



An
Bord
Pleanála

Inspector's Report ABP 302940-18

Development	Retain existing in situ foundations, construct 1 no. block of 7 townhouses, 1 no block of 2 townhouses and crèche with 2 bedroom apartment above and associated site works.
Location	Ardshanavooly, Park Road Killarney, Co.Kerry
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	18/141
Applicant	Wrightwood Developments Ltd.
Type of Application	Permission
Planning Authority Decision	Grant subject to conditions
Type of Appeal	3 rd Party v. Grant
Appellants	Paul McSweeney & Others
Observer(s)	None
Date of Site Inspection	22/01/19
Inspector	Pauline Fitzpatrick

1.0 Site Location and Description

The site which has a stated area of 0.279 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-western 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 302939-18 & 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 20/02/18 with further plans and details submitted 23/08/18 following a further information request dated 13/04/18. Revised public notices were submitted 13/09/18. Unsolicited further information was submitted 05/10/18.

The proposal entails

- Retention of in situ foundations
- Construction of:
 - Block A - 7 no terraced 3 bedroom dwellings in one block (Block A)
 - Block B – 2 no. 3 bedroom dwellings and creche with 2 no. bedroom apartment over

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 33 conditions. Of note:

Condition 4: Special contribution of €38,500 in respect of improvement works to Friary Downs and Park Road which benefit the development.

Conditions 6 & 7: Finished floor levels to be in accordance with drawings received 20/02/18.

Condition 12: Main roadway shown on the site layout plan leading to the undeveloped land to the north to be fully constructed to allow access to the said lands. Services shall also be extended along this roadway.

Condition 13: Recommendations of Road Safety Audit to be implemented in full prior to commencement of development.

Condition 15: Scheme to be subject of Stage 2 / 3 Safety Audit prior to occupation of units and all recommendations implemented.

Condition 26: 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 1st Planner's report (undated) includes EIA and AA screening. It notes that the foundations to be retained were for an apartment building and a crèche. The proposal entails 7 no. townhouses at this location. Because they are using the foundations of the original apartments the townhouses are situated close to the back boundary and thus the rear gardens are very small. The gardens are north facing and would not provide quality amenity space. The enclosed front gardens are south facing and will provide usable quality private amenity space. Further information recommended on boundary treatments, enclosure of rear back gardens, submission of Road Safety Audit and Part V compliance. The 2nd report dated 10/10/18

considers that the issues raised in the further information have been satisfactorily addressed. The issue of potential future access to adjoining lands to the north can be addressed by way of condition. With respect to the Board's decision on reference case 63.RL2492 raised by the objectors the revised levels are now forming part of the application. The finished floor levels and roof ridge are acceptable. 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 12/03/18 requires details of crèche carparking/drop off points, visitor car parking, site services and boundary treatment. A further note dated 06/09/18 following further information states that the previous comments have not been addressed and continue to apply.

Biodiversity Officer in a memo dated 07/09/18 following further information has no further comment.

Area Engineer in a report dated 08/10/17 (sic) details conditions should permission be granted including special contribution towards road improvements/projects.

3.3. Prescribed Bodies

Irish Water in a report dated 14/03/18 required further information on sewer connection. A 2nd report dated 09/10/18 following further information has no objection subject to conditions.

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 are comparable to the issues raised in the grounds of appeal summarised in section 6.1 below.

4.0 Planning History

- 4.1. **04/4149** - permission granted for 45 dwellinghouses, 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 3rd 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 ref. 63.RL2492. The Board decided that the said works for raising the ground level and 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. A map delineating the application site relative to the site to which 63.RL2492 refers attached.
- It is Kerry County Council's duty to ensure that the Board's decision is complied with. No reference is made to same in the request for further information.
- The absence of reference to the reference case in the planning application form compromised the planning authority in its validation process and decision making capability.

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 grant 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 spine 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-west of the existing estate. Foundations for what were to be apartment blocks are on site, which is fenced off and not accessible. Under ref. ABP 302939-18 permission is being sought on the site immediately to the east for retention of in situ foundations and construction of 10 no. semi-detached houses. 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 9 no. townhouses, creche and apartment. 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 in the vicinity of the western site boundary onto Dennehy's Bohereen although a map did not accompany the referrals. I would bring to the Board's attention a map labelled 'Exhibit 2' attached to this appeal stated to show the site subject of the Board's decision under files. 63.RL2350 and 63.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. Layout and Design

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

The proposal, taken in conjunction with the 10 semi-detached dwellings proposed under ref. ABP 302939-18 and delineated on the Site Layout-Proposed Services drawing received by way of unsolicited further information, in terms of its layout and design is a natural extension of that constructed to date.

As originally approved under ref. 04/4149 Units 7A and 7B along the northern boundary would have provided for in the region of 10 apartments in 3 storey blocks. Unit 11 in the north-western corner was to provide for a creche with 2 apartments over (no plans available for same).

A problem now arises in proposing to retain the in-situ foundations which were originally for an apartment building and their use for the townhouses in Block A, in that the units would be unduly close to the northern site boundary resulting in inadequate private open space being provided. The majority of the garden depths are in the region of 3 metres, would be c.18 sq.m. in area and would be north facing. The fact that the dwellings are to be served by front gardens cannot be considered a reasonable compromise. Such spaces are effectively open to the public realm and do not afford reasonable private amenity. On this basis, therefore, I do not consider that the proposed dwellings would afford a reasonable level of residential amenity for the prospective occupants and would constitute substandard development.

The private open space provision for the 2 no. townhouses in Block B appear to be acceptable. However, I would suggest that the orientation of the units facing directly onto the gable wall of Block A with only a 4.77 metre separation is not an optimum layout.

A creche with a stated floor area of 148 sq.m. is proposed with a 2 bedroom apartment over to be served by a balcony in the gable elevation. A separation distance of only 5 metres to the existing apartment block to the south is to be maintained.

Whilst I have no objection to the development of the site to complete out the residential scheme, allowing the existing foundations to dictate the dwelling layout at the expense of residential amenity, resulting in a standard of development which is inferior to that originally approved is not acceptable. A re-evaluation of the site layout and house design in this section of the overall site is recommended. I therefore recommend refusal on this basis.

7.3. Other Issues

I note that the application was deemed to be valid by the planning authority. Issues pertaining to reference to the referral cases on the planning authority form or in the further information request are not matters for comment by the Board.

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 - €22,000
- 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 - €5,500
- Contribution towards the cost of upgrading the surface of Park Road and Friary Downs Road Junction Surface - €11,000

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 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, should the Board be disposed to a favourable decision, 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 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 refused permission for the following reasons and considerations subject to conditions.

9.0 Reasons and Considerations

1. Having regard to the layout and design of the proposed development, the proximity of the 7 no. townhouses in Block A to the northern site boundary and the inadequate private open space to be provided to serve same, it is considered that the proposed development would result in a substandard level of residential amenity for prospective occupants. The proposed development, would, therefore, be contrary to the proper planning and sustainable development of the area.

Pauline Fitzpatrick
Senior Planning Inspector

February, 2019