



An  
Bord  
Pleanála

## Inspector's Report ABP-303399-19

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<b>Referral</b>	Point of detail regarding the financial contributions required pursuant to Condition Nos. 20, 21, 22, 23 & 24 of Planning Authority Register Reference: PL06/882.
<b>Location</b>	Mortarstown, Carlow.
<b>Planning Authority</b>	Carlow County Council
<b>Planning Authority Reg. Ref.</b>	17/243
<b>Referral Type</b>	Point of Detail
<b>Referred by</b>	Byrne and Byrne Ltd.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	N/A
<b>Inspector</b>	Robert Speer

## 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 the payment of the development contributions sought by Condition Nos. 20, 21, 22, 23 & 24 as attached to the grant of permission issued by Carlow County Council in respect of Planning Authority Register Reference: PL06/882 (as extended by PA Reg. Nos. 11/334 & 17/243).

## 2.0 Site Location and Description

- 2.1. The site in question is located at Mortarstown, Co. Carlow, on the southernmost fringe of Carlow town, approximately 2.0km south of the town centre, where it occupies a position between the College Green housing estate and the Quinagh House Golf Course. It presently comprises a partially constructed housing scheme and an unfinished section of a future 'Inner Relief Road'.

## 3.0 Background to Referral:

- 3.1. On 16<sup>th</sup> January, 2007 a grant of permission was issued by Carlow County Council for the construction of 130 No. dwellings, 1 No. creche, 20 No. serviced sites, a section of inner relief road, and all associated site works, at Mortarstown, Carlow. Development contributions applicable to the residential element of the scheme were subsequently imposed as per the following conditions:

*Condition No. 20:* A development contribution of €93,761.72 to be paid before the development is commenced, in respect of public roads which will facilitate the proposed development.

Reason: In order to contribute to the cost of Local Authority services which facilitate the housing estate, crèche and serviced sites.

*Condition No. 21:* A development contribution of €198,850.22 to be paid before the development is commenced, in respect of connection to public water which will facilitate the proposed development.

Reason: In order to contribute to the cost of Local Authority services which facilitate the housing estate, crèche and serviced sites.

*Condition 22:* A development contribution of €263,519.72 to be paid before the development is commenced, in respect of connection to public waste water services which will facilitate the proposed development

Reason: In order to contribute to the cost of Local Authority services which facilitate the housing estate, crèche and serviced sites.

*Condition 23:* A development contribution of €63,587.57 to be paid before the development is commenced, in respect of community, recreation, park and leisure facilities which will facilitate the proposed development.

Reason: In order to contribute to the cost of Local Authority services which facilitate the dwellings and creche.

*Condition 24:* A development contribution of €675,644.35 to be paid before the development is commenced, in respect of Development Contribution Scheme specific to lands within the Carlow Town Environs Local Area Plan.

Reason: To facilitate the provision of services outlined in the said scheme.

- 3.2. Following discussions between representatives of the developer and Carlow County Council, the Planning Authority detailed its position in correspondence dated 7<sup>th</sup> December, 2018 wherein it was stated that where Section 29 of the Urban Regeneration and Housing Act, 2015 was applied, interest would be charged in accordance with the terms of the Carlow County Council Development Contribution

Scheme, 2017-2021, from the date permission was granted to the actual payment date.

## 4.0 Planning History

### 4.1. On Site:

PA Ref. No. 06882. Was granted 16<sup>th</sup> January, 2007 permitting Byrne & Byrne Ltd. permission for the construction of 130 no. dwellings, 1 no. creche and 20 no. serviced sites and an element of inner relief road to facilitate the proposed development and all associated site works with connection to existing public services, all at Mortarstown, Carlow.

- PA Ref. No. 11334. Was granted on 10<sup>th</sup> February, 2012 permitting Byrne & Byrne Limited an 'Extension of Duration' of PA Ref. No. PL06/882 until 15<sup>th</sup> January, 2017.
- PA Ref. No. 17243. Was granted on 6<sup>th</sup> October, 2017 permitting Byrne and Byrne Ltd. an 'Extension of Duration' of PA Ref. Nos. PL06/882 & PL11/334 until 31<sup>st</sup> December, 2021.

PA Ref. No. 09339. Was granted on 11<sup>th</sup> January, 2010 permitting Byrne & Byrne Ltd. permission for change to planning permission 06/882. The proposed works include the change of house numbers 96 & 97 from Type B to Type J, and the change of numbers 25 & 26 from Type J to Type A. All at Mortarstown, Carlow.

## 5.0 Policy Context

5.1. The *Joint Spatial Plan for the Greater Carlow Graiguecullen Urban Area, 2012-2018* (extended until 4<sup>th</sup> November, 2022 pursuant to a resolution under Section 19(1)(d) of the Planning and Development Act, 2000, as amended) is the operative plan for the area.

5.2. The *Carlow County Council Development Contribution Scheme, 2017-2021* was adopted on 13<sup>th</sup> February, 2017 and is effective from that date. Section 11 of the scheme states that the payment of contributions shall be undertaken as follows:

1. The requirement for the payment of the contributions provided for in the Scheme will be included in all relevant decisions to grant planning permissions following the making of the Scheme by the Council.
2. The contributions levied under the Scheme shall be payable prior to commencement of development. The contributions payable will be based on the contribution rate in existence at the date the permission was granted (where Section 29 of the Urban Regeneration and Housing Act 2015 applies, the contributions payable will be based on the contribution rate in existence at the actual payment date). The Council will be entitled to charge interest from the date permission was granted to the actual payment date, at the rate of 5% per annum.
3. The Council may, at its discretion, facilitate the phased payment of contributions payable under the Scheme.
4. Where a development contribution is not paid in accordance with the terms of a condition laid down by the Council (or An Bord Pleanála), the Council may recover any contribution due as a simple contract debt in a court of competent jurisdiction. Carlow County Council reserves the right to initiate further enforcement action in respect of unpaid contributions.

## **6.0 The Referral**

### **6.1. Referrer's Case**

- 6.1.1. The referral submission is by Adrian Doyle & Associates on behalf of Byrne and Byrne Ltd. The grounds of referral regarding the point of detail are summarised as follows:

- The referrer was granted permission for a residential development under PA Ref. No. 06/882 (with the duration of the permission subsequently being extended twice pursuant to PA Ref. Nos. 11/334 & 17/243). Prior to the closure of the site as a result of the financial crisis, a number of the permitted houses were completed and sold. Building works recommenced in 2018.

In accordance with Section 29 of the Urban Regeneration and Housing Act, 2015, an application was made for the recalculation of the development

contributions with the Council having adopted a new Development Contribution Scheme effective from 13<sup>th</sup> February, 2017.

In its calculation of the revised development contributions, the Council applied the reduced rates, however, it also imposed an interest charge of 5% per annum from the date of the original grant of permission despite this charge forming a provision of the new Development Contribution Scheme.

- Section 29 of the Urban Regeneration and Housing Act, 2015 states that *'where the basis of determination of the contribution under subsection (1) has changed'*, then the new rate, if lower, shall be applied in respect of unsold units.

Circular Letter PL6/2015 also states the following:

*'For the avoidance of doubt, the Urban Regeneration and Housing Act, 2015 amends now section 48 of the 2000 Act to make clear that where a permission includes development contribution conditions specifying a rate of contribution and that contribution has not been reduced, then it is the newer rate of contribution that should be applied and the planning authority shall amend the condition to reduce the amount of contribution payable'*.

- In its determination of the subject matter dated 7<sup>th</sup> December, 2018, the Council has referred to Section 48 of the Planning and Development Act, 2000, as amended. In this regard it is important to note that Section 48(2)(a) of the Act states as follows:

*'The basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section'*.

Having regard to the foregoing, it is submitted that the 5% interest charge sought by the Council is included under Paragraph No. 11: *'Payment of Contribution'* in the new Development Contribution Scheme and does not form part of the *'basis for determination'*.

- The Council has asserted that Section 48(15)(b) of the Act empowers it to charge interest, however, it is considered that for such a charge to apply it would have to be included in the contribution scheme that applied at the time of the grant of permission (which was not the case in this

instance). Furthermore, the Council would have been required to impose any such charges generally and not selectively.

- Neither the Act nor Circular Letter PL6/2015 state that the new Development Contribution Scheme is to be applied but rather require the application of the new rate of contribution set out in that scheme.
- The legislative intent of Section 29 of the Urban Regeneration and Housing Act, 2015 was to provide for a level playing field between older grants of permission subject to significantly higher development contributions and those permissions granted following the reduction of charges under new development contribution schemes adopted by planning authorities. This will not be achieved if older permissions attract an annual interest charge of 5% from the date of the original grant. Indeed, over time it is possible that the reduced rate with interest will exceed the contribution originally levied which was not the intent of the legislator.
- The Board is requested to determine that the reduced rate of contribution, as provided for in the Development Contribution Scheme, 2017-2021, is to be substituted in the Development Contribution Scheme that applied at the date of the grant of permission for PA Ref. No. PL06/882, and that the imposition of a 5% annual interest charge (as set out in the new Scheme) does not apply.

## 6.2. Planning Authority's Response

- Provision was made by the Council to accommodate phased payments by the developer in an amount reduced from the contributions previously sought by the relevant grants of permission. The result of this facilitation under Section 48(15)(a) of the Act is that the mandatory requirement for the payment of interest under Section 48(15)(b) applies. Therefore, the imposition of the interest charge is both lawful and mandatory in this instance.
- Section 48 of the Act requires the basis for the determination of development contributions to be '*set out in a Development Contribution Scheme made under this section*' and, therefore, the determination of the level of contributions payable where Section 29 of the Urban Regeneration and

Housing Act, 2015 is applied had to be made only under the terms of the Development Contributions Scheme, 2017-2021.

- Section 11 of the Development Contributions Scheme, 2017-2021 provides as follows:
  - The requirement for the payment of the contributions provided for in the Scheme will be included in all relevant decisions to grant planning permissions following the making of the Scheme by the Council.
  - The contributions levied under the Scheme shall be payable prior to commencement of development. The contributions payable will be based on the contribution rate in existence at the date the permission was granted (where Section 29 of the Urban Regeneration and Housing Act, 2015 applies, the contributions payable will be based on the contribution rate in existence at the actual payment date). The Council will be entitled to charge interest from the date permission was granted to the actual payment date, at the rate of 5% per annum.
  - The Council may, at its discretion, facilitate the phased payment of contributions payable under the Scheme.
  - Where a development contribution is not paid in accordance with the terms of a condition laid down by the Council (or An Bord Pleanála), the Council may recover any contribution due as a simple contract debt in a court of competent jurisdiction. Carlow County Council reserves the right to initiate further enforcement action in respect of unpaid contributions.

The assertion by the referrer that the requirement to pay interest was not part of the original grant of permission and does not form part of the determination of any reduced level of contribution is an overly legalistic interpretation of the Scheme.

- In the case of *Cork City Council v. An Bord Pleanála (2007) 11 IR 761*, the following observation was made by Kelly J. as regards the appropriate approach to be taken in the interpretation of the Development Contribution Scheme under consideration in that case:



*‘All parties to this litigation accept that the decision of the Supreme Court dealing with the proper construction of Development Plans as set forth in the Judgement of McCarthy J. in Re: X.J.S. Investments Ltd. (1986) IR 750 is the correct approach to the construction of the GDC Scheme. There he said at p.756:-*

*“Certain principles may be stated in respect of the true consideration of planning documents:-*

- a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting canons of construction applicable to such material.*
- b) They are to be considered in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents unless such documents, read as a whole, necessarily indicate some other meaning”.*

*“This is the approach which is appropriate in the construction of the relevant provisions of the GDC Scheme . . .”*

Therefore, having regard to the foregoing, it is submitted that a member of the public reading the Development Contribution Scheme would read it as a whole and understand it as providing for a reduced level of contribution if the Council chose to allow for phased payments, but that interest could be charged where the contributions required by conditions attached to the original grant of permission have not been made. It is not appropriate to exclude the interest payment provisions from the remainder of those provisions concerning the determination of reduced contributions as this would involve a highly artificial interpretation of the Scheme.

- The developer has entered into a Section 47 Agreement with the Council as regards the payment of development contributions on a phased basis at a rate of €10,498.13 per house sold (€5,631.46 cash payment plus €4,866.67 offset against development credits in respect of the cost of the Inner Relief Road = €10,498.13 per house sold).

- Although the Chief Executive's Order of 17<sup>th</sup> February, 2017 required interest to be paid on all development contributions payable under the conditions of planning permissions issued after that date, this does not mean that it was not open to the Council to impose interest charges on outstanding contributions as a *'quid pro quo'* for facilitating such payments on a phased basis.
- The decision letter of the Council dated 7<sup>th</sup> December, 2018 refers to a previous Section 47 Agreement entered into on 8<sup>th</sup> September, 2014 which predates the Urban Regeneration and Housing Act, 2015 and thus is unaffected by the 2015 Act. However, the decision letter also refers to a meeting between the Council and the developer on 22<sup>nd</sup> March, 2018 when it was agreed that the Council would apply the provisions of Section 29 of the Act if there was a benefit to the developer, but that the calculation would include for an interest charge on the outstanding contributions under the terms of the Development Contribution Scheme, 2017-2021.

This was a reasonable basis for the Council refusing to disapply the interest payment obligations and it is not appropriate for the developer to now request the Board to interpret the terms of the Development Contribution Scheme for the purpose and effect of allowing the developer to deviate from the terms of the Section 47 agreement which is not disputed in the grounds of referral.

### 6.3. Further Responses

#### 6.3.1. Response of the Referrer:

- Notwithstanding that development contribution schemes *'are to be constructed in their ordinary meaning'*, Section 29 of the Urban Regeneration & Housing Act, 2015 is a legislative provision and must be considered in that context. In any event, the meaning of the section is very clear:  
  
*'and where the basis of determination of the contribution under subsection (1) has changed "then the new rate if lower shall be applied in respect of unsold units".'*
- It is reiterated that Circular PL6/2015 specifically states that where the new contribution rate is lower then that rate should be applied.

- The new contribution rate, if lower, applies and not the new Development Contribution Scheme.
- It would be contrary to equity and legal precedent that the State would be empowered under an Act of the Oireachtas to backdate a charge (i.e. 5% interest per annum) through the adoption of a scheme at local or national level.
- With regard to the Council's reliance on Section 48(15) of the Principal Act as a mandatory basis for charging interest:
  - It is queried if interest has been charged in all cases of phased payments since the introduction of development contribution schemes. If so, what rate of interest was applied? If not, why was that developer not charged?
  - It is unclear why it was necessary to include an interest charge in the Development Contribution Scheme, 2017 when previous schemes did not include any such provision.
  - The referrer is unaware of any other local authority which applies interest in the manner sought.
  - Section 48(14)(a) of the Principal Act requires a local authority to account for monies accrued and subsection (b) states that a report prepared under Section 50 of the Local Government Act, 1991 shall contain details of monies paid or owing to the local authority under this section and shall indicate how said monies have been expended. It is queried if Carlow County Council has met its statutory obligations in this regard.
- Paragraph 10 of the Development Contribution Scheme, 2017-2021 states that:
 

*(a) All planning permissions granted by Carlow County Council, subsequent to the date of adoption of this scheme, will be subject to this Development Contribution Scheme and development charges shall be levied as a condition under any permission issued under section 34 of the Planning*

*and Development Act, 2000 (as amended), in accordance with the terms and conditions outlined in this scheme.*

*(b) Section 29 of the Urban Regeneration and Housing Act, 2015 shall apply’.*

It is clear from the foregoing that the terms of the Development Contribution Scheme, 2017 apply only to permissions granted after the adoption of that Scheme and that Section 29 applies. If it were the intention to retrospectively apply interest in respect of permissions granted prior to the adoption of the new Scheme then it would be reasonable to expect such a provision to be stated in Paragraph 10(b) of that Scheme.

- It is considered that the imposition of interest at 5% per annum on permissions granted prior to 17<sup>th</sup> February, 2017 is contrary to the Development Contribution Scheme, 2017.
- With regard to the meeting between the Council and the developer on 22<sup>nd</sup> March, 2018, it should be noted that the developer both queried and disputed the application of any interest rate.
- In reference to the Section 47 agreement which predates the Urban Regeneration and Housing Act, 2015, the Council has acknowledged in its submission that said agreement ‘may’ take precedence over Section 29 of the 2015 Act. Moreover, Section 29 is specific in stating that *‘the planning authority shall apply that change to the conditions of the permission where to do so would reduce the amount of the contribution payable’.*

That Section 47 agreement concerned an allowance to the developer in respect of road works which were of general benefit and that were, in the main, completed several years ago. It is submitted that if interest is to be accrued by the Council on the contributions then, in equity, interest must be allowed to the developer as regards the works carried out.

The developer is statutorily entitled to the reduction in contributions and is also potentially entitled to interest on expenditure incurred.

- The Board is requested to determine that the Section 47 agreement has been amended by Section 29 of the Urban Regeneration and Housing Act, 2015

and that the developer is entitled to compound interest at 5% per annum on expenditure incurred.

- In response to the Council's assertion that the imposition of interest is mandatory under Section 48(15)(b) of the Principal Act, the Board is referred to the precise wording of same:

*15(a): A planning authority may facilitate the phased payment of contributions under this section, and may require the giving of security to ensure payment of contributions.*

*15(b): Where a contribution is not paid in accordance with the terms of the condition laid down by the planning authority, any outstanding amounts due to the planning authority shall be paid together with interest that may have accrued over the period while withheld by the person required to pay the contribution.*

The use of the term 'may' is of importance in that in order to accrue interest a basis is needed for same. Any such basis would include the rate to be applied and whether the interest was compound or simple.

The Section 47 agreement makes no reference to interest and thus none has accrued. Furthermore, the Development Contribution Scheme in place at the time of the original grant of permission did not include any interest provision. Accordingly, there is no basis for the accrual of interest and no mandatory requirement on the local authority.

- The Council is relying on the retrospective application of the Development Contribution Scheme, 2017 which was adopted long after the original grant of permission and the completion of the Section 47 agreement.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000, as amended:

#### 7.1.1. Section 34(5) of the Act states the following:

*'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 carrying out the development; if the planning authority and that person cannot agree on the matter, the matter may be referred to the Board for determination’.*

7.1.2. Section 48 of the Act includes the following provisions:

- (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 (S.I. No. 496 of 1997) applies and a commencement notice within the meaning of that Part in respect of the development 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 the 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 the 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’.*

## 7.2. Other

7.2.1. The ‘*Development Contributions, Guidelines for Planning Authorities*’ published by the Department of the Environment, Community and Local Government in January,

2013 aim to provide non-statutory guidance on the drawing up of development contributions to reflect the radical economic changes that have impacted across all sectors since guidance was last issued in 2007.

## 8.0 Assessment

8.1. From a review of the available information, it can be determined that the substantive issue in dispute relates to the contention by the first party / referrer (i.e. Byrne & Byrne Ltd.) that the amount of the development contributions payable pursuant to Condition Nos. 20, 21, 22, 23 & 24 of the grant of permission issued in respect of PA Ref. No. PL06/882 should be reduced in accordance with the current Development Contribution Scheme, 2017 (as opposed to the scheme that applied at the date of the grant of permission) exclusive of any interest sought by the Planning Authority. In support of this contention reference has been made to 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 Act, 2000, as amended i.e. the inclusion of Sections 48(3A)-(3C) as detailed in the preceding sections to this assessment.

*(N.B. (1) The points of detail in dispute would seem to be limited to those contributions imposed under the relevant Development Contribution Scheme and, therefore, I do not propose to review the special development contributions sought by Condition Nos. 26 & 29 of PA Ref. No. PL06/882).*

8.2. Notably, there would appear to be no dispute between the referrer and the Planning Authority as regards the applicability of Sections 48(3A)-(3C) of the Act in this instance given that the contributions originally imposed by Condition Nos. 20, 21, 22, 23 & 24 in respect of PA Ref. No. PL06/882 were calculated in accordance with the Development Contribution Scheme, 2003 which has since been superseded by the current Development Contribution Scheme, 2017-2021. Indeed, in its calculation of the revised development contributions, the Planning Authority has applied the reduced contribution rates. Instead, the issue in dispute is the decision of the Planning Authority to include an interest charge of 5% per annum from the date of the original grant of permission in respect of the contributions payable. In objecting to the imposition of this interest charge, the referrer has submitted that for any such

charge to apply it would have to have been included in the contribution scheme that applied at the time of the grant of permission (i.e. the Development Contribution Scheme, 2003) and that whilst the current Development Contribution Scheme, 2017 does provide for the imposition of an interest charge (please refer to Section 11 of the Scheme), this cannot be applied retrospectively. It has also been asserted that the 'interest' sought does not form part of *'the basis of determination of the contribution'* as required by the Act, but rather relates to the 'payment' of the contribution. In effect, it is the position of the referrer that the provisions introduced by Section 29 of the Urban Regeneration and Housing Act, 2015 require the application of the reduced *'rates of contribution'* contained in any new development contribution scheme as opposed to adherence to the entirety of the terms set out in that Scheme. By way of further support, the case has been put forward that the imposition of the 5% interest charge sought by the Planning Authority in this instance would be contrary to the 'spirit' and legislative intent of Section 29 of the 2015 Act which was to ensure equitable treatment for those housing developments permitted under older grants of permission that were subject to higher development contributions.

- 8.3. In response to the foregoing, the Planning Authority has argued that as Section 48 of the Principal Act (as amended) requires the basis for the determination of development contributions to be *'set out in a Development Contribution Scheme made under this section'*, the determination of the level of contributions payable as a result of the provisions introduced by Sections 48(3A)-(3C) has to be made under the terms of the current Development Contributions Scheme, 2017, including Section 11 of same which states that *'The Council will be entitled to charge interest from the date permission was granted to the actual payment date, at the rate of 5% per annum'*.
- 8.4. It has also been asserted by the Planning Authority that as it is already facilitating the phased payment of the reduced contributions by the developer in accordance with Section 48(15)(a) of the Act, it is obliged under Section 48(15)(b) to seek the payment of interest *'that may have accrued'* with regard to outstanding contributions.
- 8.5. In addition to the foregoing, the Planning Authority has indicated that the developer has entered into a Section 47 Agreement with the Council as regards the payment of development contributions on a phased basis at a rate of €10,498.13 per house sold,



and in this respect it has been suggested that as the Section 47 agreement predates the Urban Regeneration and Housing Act, 2015, it is unaffected by same. However, notwithstanding the aforementioned agreement, it would seem that the Planning Authority was amenable to applying the provisions of Sections 48(3A)-(3C) of the Act if there was a benefit to the developer on condition that the calculation would include for an interest charge on the outstanding contributions under the terms of the Development Contribution Scheme, 2017-2021.

8.6. Having reviewed the provisions of Sections 48(3A)-(3C) of the Planning and Development Act, 2000, as amended, it is clear that they introduce a facility whereby a change to the '*basis for determination*' of development contributions payable could require a Planning Authority to apply the new rate (of the current Development Contribution Scheme) where the amount of the contribution would be reduced notwithstanding that the permission was granted some time ago, although these provisions only apply in certain circumstances as outlined in Parts (a) and (b) of Section 48(3A). In the subject instance, I would advise the Board that Section 48(3A)(a) does not apply as a Commencement Notice under Part II of the Building Regulations has been lodged in respect of the development in question, however, provided the development includes houses, one or more of which has not been rented, leased, occupied or sold, it may satisfy Part (b) of Section 48(3A). In this regard, it can be confirmed from the available information that the development has commenced construction with several of the houses having been completed and occupied and thus Section 48(3A)(b) is applicable in this instance, although any reduction in the contributions will only apply to those houses that have not been rented, leased, occupied or sold.

(N.B. (2) In the interests of clarity, I would advise the Board that a Commencement Notice was lodged in respect of the overall development approved under PA Ref. No. PL06/882 on 27<sup>th</sup> February, 2007 (the date received by the Building Control Authority) and, therefore, having regard to the provisions of Section 48(3A)(a) & (b) of the Planning and Development Act, 2000, as amended, it is my interpretation that the application of any change in the basis for the determination of a contribution imposed under Section 48(1) of the Act is limited to the residential (i.e. 'houses') aspect of the approved development. Accordingly, I only propose to assess the points of detail raised in this referral as they relate to Condition Nos. 20, 21, 22, 23 &

24 of PA Ref. No. PL06/882 i.e. excluding the development contributions sought by Condition Nos. 27 & 28 which specifically relate to the construction of a crèche facility).

(N.B. (3) It is apparent from the case planner's initial assessment of PA Ref. No. PL06/882 that the calculation of the development contributions sought by Condition Nos. 20, 21, 22, 23 & 24 included for monies related to the provision of the proposed creche (this is further supported by an internal memo prepared by the Council and dated 10<sup>th</sup> December, 2012). Accordingly, for the reasons outlined above, it is my opinion that monies related to the construction of the crèche are not subject to any reduction permissible under Sections 48(3A)-(3C) of the Planning and Development Act, 2000, as amended).

8.7. With regard to the decision of the Planning Authority to impose an interest charge of 5% per annum from the date of the original grant of permission in respect of the contributions payable, it is of relevance at the outset to note that the wording of Condition Nos. 20, 21, 22, 23 & 24 as attached to PA Ref. No. PL06/882 makes no reference to the imposition of any interest charge in respect of outstanding development contributions or to any indexation of the amount payable. Indeed, the aforementioned conditions do not actually refer to any development contribution scheme or require the monies to be paid in accordance with the terms of any such scheme. It is also of note that the Development Contribution Scheme, 2003 would not appear to have included for any provision by which interest could be imposed in respect of any contributions payable, although it did provide for the indexation of the amount payable to the House Building Cost Index as and from 1<sup>st</sup> May, 2003.

8.8. Therefore, in light of the foregoing, I am inclined to suggest that it would have been entirely reasonable for the recipient / beneficiary of the grant of permission issued for PA Ref. No. PL06/882 to have concluded that the amounts of the development contributions specified in Condition Nos. 20, 21, 22, 23 & 24 were a fixed and final figure (N.B. Notwithstanding the reference in the Development Contribution Scheme, 2003 to contributions being index-linked to the House Building Cost Index, the failure to attribute the contribution specified by the condition to the scheme itself would, in my opinion, render any attempt to impose such an indexation unsound). In this regard whilst I note the Planning Authority's reference to the provisions of Section 48(15)(b) of the Principal Act whereby '*any outstanding amounts due to the planning*

*authority shall be paid together with interest that may have accrued'*, I would have reservations that in the absence of any specified rate of interest in either the condition or the contribution scheme in place at the time, the Planning Authority's interpretation of Section 48(15)(b) could effectively amount to a '*carte-blanche*' as regards the imposition of an interest charge with no clear basis as regards the determination of same.

- 8.9. With regard to the Planning Authority's reference to the Chief Executive's Order of 17<sup>th</sup> February, 2017, which requires interest to be paid on all development contributions payable under the conditions of planning permissions issued after that date, in my opinion, this order cannot be applied retrospectively and thus does not support the decision of the Planning Authority in this instance.
- 8.10. In relation to the assertion by the Planning Authority that because it is facilitating the phased payment of development contributions in accordance with Section 48(15)(a) of the Act it is therefore obliged to collect any interest that may have accrued on outstanding amounts pursuant to Section 48(15)(b), it is my opinion that the aforementioned provisions are not intended to be interpreted as being reliant on each another. In support of the foregoing, it should be noted that where a planning authority facilitates the phased payment of contributions under Section 48(15)(a) it can require the giving of security to ensure the payment of contributions. Therefore, I would suggest that the lodgement of security is the only enticement under this section as regards the payment of outstanding monies and that there is no equivalent provision to seek the payment of interest. In terms of a 'standalone' requirement for the payment of interest under Section 48(15)(b) of the Act, it is my opinion that this is an issue separate from the changes introduced by Sections 48(3A)-(3C), which are the subject matter of this referral, and thus I do not propose to comment further on same.
- 8.11. In relation to the validity or otherwise of any agreements between the developer and the Planning Authority as regards the phased payment of development contributions, and whether said agreements are affected by the changes introduced by the Urban Regeneration & Housing Act, 2015, in my opinion, the such matters are beyond the remit of the subject referral.

- 8.12. The principle basis on which the referrer has sought to challenge the imposition of the interest charge is that Sections 48(3A)-(3C) of the Planning and Development Act, 2000, as amended, only refer to reductions in the amount of the contributions payable where there has been a change in *'the basis for the determination of the contribution'* and thus it is this aspect of the current Development Contribution Scheme, 2017 which is to be applied as opposed to the terms of the wider scheme itself. In effect, the case has been put forward that it is only the rate at which development contributions are calculated in the new Scheme that should be applied and that the remaining provisions of the Scheme, including the imposition of an interest charge pursuant to Paragraph 11 of that Scheme, cannot be applied retrospectively.
- 8.13. In my opinion, there is merit in the referrer's case as Section 48(2)(a) of the Act states that the *'basis for the determination of a contribution'* is to be set out in a *'development contribution scheme'* which would seem to suggest that whilst the former forms part of the latter, the basis for the determination of a contribution is not, in itself, a *'development contribution scheme'*. This would seem to lend credence to the position of referrer that if it had been the intention of the legislature to require the retrospective application of the entirety of the terms of any new development contribution scheme to older grants of permission then this would have been expressly stated in the relevant provisions. Instead, Sections 48(3A)-(3C) of the Principal Act only reference changes attributable to *'the basis for the determination of the contribution'* as distinct from the scheme itself and thus it could be held that it is only the rate of the contribution which is to be considered.
- 8.14. However, it could perhaps be equally argued that the basis for the determination of a contribution should take cognisance of all those provisions of the scheme which have some involvement in determining the actual development contribution (e.g. exemptions, reductions, or interest accrued). Regrettably, I have been unable to identify any directly comparable cases determined by the Board, although I note that the reporting inspector in their assessment of ABP Ref No. ABP-302992-18 would seem to have been amenable to an interpretation of Sections 48(3A)-(3C) whereby a reduction contained within a current development contribution scheme that was absent from the previous scheme could be applied as it formed a change to the *'basis for determination'* of the contribution.

8.15. On balance, I am inclined to conclude that the intention of Sections 48(3A)-(3C) was to provide for the retrospective application of reduced development contributions and that the introduction of additional charges which were absent from the previous development contribution scheme and the relevant conditions (notwithstanding that the amount of the recalculated contribution may still be less than that originally imposed) would serve to undermine the intent of the legislature. In this respect it would seem reasonable to hold that any changes to the *'basis for the determination of a contribution'* as referenced in Sections 48(3A)-(3C) of the Act should be interpreted as being limited to the rate used in the calculation of the amended contribution and that is not intended to facilitate the retrospective application of the wider terms and conditions of the new development contribution scheme. Accordingly, I would suggest that the Planning Authority is not empowered to seek the payment of 5% interest per annum from the date of the original grant of permission in respect of the contributions payable in its implementation of Sections 48(3A)-(3C) of the Planning and Development Act, 2000, as amended.

## 9.0 Recommendation

**WHEREAS** by Order dated the 16<sup>th</sup> day of January, 2007 Carlow County Council under planning register reference number 06/882 granted, subject to conditions, a permission to Byrne & Byrne Ltd. care of Raymund Kelly Architects of 80 South Main Street, Wexford, for a development comprising the construction of 130 no. dwellings, 1 no. creche and 20 no. serviced sites and an element of inner relief road to facilitate the proposed development and all associated site works with connection to existing public services, all at Mortarstown, Carlow. An Extension of Duration of Permission was granted under planning register reference number 11334 on the 10<sup>th</sup> day of February, 2012 to extend the permission until the 15<sup>th</sup> day of January, 2017, with a further Extension of Duration of Permission subsequently being granted under planning register reference number 17243 on the 6<sup>th</sup> day of October, 2017, to extend the permission until the 31<sup>st</sup> day of December, 2021, and construction commenced under planning register reference number 06/882:

**AND WHEREAS** condition numbers 20, 21, 22, 23 & 24 attached to this permission required the developer to pay to the planning authority financial contributions in the sum of €1,295,363.58, being the appropriate contributions to be applied to this

development in accordance with the Carlow County Council Development Contribution Scheme, 2003 as adopted by Carlow County Council with effect from 1<sup>st</sup> May, 2003 in accordance with section 48 of the Planning and Development Act, 2000, as amended:

**AND WHEREAS** the developer and the planning authority failed to agree on the amount of the contributions to be paid in compliance with the terms of condition numbers 20, 21, 22, 23 & 24 and the matter was referred by the developer to An Bord Pleanála on the 9<sup>th</sup> day of January, 2019 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, and based on the Reasons and Considerations set out below, hereby determines that the amount of the development contributions payable under the terms of condition numbers 20, 21, 22, 23 & 24, as reduced in accordance with the Carlow County Council Development Contribution Scheme, 2017-2021 adopted on 13<sup>th</sup> February, 2017 pursuant to the provisions of sections 48(3A) – (3C) of the Planning and Development Act, 2000, as amended, in respect of any house or houses that have not been rented, leased, occupied or sold, shall be exclusive of any interest charge sought to be imposed under the terms of the current Development Contribution Scheme.

### **Reasons and Considerations**

Having regard to:

- a) sections 34(5) and 48 of the Planning and Development Act, 2000, as amended,
- b) the Carlow County Council Development Contributions Schemes, 2003 and 2017-2021,
- c) sections 29 (3(A) – 3(C)) of Part 4 of the Urban Regeneration and Housing Act 2015, and
- d) the planning history of the site
- e) the specific wording of condition numbers 20, 21, 22, 23 & 24 of the permission granted by Carlow County Council under planning register reference number 06/882, and

f) the submissions on file,

the Board considered that the amounts payable in accordance with the terms and conditions of the permission under condition numbers 20, 21, 22, 23 & 24 should be reduced in accordance with the Carlow County Council Development Contribution Scheme, 2017-2021 exclusive of any interest sought to be imposed under the terms of that Development Contribution Scheme.

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Robert Speer  
Planning Inspector

24<sup>th</sup> April, 2019