



An
Bord
Pleanála

Inspector's Report ABP-309062-20

Referral	Point of detail regarding a financial contribution relating to Planning Authority Register Reference No. 06/882 and extended by Planning Authority Register Reference Nos. 11/334 and 17/243.
Location	Mortarstown, Carlow
Planning Authority	Carlow County Council
Planning Authority Reg. Ref.	06/882
Referral Type	Point of Detail
Referred By	Byrne and Byrne Ltd.
Observer(s)	None.
Date of Site Inspection	None required.
Inspector	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 with respect to certain points of detail pertaining to the payment of the development contributions imposed by way of conditions 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

- 3.1.1. On 16th January, 2007 a grant of permission was issued by Carlow County Council under PA Ref. No. 06/882 for the construction of 130 No. dwellings, 1 No. crèche, 20 No. serviced sites, a section of inner relief road, and all associated site works, at Mortarstown, Carlow.
- 3.1.2. General development contributions applicable to the residential component of that scheme were imposed as per the following conditions:

Condition No. 19: In relation to the 20 no. serviced sites, they shall be each subject to a full planning application at which stage the house design will be agreed upon and the relevant development levy in relation to community, recreation, parks and leisure applicable.

Reason: In the interests of the orderly development of this area.

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 No. 22: A development contribution of €263,519.72 to be paid before the development is commenced, in respect of connection to public wastewater 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 No. 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 No. 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.

3.1.3. General development contributions in respect of the proposed crèche were sought as follows:

Condition No. 27: A development contribution of €1,450.27 to be paid before the development is commenced, in respect of amenities which will facilitate the proposed crèche.

Reason: In order to contribute to the cost of Local Authority services which facilitate the crèche.

Condition No. 28: A development contribution of €2,905.03 to be paid before the development is commenced, in respect of ancillary matters which will facilitate the proposed crèche.

Reason: In order to contribute to the cost of Local Authority services which facilitate the crèche.

3.1.4. Special development contributions were also imposed:

Condition No. 26: A special development contribution of €100,000.00 to be paid before the development is commenced, in respect of water network improvements which will facilitate the proposed development.

Reason: In order to contribute to the cost of Local Authority services which facilitate the development.

Condition No. 29: A special development contribution of €175,000 to be paid before development is commenced for amenity and recreation works which will facilitate the proposed development.

Reason: In order to contribute to the cost of Local Authority services which facilitate the development.

3.1.5. In addition to the foregoing, the cost of carrying out the road works was to be defrayed by development levies as follows:

Condition No. 17: The scale of this application requires a high standard of road access. The external access roadway as described in the submitted plans shall have a carriageway of width 10 metres, a grass verge on the south side of 3 metres, a footpath / cycle

lane / verge of 3.5 metres also on the south side and a grass verge of width 3 metres on the north side. The road shall be constructed to an alignment prepared by Carlow County Council. The road when completed shall be taken in charge by Carlow County Council. The cost of carrying out the roadworks shall be defrayed by development levies.

Reason: In the interests of the orderly development of this area.

- 3.1.6. While works on the construction of the permitted development have commenced (with the duration of the original grant of permission having been extended under PA Ref. Nos. 11/334 & 17/243) the wider scheme remains incomplete. Some development contributions have been paid in respect of completed units.
- 3.1.7. A subsequent dispute with respect to the application of reduced development contributions pursuant to Section 29 of the Urban Regeneration and Housing Act, 2015 was determined by the Board under ABP Ref. No. ABP-303399-19.
- 3.1.8. By way of further background, it should also be noted that prior to the decision to grant permission for PA Ref. No. 06/882, the developer / referrer (i.e. Nicholas Byrne, trading as Byrne & Byrne, or his body corporate or assignee as so determined) entered into an 'Agreement' with Carlow County Council signed on 6th October, 2006 with respect to the construction of part of the so called Carlow Southern Relief Road on lands located at Moanacurragh, Carlow.

4.0 Planning History

4.1. On Site:

- 4.1.1. PA Ref. No. 06882. Was granted 16th 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 10th February, 2012 permitting Byrne & Byrne Limited an 'Extension of Duration' of PA Ref. No. PL06/882 until 15th January, 2017.

- PA Ref. No. 17243. Was granted on 6th October, 2017 permitting Byrne and Byrne Ltd. an 'Extension of Duration' of PA Ref. Nos. PL06/882 & PL11/334 until 31st December, 2021.
- 4.1.2. PA Ref. No. 09339. Was granted on 11th 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.
- 4.1.3. ABP Ref. No. ABP-303399-19. Point of detail referral with the Board determining on 29th May, 2019 that the amount of the development contributions payable under the terms of condition numbers 20, 21, 22, 23 and 24 of planning register reference number 06/88, as reduced in accordance with the Carlow County Council Development Contribution Scheme, 2017-2021 adopted on the 13th February, 2017 pursuant to the provisions of section 48(3A)(b) – (3B) of the Planning and Development Act, 2000, as amended, in respect of any house or houses that had not been constructed and any house or houses that had been constructed but had not been rented, leased, occupied or sold, was to be exclusive of any interest charge sought to be imposed under the terms of the current Development Contribution Scheme.

5.0 Policy and Context

- 5.1. The *Joint Spatial Plan for the Greater Carlow Graiguecullen Urban Area, 2012-2018* (extended until 4th 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 13th 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 on for the recalculation of the development contributions with Carlow County Council having adopted a new Development Contribution Scheme effective from 13th February, 2017. The rejection of that application was subsequently referred to the Board (ABP Ref. No. ABP-

303399-19) which directed the Planning Authority to apply Section 29 and without the application of interest, as provided for in the 2017 Development Contribution Scheme.

Other issues relating to the payment of development contributions are now in dispute and thus the developer has referred these matters to the Board for determination.

- By way of background, on 6th October, 2006 the developer / referrer (Byrne & Byrne Ltd.) entered into a signed agreement (copy attached) with Carlow County Council with respect to lands at Moanacurragh, Carlow, and the construction of part of the so-called 'Carlow Southern Relief Road' (an objective of the Carlow Local Area Plan, 2002) which on completion would facilitate orderly and safe access to the lands and in due course be used by the public as a relief road in Carlow. The Council is of the opinion that this agreement is binding on the developer and takes precedence over the grant of permission issued in respect of PA Ref. No. 06882 on 16th January, 2007 which authorised the construction of 130 No. dwellings, 1 No. crèche, 20 No. serviced sites, an element of the inner relief road, an associated site works, all at Mortarstown, Carlow.

It is the contention of the Council that the agreement of October, 2006 (referred to as a 'Section 47 agreement' by the Local Authority) supersedes both the grant of permission for PA Ref. No. 06882 and the Board's determination of ABP Ref. No. ABP-303399-19 to the effect that Section 29 of the Urban Regeneration and Housing Act, 2015 does not apply to the grant of permission by reason of that agreement. The Council has further contended that if Section 29 were to apply then the developer must apply to Irish Water and pay the charges applicable under its charging policy as there are no provisions in the current Development Contribution Scheme covering charges for water services. It is apparent from the October, 2006 agreement that it centres around the construction of a roadway and the offset of associated costs against planning contributions.

- It is the referrer's position that the agreement of October, 2006 is not binding on the grant of permission issued under PA Ref. No. 06882 for the following reasons:

- a) The agreement predates the planning application and the subsequent grant of permission.
- b) The planning decision makes no reference to the agreement.
- c) The report of the A/Senior Planner dated 4th December, 2006 (copy attached), which recommended a grant of permission for PA Ref. No. 06882 and specified the development contributions, makes no reference to the agreement.
- d) Paragraph 4 of the agreement states:

'The estimate of Construction Costs and Levies as set out by Carlow County Council in Schedule A is agreed by both parties as being a substantial estimate and unlikely to be exceeded'.

- A comparison of the conditions attached to PA Ref. No. 06882 and Schedule A of the October agreement is set out below:

Condition No. 24: A development contribution of €675,587.57 to be paid before the development is commenced in respect of the Development Contribution Scheme specifies to lands within the Carlow Town Environs Local Area Plan.

Schedule A: Development Levies Carlow Environs Local Area –
20.41 acres @ €27,368 / acre = €558,540

The grant of permission requires a development contribution greater than the agreement in the amount of €117,044 and it is submitted that this is a substantial cost over the figure contained in the agreement and is sufficient in itself to negate the agreement.

Condition No. 19: In relation to the 20 No. serviced sites, these shall each be subject to a full planning application.

Schedule A: Houses – 130 No. @ €3,611 / house = €489,430
Sites – 20 No. @ €3,611 / site = €72,220

The agreement requires the payment of contributions for 20 No. serviced sites as an offset for road construction works even though the sites are subject to individual planning applications.

- It is considered that the grant of permission issued for PA Ref. No. 06882 supersedes the October, 2006 agreement and that the Council is bound by the terms and conditions of that decision. If the Council had wished to apply or rely on the agreement then it ought to have expressly referred to it in the grant of permission. It is further submitted that the differences between the agreement and the permission are such that the agreement is rendered null and void.
- The contention by the Council that, as it no longer includes charges for water services in its Development Contributions Scheme, the developer must apply to and pay Irish Water under the current and more costly water charging policy, is a threatening tactic designed to intimidate the developer and force acceptance of the Council's legally invalid position.
- The methodology for the collection of contributions relating to water services has been determined by the Department of Housing and Planning with Section 29 of the Urban Regeneration and Housing Act, 2015 to be applied to the non-water elements of the contributions whereas the water services elements are to be applied as per the original permission. Contributions are to be collected by the local authority and the water services portion remitted by it to Irish Water (as is confirmed in the accompanying correspondence from the Department of Housing, Local Government and Heritage dated 19th November, 2020). If the developer were to pay the charges to a body other than the local authority then it would not be possible for the Council to issue a letter of compliance.
- Condition No. 17 of the grant of permission issued for PA Ref. No. 06882 states that:

'The cost of carrying out the road works shall be defrayed by development levies'.

The roadway as constructed by Byrne & Byrne Ltd. is substantially complete and, in addition to carrying the full cost, the referrer has also been required to

pay a portion of the levies. In this respect, it is submitted that the referrer should receive credit against levies to the full extent of the cost of the road works and only after those costs have been defrayed in full should Carlow County Council be entitled to receive financial contributions (please refer to the accompanying letter from Carlow County Council dated 19th June, 2008).

- The Board is requested to determine the following:
 - 1) It is a requirement arising from Condition No. 17 of PA Ref. No. 06882 that the costs of the road construction be defrayed in full before any payments on foot of contributions are demanded or payable.
 - 2) The Board's decision in respect of ABP Ref. No. ABP-303399-19 is subject to the application and interpretation as set out by the Department of Housing and Planning in its letter dated 19th November, 2020.
 - 3) The permission granted under PA Ref. No. 06882 is standalone as evidenced by the failure to refer to the agreement in either the final grant of permission or the report of the A/Senior Planner.
 - 4) The agreement entered into on 6th October, 2006 does not regulate the development in question as it predates the permission and no reference is made to it in the planning permission.
 - 5) Due to the differences between the terms of the agreement and the conditions of the permission which were determined unilaterally by Carlow County Council, the agreement is void and ineffective.

6.2. Planning Authority Response

- Several of aspects of the referrer's application are outside the scope of a referral under the Planning Acts and the referrer is in error in seeking a ruling on matters of Contract Law which can only be determined by the Courts.
- Carlow County Council emphatically rejects the assertion that the Council '*has engaged in a threatening tactic designed to intimidate the developer and force acceptance of the Council's legally invalid position*'. The Council has discharged its statutory function in a transparent and professional manner and

has engaged proactively with the developer and its representatives to resolve all matters in a mutually satisfactory manner.

- The referrer's agent has included "without prejudice" correspondence between the Council and the developer's solicitors in the referral.
- It is considered that the intent of the referral is to pick and choose between the most advantageous elements of the Contract (Agreement) entered into pursuant to Section 47 (the 2006 agreement), the agreed Payment Plan (2014), and the Board's Order for ABP Ref. No. ABP-303399-19 (2019).
- There is a Contract (Agreement) (dated 6th October, 2006) under Section 47 of the Planning and Development Act, 2000, as amended, and a payment plan (dated 4th September, 2014) in place between the Council and the developer (copies attached). The payment plan was proposed by the developer and accepted by the Council on 8th September, 2014 i.e. after the grant of permission for PA Ref. No. 06882. Accordingly, there are two linked and legally binding contracts in place between the Council and the developer. The Council is also in receipt of professional advice that the contracts are not nullified by Section 29 of the Urban Regeneration and Housing Act, 2015.

The existence of these contracts was not addressed in the Board's determination of ABP Ref. No. ABP-303399-19 as it was in the inspector's opinion "*beyond the remit of the subject referral*". In its order "*The Board determined that amounts payable in accordance with the terms and conditions of the permission under conditions no 20, 21, 22, 23 and 24, should be reduced in accordance with the Carlow County Council Development Contribution Scheme 2017-2021*".

The application of the Board's Order for ABP Ref. No. ABP-303399-19 nullifies the collection of the development contributions sought by Condition Nos. 21 & 22 of PA Ref. No. 06882 with respect to the provision of water and wastewater services to facilitate the development i.e. when the conditions are reduced as per the Order in accordance with the Carlow County Council Development Contribution Scheme 2017-2021 they amount to € Nil. It follows therefore that implementation of the Board's Order will necessitate the developer to deal directly with Irish Water under its connection protocol. This

was brought to the referrer's attention and it is noted that prior to the Board's determination of ABP Ref. No. ABP-303399-19, the developer / referrer had been engaging directly with Irish Water and had made an application under its connections protocol.

- With respect to those matters sought to be determined by the Board:
 - 1) *It is a requirement arising from Condition No. 17 of PA Ref. No. 06882 that the costs of the road construction be defrayed in full before any payments on foot of contributions are demanded or payable.*

The Council does not agree with the referrer's interpretation of Condition No. 17. In addition, it is noted that the referral has requested the Board to determine that the 2006 Contract (Agreement) is void and ineffective while simultaneously seeking to continue to offset the development credits available to the developer under the 2006 Contract to defray charges levied under Condition No. 17. It is reiterated that there are two legally binding and linked contracts in place between the Council and the developer and that the referral is in error in seeking a determination on matters of Contract Law.

- 2) *The Board's decision in respect of ABP Ref. No. ABP-303399-19 is subject to the application and interpretation as set out by the Department of Housing and Planning in its letter dated 19th November, 2020.*

The decision of the Board in respect of ABP Ref. No. ABP-303399-19 is clear in that it '*determined that amounts payable in accordance with the terms and conditions of the permission under conditions no 20, 21, 22, 23 and 24 should be reduced in accordance with the Carlow County Development Contribution Scheme 2017-2021*'.

When Condition Nos. 21 & 22 are reduced as per the Board's Order they amount to nil. It follows therefore that the implementation of the Order requires the developer to deal directly with Irish Water under its connection protocol.

- 3) *The permission granted under PA Ref. No. 06882 is standalone as evidenced by the failure to refer to the agreement in either the final grant of permission or the report of the A/Senior Planner.*

The meaning behind the referrer's reference to PA Ref. No. 06/882 as a 'stand-alone permission' is unclear. In this regard, it is reiterated that there are two legally binding and linked contracts in place between the Council and the developer and that the referral is in error in seeking a determination on matters of Contract Law which can only be decided by the Courts.

- 4) *The agreement entered into on 6th October, 2006 does not regulate the development in question as it predates the permission and no reference is made to it in the planning permission.*

The Council does not agree with the referrer's interpretation. There is a Contract (Agreement) (dated 6th October, 2006) and a Payment Plan (dated 4th September, 2014) in place between the Council and the developer. The payment plan was proposed by the developer on 4th September, 2014 and accepted by the Council on 8th September, 2014 post the grant of permission for PA Ref. No. 06/882. Accordingly, the Board's attention is again drawn to the two legally binding and linked contracts between the Council and the developer while the referrer is in error in seeking a determination on matters of Contract Law which can only be determined by the Courts.

- 5) *Due to the differences between the terms of the agreement and the conditions of the permission which were determined unilaterally by Carlow County Council, the agreement is void and ineffective.*

There are two legally binding contracts in place between the Council and the developer and the referrer is in error in seeking a determination on matters of Contract Law which can only be determined by the Courts. If it was within the remit of the Board to determine that the 2006 Contract is void & ineffective, the developer would consequently incur significant losses because his credits would also become void and ineffective. The developer should take advice from his solicitor in

relation to the financial consequences of seeking to have the 2006 Contract (agreement) deemed void & ineffective.

6.3. Observations

None.

6.4. Further Responses

6.4.1. *Response of the Referrer to Circulation of the Planning Authority's Submission:*

- The submission by Carlow County Council is based on two issues:
 - a) The agreement of 6th October, 2006 and the email of 4th September, 2014 constitute a contract that overrides the grant of permission for PA Ref. No. 06/882 and Section 29 of the Urban Regeneration and Housing Act, 2015.
 - b) The Board's determination of ABP Ref. No. ABP-303399-19 requires the development company to apply for water services to Irish Water.
- The initial referral submission details why the '2006 Agreement' cannot be considered to constitute a Section 47 agreement and why it cannot be construed as a contract that affects the permission granted:
 - It was made before the grant of planning permission.
 - It is not referenced in the condition attached to the grant of permission nor does not it form part of that approval.
 - It is not referenced in the documentation supporting the grant of permission (including the reports of the A/Senior Executive Planner and the Roads Section). Furthermore, the figures in the agreement differ significantly from those contained in the grant of permission.
 - The grant of permission issued for PA Ref. No. 06/882 was extended under PA Ref. Nos. 11/334 & 17/243 and no reference is made to the agreement nor are its terms included in any of the conditions.
 - A new development contribution scheme was adopted by Carlow County Council on 13th February, 2017.

The referrer has been advised that the grant of planning permission takes precedence over the 2006 Agreement and that the Council cannot rely on the agreement to enforce the conditions attached to the grant of permission which relate to financial contributions. This is a question of the application of the planning permission and the basic principles of planning law. It is not a contractual legal matter.

Accordingly, the 2006 Agreement is irrelevant to the issue before the Board for consideration.

If the Council was to rely on the 2006 Agreement, there is an argument of unjust enrichment i.e. that the monetary gain it was entitled to by way of law was secured through the imposition of the conditions and it could not legitimately seek to enforce an agreement which preceded the planning process (which allows for third party participation) and where the developer ultimately became liable to the Council by way of planning conditions. This is particularly so where the Council has both a contractual remedy for non-compliance with the conditions under the enforcement provisions of the Planning and Development Act, 2000, as amended.

It is difficult to see how the Council could rely on the 2006 document as a binding contractual agreement without having regard to the terms and conditions of the grant of permission.

In any event, it is submitted that the Council would have significant difficulty in relying on the 2006 agreement when it subsequently granted planning permission and imposed development contributions (and twice extended the permission).

The referrer is also of the view that while the Urban Regeneration and Housing Act, 2015 did not necessarily 'nullify' the 2006 agreement, as a matter of contractual law it was overtaken by the subsequent grant of permission which does have a presumption of validity and where the Council was levying development contributions in accordance with the Development Contribution Scheme.

- In response to the Council's assertion that the September, 2014 email constitutes a contract, it is submitted that this only concerned a request for

confirmation from Carlow County Council as regards compliance with conditions requiring the payment of financial contributions totalling €5,631.46 in respect of a dwelling house.

By way of background, in correspondence dated 7th January, 2008 the Council advised the developer / referrer that *'A new development contribution collection policy has been implemented by Carlow Local Authorities in relation to payment of all charges. In your case this means that you will have to pay the Special Development charges upfront'*. It then requested the payment of €41,314.64 for each block of 10 No. houses. Subsequently, in a separate letter dated 19th June, 2008 the Council informed the developer / referrer that *'As already agreed this sum is due to be paid in tranches of 10 units at a time and also specify which 10 units you are paying for'* before stating that *'in monetary terms'* this would equate to €56,314.59 being payable for each block of 10 No. houses.

It is clear from the foregoing that the Council has simply made unilateral statements as regards the arrangement for the payment of contributions and that the correspondence in question does not amount to any agreement between the parties. Furthermore, both letters state that no letters of compliance will be issued by the Council until such time as the development contributions have been paid as outlined.

The power of the Council to refuse condition compliance prevents the developer / referrer from completing any sales and, therefore, the Local Authority should not be able to exercise that power other than in accordance with the conditions of the grant of permission and the planning laws.

The key point is that the contribution rate of €5,631.56 per unit was determined by the Council and not by the referrer while the email of 4th September, 2014 simply serves to restate the position previously asserted by the Local Authority in earlier correspondence to the referrer and to seek confirmation of same. It is difficult to understand how the September, 2014 email (which requests the Council to confirm what it had already decided and includes an attachment setting out the financial conditions as attached to the grant of permission) could be construed as a contract. It should also be noted

that this email predated Section 29 of the Urban Regeneration and Housing Act, 2015 which served to reduce contributions in instances where a new development contribution scheme had been adopted which benefited the developer in respect of unsold units.

- The Board's determination of ABP Ref No. ABP-303399-19 could be considered deficient in that it did not deal with Condition Nos. 21, 22 & 26 in accordance with the provisions of Circular 21/2013 as confirmed by the Ombudsman Decision L55/17/0585.
- Carlow County Council is aware of the methodology for the calculation of revised development contributions as evidenced by the accompanying emails and other correspondence. However, it appears that the Council was satisfied to apply Section 29 in accordance with Circular PS 21/2013 and without the superimposition of the October, 2006 agreement as long as the penal and retrospective interest was paid (the imposition of which was rejected by the Board in its determination of ABP Ref No. ABP-303399-19).

There was never any reference to the fact that the current development contribution scheme does not include for water service charges or a need to apply to Irish Water if Section 29 were to be applied.

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'.

7.2. 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.

7.2.2. Circular Letter PS21/2013: ‘*Transfer of water service functions to Irish Water: planning issues*’ issued by the Department of the Environment, Community and Local Government in December, 2013 (on foot of the enactment of the Water Services (No. 2) Act, 2013 which transferred a range of statutory water services functions from local authorities to Irish Water from 1st January, 2014) states the following with respect to development contributions:

‘In respect of permissions under section 34 of the Planning Act granted prior to 1st January 2014, the full development contribution (where such was attached as a condition of the planning permission) including, where relevant, the portion in respect of water services infrastructure, must be paid to the planning authority, in accordance with the terms of the permission.

After 1st January 2014, planning authorities, when granting permission, should no longer include a portion in respect of water services infrastructure in any development contribution applied. A charge in respect of water services infrastructure provision in respect of developments granted planning permission after 1st January 2014 will instead be levied by Irish Water . . .

The Department will issue guidance on the appropriate transfer of development contributions by planning authorities to Irish Water. It should be noted that the Water Services (No. 2) Act 2013 provides that any monies transferred on this basis must be expended by Irish Water for the purposes of the provision of water services in the functional area of the planning authority.

New development contribution schemes made by planning authorities after 1st January 2014 should not contain charges in respect of water services infrastructure’.

8.0 Assessment

8.1. From a review of the available information, it can be determined that the substantive issue in dispute between the referrer and the Planning Authority is the mechanism by which the development contributions sought in respect of PA Ref. No. 06/882 are to be calculated and paid having regard to the following key considerations:

- 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);
- The Board's previous determination of a point of detail referral concerning the calculation of development contributions under ABP Ref. No. ABP-303399-19;
- The revised protocols for the payment of development contributions towards water services infrastructure arising from the transfer of water service functions to Irish Water;
- The offsetting of contributions against those costs already incurred by the developer as a result of the partial construction of the Carlow Southern Relief Road;
- The contractual obligations (if any) arising from an agreement signed between the referrer / developer and Carlow County Council on 6th October, 2006 with respect to the construction of part of the so called Carlow Southern Relief Road on lands located at Moanacurragh, Carlow; and
- Any payment plans agreed between the referrer / developer and the Local Authority.

8.2. This dispute has culminated in the submission of the subject referral with the developer seeking a determination on the following related matters:

- 1) It is a requirement arising from Condition No. 17 of PA Ref. No. 06882 that the costs of the road construction be defrayed in full before any payments on foot of contributions are demanded or payable.

- 2) The Board's decision in respect of ABP Ref. No. ABP-303399-19 is subject to the application and interpretation as set out by the Department of Housing and Planning in its letter dated 19th November, 2020.
- 3) The permission granted under PA Ref. No. 06882 is standalone as evidenced by the failure to refer to the agreement in either the final grant of permission or the report of the A/Senior Planner.
- 4) The agreement entered into on 6th October, 2006 does not regulate the development in question as it predates the permission and no reference is made to it in the planning permission.
- 5) Due to the differences between the terms of the agreement and the conditions of the permission which were determined unilaterally by Carlow County Council, the agreement is void and ineffective.

8.3. In assessing the subject matter of this referral, at the outset I would draw the Board's attention to the specific legislative provisions set out in Section 34(5) of the Planning and Development Act, 2000, as amended, and the limited scope of those matters which may be referred under that section to the Board for determination. Section 34(5) states that conditions imposed under subsection (1) on a grant of permission may provide for 'points of detail' to be agreed between the planning authority and the person carrying out the development. It subsequently provides a mechanism whereby those matters may be referred to the Board for determination should the planning authority and the person carrying out the development fail to reach agreement. The pertinent issue is that the disagreement resulting in the referral to the Board arises from a failure to agree a 'point of detail' derived from a condition of the grant of permission. Consequently, this serves to limit the scope of those matters which can be referred to the Board under Section 34(5) with any matters falling outside of those provisions beyond its jurisdiction. Therefore, the questions posed by the referrer should be reviewed strictly in accordance with the legislation and without deviation into matters beyond the Board's remit.

- 8.4. (1) *It is a requirement arising from Condition No. 17 of PA Ref. No. 06882 that the costs of the road construction be defrayed in full before any payments on foot of contributions are demanded or payable:*
- 8.4.1. Condition No. 17 of PA Ref. No. 06882 refers to the construction of the external access roadway shown on the approved plans and includes a provision whereby the completed road is to be taken in charge by Carlow County Council. It also states that the cost of carrying out these road works shall be defrayed by development levies. However, the condition makes no reference to the timing of any payment of development contributions in terms of defraying the costs of the road construction nor does it provide for any mechanism whereby the arrangements for any such payments are to be agreed between the developer and the Planning Authority. In effect, Condition No. 17 only comprises a series of statements specifying certain requirements.
- 8.4.2. In my opinion, it is not open to the Board to interpret a condition attached to a final grant of permission in such a manner as to provide for an arrangement or other such mechanism which is not already included for in the condition itself. Similarly, the Board is not empowered to alter the wording of such a condition in order to address any perceived deficiency nor is it entitled to add any provision in its interpretation of that condition. In this regard, I am inclined to suggest that it is beyond the provisions of Section 34(5) for the Board to make a ruling on this aspect of the referral given that Condition No. 17 is silent on when the cost of carrying out the road works is to be defrayed by development levies.
- 8.4.3. Should the Board disagree with the foregoing assessment and seek to make a determination on Item No. 1 of the referral, it is of relevance to note that all of the development contributions sought by the grant of permission issued for PA Ref. No. 06882 (with the exception of those required by Condition No. 19 which refers to the serviced sites) are required *'to be paid before the development is commenced'*. Therefore, by extension, if the contributions are required to be paid in advance of the commencement of development, it would follow that any 'defrayment' or offsetting of the costs of the subsequent road construction would be achieved by way of reimbursing or crediting the developer i.e. the costs of the road construction arising from Condition No. 17 of PA Ref. No. 06882 would be credited after the payment of the development contributions in full.

- 8.4.4. With respect to the assertion by the Planning Authority that the referrer is seeking to rely on the terms of an agreement with Carlow County Council made on 6th October, 2006 (with a view to offsetting the development credits available to it under that 'contract' so as to defray the charges levied under Condition No. 17) while also asking the Board to determine that the October, 2006 agreement is void and ineffective, I propose to consider the matter of the 2006 agreement between the referrer and the Local Authority elsewhere in this report.
- 8.5. *(2) The Board's decision in respect of ABP Ref. No. ABP-303399-19 is subject to the application and interpretation as set out by the Department of Housing and Planning in its letter dated 19th November, 2020:*
- 8.5.1. The application and interpretation of the Board's Order in respect of ABP Ref. No. ABP-303399-19 is subject to all applicable legislative and regulatory provisions. I do not propose to comment further in this regard on the basis that the subject matter for which a determination has been sought is not within the scope of Section 34(5) of the Planning and Development Act, 2000, as amended, in that it does not involve the referral of a matter relating to a failure to agree a 'point of detail' deriving from a condition of the grant of permission.
- 8.6. *(3) The permission granted under PA Ref. No. 06882 is standalone as evidenced by the failure to refer to the agreement in either the final grant of permission or the report of the A/Senior Planner:*
- (4) The agreement entered into on 6th October, 2006 does not regulate the development in question as it predates the permission and no reference is made to it in the planning permission:*
- (5) Due to the differences between the terms of the agreement and the conditions of the permission which were determined unilaterally by Carlow County Council, the agreement is void and ineffective:*
- 8.6.1. With respect to Item Nos. 3, 4 & 5 of the referral, I am similarly satisfied that the matters for which a determination has been sought are not within the scope of Section 34(5) of the Planning and Development Act, 2000, as amended, in that they do not involve the referral of a matter relating to a failure to agree a 'point of detail' deriving from a condition of the grant of permission.

8.6.2. Furthermore, it is clear that the substantive issue with respect to Item Nos. 3, 4 & 5 concerns the relationship between the grant of permission issued for PA Ref. No. 06882 and the agreement / contract entered into by the referrer with Carlow County Council dated 6th October, 2006 (including the continued validity of that agreement and any obligations deriving from it). In my opinion, Item Nos. 3, 4 & 5 of the referral concern issues of contractual law and, therefore, it would be inappropriate for the Board to make any determination in respect of those matters.

9.0 Recommendation

DISMISS the referral under subsection (1) (b) of section 138 of the Planning and Development Act, 2000, as amended, based on the reasons and considerations set out below.

Reasons and Considerations:

Having regard to the provisions of section 34(5) of the Planning and Development Act, 2000, as amended, it is considered that the conditions attached to Carlow County Council Planning Register Reference No. 06/882 do not provide for the points of detail which are the subject of this referral to be agreed between the planning authority and the person carrying out the development and, therefore, do not provide for the referral of the matter to the Board for determination in the event that the planning authority and that person cannot agree on the matters.

Robert Speer
Planning Inspector

6th October, 2021