



An  
Bord  
Pleanála

## Inspector's Report ABP-307091-20

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<b>Question</b>	Point of detail regarding condition 81 attached to permitted application 04/7674 and reviewed under PL04.212515
<b>Location</b>	Lenhenagh Beg & Lenenagh More, Pouladuff, Togher, Co. Cork
<b>Referral</b>	
Planning Authority	Cork City Council
Referred by	Ruden Homes Ltd
Planning Authority Decision	None

**Date of Site Inspection** 15<sup>th</sup> July 2020

**Inspector** Hugh D. Morrison

# Contents

1.0 Site Location and Description .....	3
2.0 The Question .....	3
3.0 Planning History.....	4
4.0 The Referral.....	5
4.1. Referrer's Case .....	5
4.2. Planning Authority Response .....	8
5.0 Assessment .....	8
6.0 Recommendation.....	13

## 1.0 Site Location and Description

- 1.1. The site is located in Lehenagh Beg and Lehenagh More, townlands to the south of the South Ring Road (N25) and to the west of the Kinsale Road (N27) in the southern suburbs of Cork City. This site is accessed off the eastern side of Pouladuff Road (L2455) at two separate points on this north/south local road. The junctions formed by the L2455 and these access roads, Court Lawn West and Coolkellure Road, have been upgraded to incorporate right hand turning lanes within the local road.
- 1.2. The more northerly of the two aforementioned junctions is accompanied on either side of Court Lawn West by frontage to the site, which has been developed to provide two short cul-de-sacs with dwelling houses on one side that overlook the local road. The corresponding nearside of the L2455 has been developed, too, to provide public footpaths on either side of the access point. By contrast, the more southerly of the two junctions lies at some remove to the west of the site.
- 1.3. The referrer cites the L2455 and the L6453. The former local road is clearly signed “on the ground”. The latter local road is not so signed. A Section 132 notice was thus served on the PA in a bid to achieve clarity/certainty on the whereabouts of this road. Regrettably, no response has been forthcoming. Making deductions from my site visit, I am thus assuming that the east/west route known as Coolkellure Road and the north/south route known as Coolkellure Rise, which connects at its northern end with the Coolkellure Road, is the L6453.
- 1.4. Works have been undertaken to Coolkellure Road to widen the carriageway and to provide a public footpath on its southern side. Likewise, a public footpath has been provided on the eastern side of Coolkellure Rise, to correspond with the frontage of the site and new development contained thereon, and the junction between Coolkellure Road and Coolkellure Rise has been laid out as a mini-roundabout.

## 2.0 The Question

- 2.1. The current referral on a point of detail is made under Section 34(5) of the Planning and Development Act, 2000 – 2020. The point of detail at issue relates to the intent of condition 81 attached to the permission granted to application 04/7674 following

amendment under appeal PL04.212515. This condition refers to road improvement works and the question arising is whether such works pertain only to the primary local road L2455 or to the secondary local road L6453, too? The PA insists that they only apply to the former road, while the referrer insists that they apply to the latter road, too.

- 2.2. At stake in the answer to the aforementioned question is the quantum of costs that can be offset by the referrer, as developer, against the requirement to pay a special contribution of €1,630,869 to fund road improvement works.

### 3.0 Planning History

#### 04/7674

Construction of a total of 554 no. residential units comprising:

- (a) 45 no. five-bed detached, 8 no. three-bed detached, 26 no. four-bed semi-detached, 144 no. three-bed semi-detached, 8 no. four-bed terraced, 292 no. three-bed terraced and 31 no. two-bed apartments,
- (b) 1 no. creche (586 sqm),
- (c) 1 no. shop (163.8 sqm),
- (d) Associated car parking,
- (e) 3 no. electricity sub-stations,
- (f) Construction of a new vehicular and pedestrian entrance from the existing road on the north western frontage of the site,
- (g) A second entrance for vehicular and pedestrian access from the existing road at the western frontage of the site onto Matthew Hill cross road, and
- (h) Provision of bin storage, plant, landscaping/recreational amenities and all other site development and ancillary works.

Permission granted for 537 no. residential units subject to 81 conditions.

Conditions Nos. 80 and 81 were the subject of appeal **PL04.212515**. Condition No. 80 was confirmed, and Condition No. 81 was amended as follows:

While the total sum payable as a special contribution under Section 48(2)(c) of the Planning and Development Act 2000 continued to be stated as €3,480,869 and the portion required for the provision of sports and recreation facilities remained constant at €1,850,00, instead of explicitly stating that the remaining €1,630,869 was for road improvement works (537 dwellings x €3037 per dwelling), the wording was revised to state the following:

*(b) road improvement works. This amount may be offset by the cost of works pursuant to condition No. 52 which directly overlaps with the said road improvement scheme and which are carried out to the satisfaction of the planning authority.*

The reason for this condition is stated as being “It is considered that the developer should contribute towards these specific exceptional costs, for works which will benefit the proposed development.”

Condition 52 states the following:

*The developer shall be responsible for the design and construction of all works relating to the public road as set out in the “Further Information” received by the Planning Authority on 14/03/04. The design and construction shall be carried out in accordance with Department of the Environment and Local Government and NRA design and construction guidelines and to the satisfaction of Cork County Roads Design Department. All design and construction details shall be agreed with Cork County Council’s Roads Design Office prior to commencing construction work on site.*

The reason for this condition is stated as being “In the interest of orderly development.”

## **4.0 The Referral**

### **4.1. Referrer’s Case**

The referrer states that it has paid the special contribution towards road improvement works to the PA on a progressive basis, i.e. €3037 per completed dwelling unit. To date the only road improvement works which have been carried out are those that the referrer, as developer, has undertaken in accordance with

Condition No. 52. It confirms that they have been carried out to the satisfaction of the PA.

The referrer states that what is in dispute between the PA and itself is what costs can be included in the offset provision set out in Condition No. 81, i.e. both parties agree that the costs incurred in undertaking road improvement works to the local primary road, the L2455, can be included, but they disagree over the inclusion of costs incurred in such works to the local secondary road, the L6453. Furthermore, the PA's exclusion of certain specific costs is in dispute, too, e.g. land acquisition, cartage, and waste disposal.

The referrer, therefore, requests that the Board rule in its favour by confirming that the cost of all road improvement works to the local road network undertaken by the developer in accordance with Condition No. 52 can be offset against that portion of the special contribution that pertains to road improvement works in Condition No. 81.

The referrer also requests that all costs that the PA would have incurred if it had undertaken the same works be included in the offset.

The following reasons and considerations are cited in support of these requests:

- The further information referred to in Condition No. 52 delineated road improvement works outside the red edge of the application site and in the local primary and secondary roads. These works were envisaged by the PA when it calculated the special contribution for road improvement works and so their cost should be offset against this contribution.
- Condition No. 81 refers to "the said road improvement scheme" but, notwithstanding Section 48(12)(a) of the Act, it does not specify the proposed works to be carried out by the PA to which the contribution relates.
- The Road Design report dated 6<sup>th</sup> April 2005 advised that the road improvement scheme was, as of the date of writing, at the preliminary design stage. Consequently, the PA was not in a position to define the "specific exceptional works" that it would entail. Clarity, in this respect, awaited the submission of design and construction details as required by Condition No. 52.

- The PA is seeking to exclude from the calculation of costs to be offset, those costs that were incurred by the developer in carrying out road improvements to the L6453. In this respect, the PA states that, while these works were undertaken pursuant to Condition No. 52, they were never envisaged under Condition No. 81, which relates exclusively to the L2455 – Lehenaghmore Road Widening Scheme. The PA’s position is thus that only road improvement works undertaken by the developer which affect the L2455 are admissible for the purpose of calculating the offset at issue.
- The referrer critiques the PA’s position as follows:
  - The PA’s documents submitted to the Board on 3<sup>rd</sup> August 2005 in connection with the appeal PL04.212515 referred to the “Lehenaghmore Road Widening Scheme” rather than the “L2455 – Lehenaghmore Road Widening Scheme”. The Scheme thus appears to have been altered in its scope and renamed.
  - The special contribution cited in Condition No. 81 was calculated on the basis of the earlier Road Design Report rather than the documents subsequently submitted to the Board.
  - Condition No. 81 does not state “the cost of works pursuant to Condition No. 52 which directly overlap with the said road improvement scheme” but “the cost of works pursuant to Condition No. 52 which directly overlaps with the said road improvement scheme”. Thus, the Condition No. 52 works are stated definitively as overlapping with the road improvement scheme.
  - Insofar as planning permissions should be capable of being self-interpreting without recourse to other documents, “the said road improvement scheme” in Condition No. 81 must be capable of elucidation from elsewhere in the permission. Only Condition No. 52 refers to works to the public road, as denoted by further information received by the PA on the 14<sup>th</sup> March 2004, and so therein lies the elucidation.
  - The reference to “the said road improvement scheme” in Condition No. 81 may have been included to ensure that the subsequent offset was against the costs of road improvement works, i.e. the €1,630,869 portion of the

special contribution, rather than the provision of sports and recreation facilities, i.e. the €1,850,00 portion.

- The cost of road improvement works under Condition No. 81 was calculated on the basis of individual dwelling units. Subsequent appeals have overturned this methodology. Thus, under Section 48(2)(c) of the Act, this Condition could be deemed to be *ultra vires* unless the full offset is allowed for the cost of the Condition No. 52 works.

#### 4.2. Planning Authority Response

No comments have been received.

### 5.0 Assessment

- 5.1. This referral over a point of detail relates to special contribution Condition No. 81, which was attached to the planning permission granted to application 04/7674. This Condition was the subject of a first party appeal to the Board (PL04.212515), as a result of which it was altered to allow for the amount of €1,630,869 required for road improvement works to be reduced. Thus, it states that “This amount may be offset by the cost of works pursuant to condition No. 52 which directly overlaps with the said road improvement scheme and which are carried out to the satisfaction of the planning authority.”
- 5.2. By way of response to the aforementioned appeal, the PA submitted a memo, entitled “Proposed road widening at Lehenaghmore” and dated 28<sup>th</sup> July 2005, attached to which was an appendix providing a summary of an estimated bill of quantities for the said widening. This bill of quantities elucidates the special contribution sought, by giving a breakdown in the costs that would be incurred in the road widening. A further appendix itemises the works to be undertaken, which include the provision of a 2m wide public footpath along the eastern side of extended lengths of Pouladuff Road and the provision of right hand turning lanes at the two junctions on this Road, which serve the subject site.
- 5.3. Condition No. 52 relates to further information received by the PA from the applicant on 14<sup>th</sup> March 2004. This information, insofar as it concerned works to existing public roads, was shown on the following series of plans:



- Drawing No. C002 Revision PL2 entitled “Proposed site layout sheet 2 of 5”,
- Drawing No. C004 Revision PL2 entitled “Proposed site layout sheet 4 of 5”,
- Drawing No. C006 Revision PL2 entitled “Proposed traffic calming layout and details”, and
- Drawing No. C007 Revision PL1 entitled “Proposed Matthew Hill junction upgrade”.

This Condition states that the developer shall be responsible for the design and construction of all works relating to the public road set out in this further information.

- 5.4. These plans show that Condition No. 52 encompasses the widening of Pouladuff Road (L2455), which is also referred to as Matthew Hill Road and Lehenagh Road, and to works to Coolkellure Road (L6453) and Coolkellure Rise (L6453). Thus, the provision of a right hand tuning lane and public footpaths at the junction between Pouladuff Road and Court Lawn West and the provision of a right hand turning lane at the junction between Pouladuff Road and Coolkellure Road, identified in the above cited memo, come within the ambit of this Condition.
- 5.5. The referrer and the PA agree that the cost of works undertaken by the developer to the L2455 are admissible for the purpose of offsetting. Where they disagree is in relation to the status of the cost of works undertaken by the developer to the L6453, i.e. the referrer considers that they should be admissible too, while the PA does not.
- 5.6. The referrer sets out a series of reasons and considerations in support of its position. I will summarise and discuss each of these below.
- The referrer contends that the works comprised under Condition No. 52 formed the basis for the PA’s calculation of the special contribution.
- I am unable to confirm this contention, as before the PA granted planning permission, the only figure cited was that of an estimated €2.43m for a road improvement scheme to Pouladuff Road in the Road Design Report dated 6<sup>th</sup> April 2005. A special contribution of €3037 per dwelling was requested. As 537 dwellings were permitted, this translated into the special contribution amount of €1,630,869.

At the appeal stage, the PA submitted to the Board a memo, referred to in paragraph 5.2 above, in which the estimated cost of the said road improvement scheme was calculated to be €2,022,540. This figure was aggregated to land and bridge costs and reduced by existing contributions already received to give an outstanding figure of €1,652,540, i.e. slightly more than would be raised by the special contribution.

- The referrer questions the validity of Condition No. 81 as the specific exceptional works comprised in the road improvement scheme are not stated.

I consider that this question pertains to the earlier appeal rather than the current referral.

- The referrer cites the Road Design Report dated 6<sup>th</sup> April 2005 and it states that the specific exceptional works could only be elucidated once the detailed design and construction works required by Condition No. 52 had been prepared.

I consider that the further information plans listed above, under paragraph 5.3, show in outline the works concerned and so their identification would not have needed to await their detailed presentation.

I note that the Road Design Report only refers to “a major road improvement scheme” to Pulladuff Road, i.e. the L2455, whereas the further information plans listed above show some works to this Road, but also works to Coolkellure Road (L6453) and Coolkellure Rise (L6453), too. Thus, while there is some overlap in the works referred to in this Report and on these plans, they do not equate with one another. The PA’s memo, submitted at the subsequent appeal stage, identifies this overlap, see paragraph 5.4 above, while it underscores this difference, too.

5.7. The referrer proceeds to summarise the PA’s position, as referred to under paragraph 5.5 above, before critiquing the same. I will summarise and discuss each of the criticisms below.

- The referrer draws attention to the memo submitted to the Board and dated 28<sup>th</sup> July 2005. This memo omits from its heading the local road number L2455. Significance is attached to this omission.

I consider that this omission is immaterial, as the contents of the memo explicitly refer to the Pouladuff Road, i.e. the L2455.

- The referrer states that the special contribution was calculated on the basis of the earlier Road Design Report rather than the subsequent memo.

I note, however, that the two figures, cited above, are similar.

- The referrer draws attention to the exact wording of Condition No. 81 in which the cost of works pursuant to Condition No. 52 are not said to directly overlap with the road improvements scheme but the former “directly overlaps” with the latter, i.e. the cost of works pursuant to Condition No. 52 can be wholly offset. The referrer also draws attention to the principle that planning permissions should be capable of being self-interpreting. Condition No. 81 refers to a road improvement scheme and links this scheme to overlapping works cited under Condition No. 52. Thus, in the absence of any other elucidation, the two can be equated.

Taking these two points in reverse, Condition No. 1 refers to “the plans and particulars” lodged with the PA originally and then under further information on 14<sup>th</sup> and 29<sup>th</sup> March 2005. The particulars thus lodged on 14<sup>th</sup> March 2005 include a “Further Information Submission” in which the PA’s further information request is engaged with. Thus, Paragraph 3 of the PA’s letter of request dated 6<sup>th</sup> December 2004 is reproduced in which the following is stated: “Please note also that the public road bordering the site is on a list of Schemes due to be upgraded. You are advised to contact Pat Farrell, Senior Engineer, County Hall regarding the following: Upgrading the existing public road...” Thus, Condition No. 1 references a Scheme for “the public road bordering the site”, which pre-exists the applicant’s proposal. Insofar as this proposal would interface with this public road, there was a need for the applicant to liaise with the said Senior Engineer.

While the public road singular is not formally identified, Pouladuff Road borders the site and so it fits this description. The submitted further information plans show works to this Road, indeed, the most detailed of these plans, submitted on 29<sup>th</sup> March 2005, show works exclusively to it (Drawing Nos. RH-ENT1-PO1 & RH-ENT2-PO2). The Roads Design Report dated 6<sup>th</sup>

April 2005, confirms this identification, as Pouladuff Road is the only public road in the locality of the site that is the subject of a pre-existing Road Improvement Scheme.

I consider that, as only Pouladuff Road is the subject of the Road Improvement Scheme, the logic of offsetting road works against the cost of this Scheme would only apply to such works on this Road, as only these works would be capable of overlapping with works comprised in the said Scheme.

In the light of the above considerations, I do not accept that the road improvement scheme cited in Condition No. 81 can be equated to the works to the public road cited in Condition No. 52. Furthermore, if there were a one-to-one-correspondence in this respect, then the offset would completely extinguish the special contribution insofar as it refers to road works. Accordingly, this element of Condition No. 81 would be illogical and superfluous.

While I acknowledge the referrer's grammatical analysis of Condition No. 81, I consider that this needs to be weighed in the light of the foregoing discussion in which it is evident that the public road, which is the subject of the pre-existing road improvement scheme, is Pouladuff Road, i.e. the L2455.

- The referrer comments on why Condition No. 81 refers to "the said road improvement scheme". Essentially, it contends that this was to distinguish that portion of the special contribution attributable to road improvement works from that portion that is attributable to the provision of sports and recreation facilities.

I do not disagree with this commentary.

- The referrer contends that the methodology used by the PA to calculate that portion of the special contribution that is attributable to the road improvement scheme has been overturned under more recent appeals. It states that Condition No. 81 could thus be overturned, too, unless the applicant's position on the admissible offset is accepted.

I consider that this matter lies beyond the scope of the current point of detail referral.

- 5.8. Having regard to my above assessment of the referrer's case, I do not accept that the cost of all road improvement works to the local road network undertaken by the developer in accordance with Condition No. 52 can be offset against that portion of the special contribution that pertains to road improvement works in Condition No. 81. Instead, I consider that, in the light of the totality of the planning permission granted to application 04/7674, the offset is for the cost of those works undertaken to Pouladuff Road, i.e. the L2455 only, as it is this Road that is the subject of the PA's Road Improvement Scheme.
- 5.9. The referrer also requests that the offset should extend to all the costs that the PA would have incurred if it had undertaken the same works as those undertaken by the referrer as the developer. It thus states that land acquisition costs and cartage and waste disposal costs should be include within the calculation of the offset.
- 5.10. I consider that the basis of the calculation of the offset should reflect the basis of the calculation of the special contribution, insofar as it relates to road works. This basis is set out in the PA's memo dated 28<sup>th</sup> July 2005. It explicitly includes land acquisition costs in its calculation but not cartage and waste disposal. I therefore consider that the former rather than the latter should be allowed for in the calculation of the offset.

## 6.0 Recommendation

I recommend that the Board should decide this referral in accordance with the following draft order.

**Whereas** by order dated 6<sup>th</sup> October 2005, An Bord Pleanala, under appeal ref. no. PL04.212515, confirmed Condition No. 80 and amended Condition No. 81 attached to the planning permission granted to Ruden Homes Ltd for the construction of a total of 554 no. residential units comprising:

- (a) 45 no. five-bed detached, 8 no. three-bed detached, 26 no. four-bed semi-detached, 144 no. three-bed semi-detached, 8 no. four-bed terraced, 292 no. three-bed terraced and 31 no. two-bed apartments,

- (b) 1 no. creche (586 sqm),
- (c) 1 no. shop (163.8 sqm),
- (d) Associated car parking,
- (e) 3 no. electricity sub-stations,
- (f) Construction of a new vehicular and pedestrian entrance from the existing road on the north western frontage of the site,
- (g) A second entrance for vehicular and pedestrian access from the existing road at the western frontage of the site onto Matthew Hill cross road, and
- (h) Provision of bin storage, plant, landscaping/recreational amenities and all other site development and ancillary works,

On a site of 49.9 acres at Lehenagh Beg and Lehenagh More, Pouladuff, Togher, County Cork:

**And whereas** Condition 81 attached to the said permission required the developer to pay a special contribution in respect of road improvement works for an amount to be “offset by the cost of works pursuant to condition number 52 which directly overlaps with the said road improvement scheme”:

**And whereas** the developer and the planning authority have failed to agree on the works that are admissible within the said offset and so the matter has been referred by the developer to An Bord Pleanala on the 30<sup>th</sup> March 2020 for determination:

**Now therefore** An Bord Pleanala, in exercise of the powers conferred in it by Section 34(5) of the Planning and Development Act, 2000 – 2020, hereby determines that the works in view are those works that have been undertaken by the developer to the public road, the L2455, only and that the basis for assessing the cost of these works includes land acquisition costs but not cartage and waste disposal costs.

### **Matters considered**

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

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Hugh D. Morrison  
Planning Inspector

18<sup>th</sup> August 2020