



An  
Bord  
Pleanála

## Inspector's Report ABP 302939-18

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<b>Development</b>	Retain existing in situ foundations, construct 10 semi-detached dwellings and associated site works.
<b>Location</b>	Ardshanavooly, Park Road, Killarney, Co.Kerry
<b>Planning Authority</b>	Kerry County Council
<b>Planning Authority Reg. Ref.</b>	18/221
<b>Applicant</b>	Wrightwood Developments Ltd.
<b>Type of Application</b>	Permission
<b>Planning Authority Decision</b>	Grant subject to conditions
<b>Type of Appeal</b>	3 <sup>rd</sup> Party v. Grant
<b>Appellants</b>	Paul McSweeney & Others
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	22/01/19
<b>Inspector</b>	Pauline Fitzpatrick

## 1.0 Site Location and Description

The site, which has a stated area of 0.352 hectares, is to the rear of and is accessed via a partly constructed residential estate known as Sail Ardan and Coill Coirean. The estate and the residential schemes of Friary Downs/Court, Arlington Heights and Burr Ridge immediately to the south are all served by a central access road off Park Road c. 700 metres to the north-east of Killarney town centre. Dennehy's Bohereen, which is a narrow cul de sac lane serving both one off and small clusters of houses, bounds the overall lands to the west.

The estate comprises a mix of two storey, semi-detached and terraced dwellings and 2 and 3 storey apartments served by a central open space area. The appeal site is in the north-eastern corner and is fenced off. It is roughly rectangular in shape.

The Board is advised that this appeal is 1 of 3 currently before it for residential development within the estate with the same appellants in each instance. The other file references are ABP 302940-18 & ABP 302942-18. I recommend that they be assessed in tandem.

The Board is further advised that the plans and drawings of the scheme granted permission under ref 04/4149 are attached to reference case RL2350.

## 2.0 Proposed Development

The application was lodged with the planning authority on the 09/03/18 with further plans and details submitted 23/08/18 following a further information request dated 02/05/18. Revised public notices were submitted 13/09/18. Unsolicited further information was submitted 05/10/18.

The proposal entails the retention of in situ foundations and the construction of 10 no. semi-detached 4 bedroom dwellings. Connection to existing services is proposed.

The application is accompanied by a Road Safety Audit Report.

## 3.0 Planning Authority Decision

### 3.1. Decision

Grant permission for the above described development subject to 31 conditions. Of note:

Condition 4: Special contribution of €35,000 in respect of improvement works to Friary Downs and Park Road which benefit the development.

Condition 6: Finished floor levels to be in accordance with drawings received 09/03/18.

Condition 10: Main roadway shown on the site layout plan leading to the undeveloped land to the north to be fully constructed to allow full access to the said lands. Services shall also be extended along this roadway.

Condition 11: Recommendations of Road Safety Audit to be implemented in full prior to commencement of development.

Condition 13: Scheme to be subject of Stage 2 / 3 Safety Audit prior to occupation of units and all recommendations implemented.

Condition 25: No part of the proposed dwellings to be used for the provision of overnight commercial guest accommodation without a prior grant of permission.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

The 1<sup>st</sup> Planner's report (undated) includes EIA and AA screening. Further information is recommended on boundary treatments, preparation of road safety audit in accordance with DMURS and compliance with Part V. A 2<sup>nd</sup> report dated 10/10/18 states that access to the land to the north of the site raised in an observation received will be resolved by way of condition. The medium density development is in keeping with the general character of the area. A grant of permission subject to conditions recommended.

#### 3.2.2. Other Technical Reports

Housing Department addressing Part V obligations.

Housing Estates Unit in a report dated 26/03/18 requires details of visitor car parking, roads, footpaths, site services and public lighting.

County Archaeologist in a memo dated 03/04/18 notes no recorded monuments in the vicinity. No mitigation required.

Biodiversity Officer in a memo dated 04/04/18 considers that no significant effects are likely in terms of designated sites. Site to be landscaped. 2<sup>nd</sup> memo dated 07/09/18 has no further comment.

Kerry National Road Design Office in an email dated 12/04/18 has no observations to make.

Area Engineer in a memo dated 02/05/18 notes that the estate was granted in 2004 prior to DMURS. This section of the estate should be designed in accordance with DMURS and plans submitted to reflect same. A further report dated 08/10/17 (sic) details conditions should permission be granted including a special contribution towards road improvements/projects.

### **3.3. Prescribed Bodies**

Irish Water in a report dated 11/04/18 has no objection subject to conditions.

Inland Fisheries Ireland in a report dated 16/04/18 details conditions addressing construction and site servicing should permission be granted.

### **3.4. Third Party Observations**

Objections and observations to the proposal received by the planning authority are on file for the Board's information. The issues raised relate to:

- Extension of main estate roadway and services to site boundary to allow for potential future development of adjoining lands.
- Access to rear of No.7 Burr Ridge onto Dennehy's Bohereen damaging the boundary ditch. Impermeable fence not erected.
- Proposal, coupled with other proposed development, would constitute a high density development.

## 4.0 Planning History

- 4.1. **04/4149** - permission granted for 45 dwelling houses, 40 no. apartments, two storey building containing a child care facility and 2 no. apartments, access road and ancillary sites services.

Permission was granted to extend the duration of the permission

### 4.2. **Reference Case: 63 RL 2350**

Question: Whether works raising the ground level constitutes development which is not exempt and whether works to return them to their original condition constitute developments that are not exempt.

The Board decided that

- a) the importation and deposition of builders' waste, rubbish or debris constitutes a material change of use of the land as defined in section 3(2)(b)(iii) the Planning and Development Act, 2000,
- (b) the excavation of unsuitable material and its deposition within the site constitutes works as defined in section 2 of the said Act, and
- (c) the said excavation and deposition works come within the scope of class 16 of part 1 of Schedule 2 to the Planning and Development Regulations, 2001, but
- (d) the temporary raising and lowering of the ground level within the crown spread of the trees at the western boundary contravenes materially the terms of the planning permission under which development is taking place (that is, condition number 22(a) and (b) of planning register reference number 04/4149) and, therefore, the restrictions on exemption under article 9 (1)(a)(i) of the said Regulations apply:

The Board decided that the said works was development and was not exempted development.

### 4.3. **Reference Case 63 RL 2492**

Question: 1) Whether building of the existing residential units on unauthorised artificially raised ground, 2) whether new development work on unauthorised artificially raised ground which differs so seriously from the approved development 04/4149 and 3) work to return the development to an authorised condition is or is not development and is or is not exempted development.

The Board determined that –

(a) the importation and deposition of builders' waste, rubbish or debris constitutes a material change of use of the land as defined in section 3(2)(b)(iii) of the Planning and Development Act, 2000,

(b) the excavation of unsuitable material and its deposition within the site constitutes works as defined in section 2 of the said Act, and

(c) the said excavation and deposition works come within the scope of class 16 of part 1 of Schedule 2 to the Planning and Development Regulations, 2001, but

(d) the temporary raising and lowering of the ground level within the crown spread of the trees at the western boundary contravenes materially the terms of the planning permission under which development is taking place (that is, condition number 22(a) and (b) of planning register reference number 04/4149) and, therefore, the restrictions on exemption under article 9 (1)(a)(i) of the said Regulations apply:

The Board decided that above detailed works was development and was not exempted development.

## **5.0 Policy and Context**

### **5.1. Development Plan**

Killarney Town Development Plan 2009-2015

The site is within an area zoned Existing Residential

### **5.2. Natural Heritage Designations**

None in the vicinity.

### **5.3. Environmental Impact Assessment**

Having regard to the nature and scale of the proposed development there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

## 6.0 The Appeal

### 6.1. Grounds of Appeal

The 3<sup>rd</sup> Party appeal by Paul McSweeney & Others can be summarised as follows:

- The in situ foundations constitute unauthorised development. The said lands are subject of Board's decision under refs. 63.RL2350 and 63.RL2492. The Board decided that the raising of the ground level and the works to return them to their original condition is development and is not exempted development. It is contended that Kerry County Council is legally obliged to instruct the applicants to remove the in situ foundations and reinstate the grounds to their original condition.
- The boundary ditch of the applicant's housing development along Dennehy's Bohereen, to the rear of No.7 Burr Ridge, is being used by residents as a short cut to Killarney town. The applicant has not addressed this matter or erected an impermeable fence to satisfy the Board's decision under ref. 63.RL3450.

### 6.2. Applicant Response

The submission from teicniuil-priory Consulting Engineers on behalf of the applicant can be summarised as follows:

- The appeal is not based on any substantive planning issues.
- There is a misunderstanding of planning legislation.
- The issue of the boundary ditch has no relevance to the proposed development. A 2.5 metre heavy duty welded wire fence is in place along the entire length of the ditch.
- Any and all previous planning issues concerning other grants of permission have been resolved.

### 6.3. Planning Authority Response

None.

#### 6.4. **Observations**

None

### 7.0 **Assessment**

I consider that the issues arising in the case can be assessed under the following headings:

- Nature and extent of proposal
- Layout and Design
- Other Issues

#### 7.1. **Nature and Extent of Proposal**

To set the development in context, it forms a section of the overall residential development granted permission under 04/4149 for a mix of 87 dwellings and apartments and a childcare facility known as Sail Ardan and Coill Coirean. To date 28 houses and 30 apartments have been constructed. The central access road from Park Road also provides access to the Friary Court/Downs, Arlington Heights and Burr Ridge housing schemes which are to the south of the current appeal site. Dennehy's Bohereen is a narrow cul-de-sac lane which bounds the overall lands to the west and serves a number of dwellings, both one off and in small cul-de-sacs.

The proposal constitutes 1 of 3 appeals currently before the Board. The current proposal refers to the plot of ground to the north-east of the existing estate. Foundations for 8 no. dwellings are on site which is fenced off and not accessible. Under ref. ABP 302940-18 permission is being sought on the site immediately to the west for retention of in situ foundations, 9 townhouses, and a creche with apartment above. File ref. ABP 302942-18 refers to a site to the south on which permission for 15 dwellings is being sought. Taken together the 3 developments would equate to 34 dwellings and 1 apartment which, when coupled with that developed to date, would result in an overall scheme of 62 dwellings, 31 apartments and a crèche. This is a net increase of 6 units over that previously approved. I refer the Board to my assessment of the suitability of the design and layout of the other two developments in the respective reports.



In terms of the proposal subject of this appeal and as per the public notices that accompany the application, permission is being sought to retain in situ foundations and construction of 10 no. semi-detached dwellings. The legislative code as pertaining to planning allows for applications for retention permission as is the case in this instance.

Reference is made in the appeal submission to referrals to the Board under refs. RL2350 and RL2492 and the Board's decisions that the raising of the lands constituted development and did not constitute exempted development.

As extrapolated from the details accompanying the said referrals the area of material concern would appear to be in the vicinity of the western site boundary onto Dennehy's Bohereen although a map showing the area in question did not accompany the referrals. I would bring to the Board's attention a map labelled 'Exhibit 2' attached to the appeal on file ref. ABP 302940 which is stated to show the site subject of the Board's decisions under files. 63.RL2350 and RL2492. The site as delineated thereon does not encompass the current appeal site. It could, therefore, be extrapolated that the Board's determinations do not pertain to the appeal site.

Notwithstanding, and should the determinations be considered to refer to the overall lands, I note that whilst the public notices did not specifically refer to the retention of the raising of lands I submit that the said notices are adequate in that the foundations to be retained could only be in situ premised on the material imported onto the site, thereby to allow the foundations to be developed at the level that they are at. In other words, the development to be retained inherently includes the importation of materials to have allowed for the construction of the foundations.

On this basis, therefore, I consider that the nature and extent of the proposed development as given in the public notices is acceptable. However, should the Board not concur it may consider it appropriate to request revised notices.

## **7.2. Acceptability of Proposal**

The site is within an area zoned Existing Residential in the current Killarney Town Development Plan.

The proposal, taken in conjunction with the 9 townhouses proposed under ref. ABP 302940-18 and delineated on the Site Layout-Proposed Services drawing received

by way further information immediately to the west, in terms of its layout and design, is a natural extension of that constructed to date.

I note that the original layout in this portion of the overall development provided for 8 semi-detached and 1 no. detached units. In the current application an additional unit is to be provided to the south of the access road providing for 2 no. semi-detached units.

I also note that the previous units to be developed provided for 3 bedrooms. The current floor plans for the dwellings indicate four bedrooms. The house design is also altered from that approved but will assimilate with the scheme as developed to date.

As a consequence of the larger footprint, the private garden spaces are smaller than those previously granted. The rear garden provision for the line of semi-detached units along the northern boundary are generally adequate with the north-eastern most unit served by the smallest space of in the region of 44 sq.m. The others range between 48 sq.m. and 68 sq.m. However, the garden area to be provided to 1 of the 2 units to the south of the estate road would be virtually non-existent with the units to be positioned at an awkward angle to the roadway. To allow for the units as proposed would result in a substandard level of amenity for prospective occupants. The omission of the two units and replacement with a single unit, only, as originally approved is recommended to address this shortcoming.

Sufficient parking is provided to serve the units.

The central open space as developed accords with that approved and will serve both existing and proposed dwelling units. I also note that as per the plans submitted by way of further information the central access road is to be extended to the northern site boundary which would allow for potential future access to the said lands.

### **7.3. Other Issues**

I submit that the issue of access to the rear of No.7 Burr Ridge onto Dennehy's Bohereen and the implications of the Board's determination on reference case 63.RL3450 as raised by the appellants does not form part of the current proposal or the residential scheme of which it will form part and is not a relevant consideration.

I note that a special contribution of €35,000 has been levied by the planning authority in respect of road improvements/projects.

As to when a planning authority may require the payment of a Special Contribution is covered in Section 48(2)I of the Planning and Development Act 2000, as amended, with Section 7.12 of the Development Management Guidelines, 2007 providing guidance with respect to same. It is clear that such a request should only be made in respect of a particular development whereby demands likely to be placed on public services and facilities are deemed to be exceptional thereby incurring costs not covered by the General Development Contribution Scheme of the Council. Any condition imposed under this section must '*specify the particular works carried out or proposed to be carried out by the local authority to which the condition relates*'. This requirement to identify the nature / scope of the works, the expenditure involved and the basis for its calculation, including how it is apportioned to the particular development, is of relevance and includes a mechanism whereby special contributions can be refunded to the applicant in the event that the works in question are not commenced or are not completed within the required timescales.

The question in this case is whether the stipulated works can be taken to fall within the category for which a special contribution might be sought.

As per the Area Engineer's report dated 08/10/17 (sic) the breakdown of the financial contribution requirement is given namely:

- Contribution towards the cost of the implementation of the Park Road and Friary Down – N22 inter-link road - €20,000
- Contribution towards the cost of the implementation of traffic lights at Park Road and Friary Down Road Junction Upgrade in accordance with the Killarney Masterplan - €5,000
- Contribution towards the cost of upgrading the surface of Park Road and Friary Downs Road Junction Surface - €10,000.

Whilst I can surmise that the latter two projects would specifically benefit the proposed development no detail is given to the overall costs of the projects or the apportioning of same to development. This is contrary to the above legislative requirements. In this regard I would bring to the Board's attention that the Park

Road and Friary Downs road junction upgrade is proposed as part of an approved cinema development on lands to the south of Park Road (file ref. PL08.249268) and, by way of condition 4 attached to same, is required to be completed prior to the opening of the development

In terms of the contribution towards the link road I submit that the proposed works would not be specific to the current scheme and, whilst it may be exceptional in its own right, will benefit the wider community within the town. I consider that such a financial requirement would be better incorporated into the general contribution scheme and adopted in accordance with the procedures set out in Section 48 of the Act.

On this basis I recommend that the condition be appropriately modified to exclude this contribution requirement and to provide for the other two projects, the amount to be agreed between the applicant and the planning authority.

#### *Appropriate Assessment*

Having regard to the nature and scale of the development on zoned and serviced lands within Killarney town and the proximity to the nearest European Site no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

## **8.0 Recommendation**

Having regard to the foregoing I recommend that permission for the above described development be granted permission for the following reasons and considerations subject to conditions.

## **9.0 Reasons and Considerations**

Having regard to existing residential zoning objective for the site as set out in the current Killarney Town Development Plan, and to the planning history on the site, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of the area or of property in the vicinity and would be acceptable in terms of traffic safety and

convenience. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

## 10.0 Conditions

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars submitted on the 23rd day of August, 2019 and 5th day of October, 2018 except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

**Reason:** In the interest of clarity.

2. The two semi-detached units to the south of the estate road shall be omitted. One dwelling, only, shall be provided at this location. Revised plans and particulars with the necessary alterations shown thereon shall be submitted to the planning authority for its written agreement prior to commencement of development.

**Reason:** In the interest of residential amenity

3. Details of the materials, colours and textures of all the external finishes to the proposed dwellings shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

**Reason:** In the interest of visual amenity.

4. Water supply and drainage arrangements, including the disposal of surface water, shall comply with the requirements of the planning authority for such works and services.

**Reason:** In the interest of public health.

5. (a) The road layout shall be developed in accordance with the details provided on drawing no. 90-18-0-804 New Site Layout Proposed

Services received by the planning authority on the 5<sup>th</sup> day of October, 2018.

- (b) The internal road network serving the proposed development including turning bays, junctions, parking areas, footpaths and kerbs shall comply with the detailed standards of the planning authority for such road works.

**Reason:** In the interest of clarity and of traffic and pedestrian safety.

- 6. All service cables associated with the proposed development (such as electrical, telecommunications and communal television) shall be located underground. Ducting shall be provided by the developer to facilitate the provision of broadband infrastructure within the proposed development.

**Reason:** In the interests of visual and residential amenity.

- 7. Notwithstanding the provisions of Article 10(4) of the Planning and Development Regulations, 2001, or any statutory provision modifying or replacing them, no room in the proposed houses shall be used for the purpose of providing overnight paying guest accommodation without a prior grant of planning permission.

**Reason:** In order to prevent overdevelopment of the site in the interest of residential amenity.

- 8. (a) Screen walls shall be provided to screen rear gardens from public view. Such walls shall be two metres in height above ground level.

(b) Details of the layout, the materials, and external finishes of the screen walls shall be submitted to, and agreed in writing with, the planning authority, prior to commencement of construction of the dwellings.

**Reason:** In the interest of residential and visual amenity.

- 9. All rear gardens shall be bounded by block walls, 1.8 metres in height, capped, and rendered, on both sides, to the written satisfaction of the planning authority.

**Reason:** In the interest of residential and visual amenity.

10. Proposals for an estate/street name, house numbering scheme and associated signage shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. Thereafter, all estate and street signs, and house numbers, shall be provided in accordance with the agreed scheme. No advertisements/marketing signage relating to the name(s) of the development shall be erected until the developer has obtained the planning authority's written agreement to the proposed name(s).

**Reason:** In the interest of urban legibility.

11. Prior to commencement of development, the applicant or other person with an interest in the land to which the application relates shall enter into an agreement in writing with the planning authority in relation to the provision of housing in accordance with the requirements of section 94(4) and section 96(2) and (3) (Part V) of the Planning and Development Act 2000, as amended, unless an exemption certificate shall have been applied for and been granted under section 97 of the Act, as amended. Where such an agreement is not reached within eight weeks from the date of this order, the matter in dispute (other than a matter to which section 96(7) applies) may be referred by the planning authority or any other prospective party to the agreement to An Bord Pleanála for determination.

**Reason:** To comply with the requirements of Part V of the Planning and Development Act 2000, as amended, and of the housing strategy in the development plan of the area.

12. The development hereby permitted shall be carried out and completed at least to the construction standards set out in the Planning Authority's Policy on Taking in Charge of Housing Estates. Following completion, the development shall be maintained by the developer, in compliance with these standards, until taken in charge by the planning authority.

**Reason:** To ensure that the development is carried out and completed to an acceptable standard of construction.

13. Site development and building works shall be carried out only between the

hours of 0800 to 1900 Mondays to Fridays inclusive, between 0800 to 1400 hours on Saturdays and not at all on Sundays and public holidays.

Deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the planning authority.

**Reason:** In order to safeguard the [residential] amenities of property in the vicinity.

14. Construction and demolition waste shall be managed in accordance with a construction waste and demolition management plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall be prepared in accordance with the “Best Practice Guidelines on the Preparation of Waste Management Plans for Construction and Demolition Projects”, published by the Department of the Environment, Heritage and Local Government in July 2006.

**Reason:** In the interest of sustainable waste management.

15. A plan containing details for the management of waste (and, in particular, recyclable materials) within the development, including the provision of facilities for the storage, separation and collection of the waste and, in particular, recyclable materials and for the ongoing operation of these facilities within each house plot shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. Thereafter, the waste shall be managed in accordance with the agreed plan.

**Reason:** To provide for the appropriate management of waste and, in particular recyclable materials, in the interest of protecting the environment.

16. The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development, including hours of working, noise



management measures and off-site disposal of construction/demolition waste.

**Reason:** In the interests of public safety and residential amenity.

17. Prior to commencement of development, the developer shall lodge with the planning authority a cash deposit, a bond of an insurance company, or other security to secure the provision and satisfactory completion and maintenance until taken in charge by the local authority of roads, footpaths, watermains, drains, public open space and other services required in connection with the development, coupled with an agreement empowering the local authority to apply such security or part thereof to the satisfactory completion or maintenance of any part of the development. The form and amount of the security shall be as agreed between the planning authority and the developer or, in default of agreement, shall be referred to An Bord Pleanála for determination.

**Reason:** To ensure the satisfactory completion and maintenance of the development until taken in charge.

18. The developer shall pay to the planning authority a financial contribution 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. Details of the application of the terms of the Scheme 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 the proper application of the terms of the Scheme.

**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.

19. The developer shall pay to the planning authority a financial contribution as a special contribution under section 48(2) (c) of the Planning and Development Act 2000 in respect of the installation of lights and upgrading of the road surface at the Park Road and Friary Downs Road Junction.

The amount of the contribution 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 for determination. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be updated at the time of payment in accordance with changes in the Wholesale Price Index – Building and Construction (Capital Goods), published by the Central Statistics Office.

**Reason:** It is considered reasonable that the developer should contribute towards the specific exceptional costs which are incurred by the planning authority which are not covered in the Development Contribution Scheme and which will benefit the proposed development.

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**Pauline Fitzpatrick**  
**Senior Planning Inspector**

**February, 2019**