in default of agreement the matter is to be referred to the Board for determination.’

8.2 Development Management, Guidelines issued by Department of Environment, Heritage and Local Government 2007. These Guidelines provide guidance for Planning Authorities and seek to promote best practice in the development management process. At 7.12 Conditions requiring development contributions it is stated “*Development contributions conditions may only be attached if they accord with the provisions of either section 48 or 49 of the Planning Act and they are based on the application of the terms of one or more development contribution schemes which have been formulated and adopted in accordance with those sections of the Act, or on the need for a special financial contribution.Section 48(general) schemes relate to the existing or proposed provision of public infrastructure and facilities benefiting development within the area of the planning authority and are applied as a general levy on development.*”

9.0 **Assessment**

9.1 The issue to be determined in this referral revolves solely around condition 2 of the planning register reference PL13.223356 (06/1145) and which states:

Prior to the commencement of development, a contribution of €3,490,197.26 shall be paid to Limerick County Council in accordance with the provisions of the Development Contribution Scheme made by Limerick County Council on the 19th December, 2003 in respect of public infrastructure and facilities benefitting development in the area of the Planning Authority and that is provided or, that is intended will be provided, by or on behalf of Limerick County Council.

Reason: - The developer shall contribute towards the expenditure incurred, or intended to be incurred, in the provision of public infrastructure and facilities benefitting development within County Limerick

9.2 The substantive issue in dispute relates to the contention of the first party that the amount payable in connection with condition 2 should be reduced in accordance with a new provision included in the 'Basis for Determination' in the current Development Contribution Scheme 2017-2021, (as opposed to the scheme that applied at the date of the grant of permission). The first party's justification for this contention arises from the provisions contained in Section 29 of the Urban Regeneration and Housing Act 2015, which introduced changes to Section 48 of the Planning and Development Acts 2000 (as amended). Specifically, Subsections 3A-3C of Section 48 now provide for changes to be made to financial contribution conditions granted in respect of development under Section 34 of the Act, in certain circumstances.

9.3 The relevant parts of the new subsections of the P&D Act read as follows:

3A. Where a permission which includes conditions referred to in subsection (1) has been granted under section 34 in respect of a development and the basis for the determination of the contribution under subsection (1) has changed –

(a) Where the development is one to which Part II of the Building Control Regulations 1997....applies and a commencement notice..... has not been lodged, or

(b) Where the development comprises houses and one or more of those houses has not been rented, leased, occupied or sold,

the planning authority shall apply that change to the conditions of the permission where to do so would reduce the amount of contribution payable.

3B. Where a development referred to in subsection 3A comprises houses one or more of which has not been rented, leased, occupied or sold, the planning authority shall apply the change in the basis for determination of the contribution referred to in that subsection only in respect of any house or houses that have not been rented, leased, occupied or sold.

3C. Where the planning authority applies a change in the basis for the determination of a development contribution under subsection 3A, it may amend a condition referred to in subsection (1) in order to reflect the change.

9.4 The First Party contends that the 'Basis for Determination' in the current Development Contribution Scheme differs from that of the Scheme under which the original permission was granted. Section 4(e) of the current Scheme states that

"Exemptions and reduced rates were reviewed, and amended consistent rates have been incorporated into the Scheme, having regard to the Guidelines issued by the DoECLG in January 2013".

The Reductions, which are set out in Section 9 of the GDCS, include the following:-

"Residential and commercial buildings that achieve a BER rating in excess of A shall receive a discount of 5%. This shall be facilitated following certification of the completed building and will be deducted from the final phase payment."

On the basis of the foregoing, the first party contends that as the basis for determination has changed to include a reduction in contribution payable for buildings which achieve in excess of A rating, which it is submitted is the case here, a 5% discount should be applied in respect of House Nos. 1-28 The Crescent.

9.5 The Planning Authority argues, however, that the Contribution Scheme applicable at the date of the decision is the relevant scheme in calculating the amount payable. The Planning Authority has stated that the BER reduction is contained only in the 2017-2021 Scheme and is not contained in any of the previous schemes which were in place when the parent permission and all other subsequent permissions were decided, i.e. 06/1145, 15/463 and 16/623. It was concluded on this basis, that as the units in question were originally decided, levied and paid for under older permissions, the planning authority is of the view that there is no facility for a BER reduction under the current scheme.

9.6 Having reviewed the changes to the Planning and Development Acts as outlined above, I would agree with the first party that the new legislative provisions have introduced a facility whereby a change to the 'basis for determination' of the contribution could require the P.A. to apply the new rate, where the amount of contribution would be reduced, even though the permission was granted some time ago. However, the provisions apply only in certain circumstances as outlined in (a) and (b) of Subsection 3A inserted into Section 48 of the Principal Act. These are where firstly, a commencement notice under Part II of the Building Regulations has not been lodged, (which is not the case here), and secondly, where the development

relates to houses, one or more of which has not been rented, leased, occupied or sold. As the second circumstance could potentially be relevant, it deserves further examination.

- 9.7 There is further guidance in Subsection 3B which stipulates that any such reduction that might be applicable shall only apply in respect of any house or houses that have not been rented, leased, occupied or sold. I inspected that site on the 29th December 2018 and can confirm that all of the units in question have been completed and all appeared to be occupied. Although certain parts of the overall development are still under construction, a substantial majority of the overall development is occupied and Nos. 1-28 The Crescent is complete and occupied. Thus, it is considered that neither of the circumstances outlined in Subsections 3A (a) or 3A(b) are applicable in this case, as the development in question was permitted and levied under the previous scheme and presumably, the contributions were also paid under that scheme.
- 9.8 On this basis, I consider that the development contribution specified at the time of the decision is the appropriate amount payable and that no reduction should apply. Given that the amount payable was specified in condition 2 of the parent permission (06/1145/PL13.223356), and that each subsequent permission stipulated that it was governed by the terms of the parent permission, it is considered that the amount specified in that condition is the appropriate amount of contribution to be paid.

10 Recommendation

- 10.1 It is recommended that the Board determine that Limerick City and County Council is correct in applying development contributions in accordance with the adopted Development Contribution Scheme that was in operation at the time of the relevant planning decisions in respect of Nos. 1-28 The Crescent and that the level to be applied in order to comply with Condition No. 2 of PL13.223356 (06/1145) is €3,490,197.26. I recommend an order as follows:

WHEREAS by order dated the 19th March, 2008 made by An Bord Pleanála, under register reference number PL13.223356 (06/1145), granted subject to conditions a permission to Bill and Gerard Keary care of McCutcheon Mulcahy of 6 Joyce House,

Barrack's Square, Ballincollig, Co Cork for development comprising a mixed use residential, commercial and community facilities development. The planning permission (which was extended under 11/7084 until 16/06/2017), and amended under 15/463 and 16/623 and construction commenced under PL13.223356 all at Kilmallock Road, Crossagalla, Co Limerick:

AND WHEREAS condition 2 attached to the said permission required:

Prior to the commencement of development, a contribution of €3,490,197.26 shall be paid to Limerick County Council in accordance with the provisions of the Development Contribution Scheme made by Limerick County Council on the 19th December, 2003 in respect of public infrastructure and facilities benefitting development in the area of the Planning Authority and that is provided or, that is intended will be provided, by or on behalf of Limerick County Council.

Reason: - The developer shall contribute towards the expenditure incurred, or intended to be incurred, in the provision of public infrastructure and facilities benefitting development within County Limerick

AND WHEREAS the developer and the Planning Authority failed to agree on the above details in compliance with the terms of the said condition and the matter was referred by the developer to An Bord Pleanála on the 4th day of July, 2018 for determination:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 34(5) of the Planning and Development Act, 2000, as amended, hereby determines that the Board agrees that the amount payable within the terms and conditions of the permission under condition 2 is €3,490,197.26 in accordance with the terms and conditions of the development contribution scheme applicable at the date of grant of permission.

REASONS AND CONSIDERATIONS

Having regard to the planning history, the submissions from the parties and the nature and scale of the development in question which is substantially complete and

occupied the Board considered that the amount payable in accordance with the terms and conditions of the permission under condition 2 is the amount provided for in the contribution scheme applicable on the date of the grant of permission, which is €3,490,197.26, and that the reduction provided for in under the current contribution scheme is not applicable in this case.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

Mary Kennelly
Senior Planning Inspector
7th January 2019