



An  
Bord  
Pleanála

## Inspector's Report

### ABP-309918-21

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<b>Development</b>	Construction of 6 dwellings as an extension to partially completed housing development.
<b>Location</b>	Castlehyde Park, Millbanks , New Ross, Co Kilkenny
<b>Planning Authority</b>	Kilkenny County Council
<b>Planning Authority Reg. Ref.</b>	20413
<b>Applicant(s)</b>	Peraghon Limited
<b>Type of Application</b>	Permission
<b>Planning Authority Decision</b>	Grant Permission
<b>Type of Appeal</b>	First Party appeal against condition
<b>Appellant(s)</b>	Peraghon Limited
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	Not visited
<b>Inspector</b>	Angela Brereton

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## 1.0 Site Location and Description

- 1.1. The site forms part of an unfinished section of Castlehyde Park estate, Millbanks, New Ross. It is irregularly shaped and is located at the south-eastern corner of the overall development granted under Reg.Ref. P04/2073 (parent permission). It includes the main entrance to the application site. The current proposal would complete the row with the existing 5no. unfinished houses adjoining the proposed development and facing the public road.
- 1.2. Access to the site is from internal road no.2 connected to the main estate entrance. The entrance serving the site is from Millbank Grove and is within the 50kph village maximum speed limit for New Ross Town.

## 2.0 Proposed Development

- 2.1. Permission is sought at Castlehyde, Millbanks, New Ross, Co. Kilkenny for the following:
  - The erection of 6no. 2 storey semi-detached dwellings as an extension to existing partially completed housing development,
  - All associated site development works including storm attenuation tank and alterations to the existing site entrance from that granted under Reg.Ref. 04/2073.
- 2.2. Documentation submitted with the application includes the following:
  - A letter has been submitted from Bryan McCarthy & Associates Consulting Engineers providing a description and rationale for the proposed development.
  - Architectural and Engineering drawings.

## 3.0 Planning Authority Decision

### 3.1. Decision

On the 12<sup>th</sup> of March 2021 Kilkenny County Council granted permission for the proposed development subject to 19no. conditions. These conditions generally

concern development contributions, infrastructure i.e. connections to public water and public sewer (Irish Water), public lighting, roads including entrance, site development works, submission of a construction and traffic management plan, landscaping and boundary treatment, waste management plan, surface water drainage and connection to services. Condition no.19 which concerns taking in charge and development bond is the subject of this appeal.

### **3.2. Planning Authority Reports**

#### **3.2.1. Planning Reports**

The Planner's Report had regard to the locational context, planning history and policy and to the interdepartmental reports. They note no submissions were made. Their Assessment included the following:

- They note the previous planning history (Reg.Ref. 04/2073 refers) and the unfinished nature of the estate.
- This estate is subject to a current taking in charge planning application with Kilkenny County Council.
- A Screening exercise was completed, which showed that no significant environmental impact is likely having regard to the distance of the subject site from any Natura 2000 site.
- They considered that the proposed six dwelling units satisfactorily integrate with the existing estate design.
- They had some concerns about the design and landscaping of the public open space and pedestrian access arrangements.
- They noted the concerns raised by Roads Design.

Further Information was sought to include the following:

- Roads Design details including relative to the turning bay, crossing point, footpaths and paving and public lighting.
- Irish Water records indicate the presence of Irish Water infrastructure within the red line boundary of the planning application site and request further details.

- Further detail on the landscaping and public open space to the front of the proposed development.
- To provide details of outstanding/remedial works required as agreed with the Council including relative to taking in charge, associated costs, responsibility and phasing of works.
- To identify waste storage facilities for segregation of waste.

#### Further Information response

Bryan McCarthy & Associates has submitted an F.I response on behalf of the applicants. In summary this includes the following:

#### *Roads*

- The turning bay layout has been altered to satisfy the requirements.
- The crossing point is now removed and the continuity in the footpath as provided by the path abutting the roadway.
- The orientation of the proposed steps and footpath has now been altered.
- Design details of public lighting have been submitted.

#### *Water*

- They enclose a copy of the Irish Water Pre-Connection feasibility letter, indicating that the proposals to connect to the water and wastewater infrastructure can be facilitated to serve the site.

#### *Landscaping/Open Space*

- The landscape proposal has been revised in line with Kilkenny DP 2014-2020. Revised drawings have been submitted. The revised proposal aims to provide usable public open spaces for safe and passive and active use.
- They deem the landscape plan to comply with the requirements of the Council and the immediate area surrounding the proposed development.

#### *Taking in Charge*

- The applicant has attempted to work alongside Kilkenny County Council since 2017 to complete the estate and the various taking in charge works. They

note concerns about costs and delays to date in trying to agree any form of taking in charge process with the council. They also refer to works carried out and to the development bond.

#### *Waste*

- They provide details of waste disposal and bin storage for each dwelling.

#### Planner's response

The Planner had regard to the F.I submitted including the revised drawings and noted that the Council's Environment, Roads and Parks Sections and Irish Water had no objections to the revised proposed subject to recommended conditions. They noted that the proposed development will complete an unfinished section of the estate and improve the visual and residential amenities of the area and progress the current taking in charge application for Castlehyde Estate. The Planner recommended that permission be granted subject to conditions.

### **3.3. Other Technical Reports**

#### Road Design

They requested that further information be submitted relative to the design of roads layout, turning bays, footpaths, access including pedestrian access and public lighting.

In response to the further information submission, they provide that the revised details submitted by the applicant are noted and are considered to have addressed the points raised in the F.I request. They recommend conditions including relative to public lighting, a Stage 3 Road Safety Audit, road-markings and signage, road/paving surfaces. Also, that a construction and traffic management plan for the proposed development be submitted. They note that a road opening licence will be required in respect of all works affecting the public road and footpaths.

#### Environment Section

They request that the applicants clearly identify the waste storage facilities for segregation of waste into dry recyclable, biodegradable and residual, having regard to both internal and external arrangements for each of the proposed units.

### 3.4. Prescribed Bodies

#### Irish Water

They recommend that further information be submitted to demonstrate the protection of existing Irish Water infrastructure on the site and compliance with their codes and practices.

### 3.5. Third Party Observations

None noted on file. The Planner's Report notes that none were submitted.

## 4.0 Planning History

As noted in the Planner's Report, this includes the following relative to permissions granted subject to conditions by Kilkenny County Council relevant to the subject application:

- Reg.Ref. P04/2073 – Permission granted for the construction of 160 houses (detached, semi-detached, terrace and courtyard house types), together with associated site works and associated services installation, all on site.

It is of note that condition no.4 of this permission omitted a number of the units and excluded development on the area shown in blue which contained 6 no. houses accessed from Road no.2. Condition no.34 referred to provision for a development bond and Condition no.38 to taking in charge.

- Reg.Ref. P06/146 – Permission for a change of layout and change of house type through the full extent of Road No.2. Reference is had to Condition No.4 of Pl.Ref.04/2073. This relates to Condition no.4 of Reg.Ref.04/2073.
- Reg.Ref.06/168 – Permission granted for change of layout and access through Road No. 4 of Planning Ref. 04/2073. Reference is had to Condition No.4 of Pl.Ref.04/2073. Condition no.7 refers to development bond.
- Reg.Ref.10/79 – Permission refused for an extension of duration of planning permission Reg.Ref. P04/2073 for the following reason:

*Having regard to the extent of works still to be completed under the permission, the Planning Authority considers that substantial works*

*were not carried out during the appropriate period and that the development would not be completed in a reasonable period of time. The Planning Authority considers that the current application for an extension of duration of permission does not comply with Section 42(1) (ii) & (iii) of the Planning and Development Acts 2000-2007.*

- Reg.Ref.10/478 – Permission granted for Extension of Duration of Reg.Ref. 04/2073 subject to Condition no.1:

*Over and above previous conditions relating to security, prior to commencement of any further phase approved under P04/2073 permission (as agreed in Bond File), the Developer shall lodge with Kilkenny County Council, a cash deposit, a bond of an insurance company, or other security to secure the provision and satisfactory completion and maintenance until taken in charge by the Council of roads, footpaths, water-mains, drains, public open space and other services required in connection with the development for remaining future phases for the development, coupled with an agreement empowering the Council to apply such security or part thereof for the satisfactory completion or maintenance of any part of the development. The form and amount of the security shall be subject to the agreement of the Planning Authority.*

*Reason: To ensure the satisfactory completion of the development.*

## **5.0 Policy Context**

### **5.1. Wexford County Development Plan 2022-2028**

While the application was considered under the Wexford County Development Plan 2013-2019, this has been superseded and the current Plan came into effect on the 25<sup>th</sup> of July 2022.

The Wexford County Development Plan 2022-2028 sets out the overall strategy for the proper planning and sustainable development of County Wexford for the plan period and beyond. The Plan relates to the whole functional area of Wexford County



Council including the areas previously under the jurisdiction of Wexford Borough Council, New Ross Town and Enniscorthy Town.

The Core Strategy supports compact growth and liveable settlements, regeneration and rejuvenation of towns. New Ross is described as a Level 2 Large Town.

Section 3.6.2 notes the strategic location and that New Ross is the fourth largest town in the County. It is an objective to prepare a Local Area Plan for the Town. A set of strategic objectives for the Town is set out in Chapter 3 (NT01 to NT11 refer). The spatial planning framework, which will incorporate this development approach, is to be set out in a newly prepared New Ross and Environs LAP.

Chapter 4 refers to Sustainable Housing. Objectives of note relative to Unfinished Housing Estates include:

*Objective SH29: To have regard to 'Managing and Resolving Unfinished Housing Developments-Guidance Manual' (Department of Environment, Community and Local Government, 2011) when preparing local area plans and assessing planning applications dealing with unfinished housing developments.*

*Objective SH30: To adopt a flexible approach to planning applications which seek to resolve issues relating to unfinished housing development and where this would result in substantial environmental or community gain. Such flexibility may include reconfiguration of a development in relation to open space, roads and circulation requirements.*

## **6.0 The Appeal**

### **6.1. Grounds of Appeal**

A First Party Appeal is made by Cunnane Stratton Reynolds on behalf of Peraghton Limited. While they are satisfied with the positive notification of the decision to grant permission, they seek revisions to Condition no.19. Their Grounds of Appeal include the following:

#### *Lack of Clarity*

- Lack of clarity in the working of Condition no.19. It appears to seek the completion of development, outside of the permitted development, already

granted permission and for which surety already existed and has been collected under a separate permission. They consider this to be unreasonable.

- They submit that such a provision is inequitable having regard to the planning history of the site and contrary to the provisions of Section 34 of the Planning and Development Act 2000, as amended.
- In the interests of clarity and for the avoidance of development delay this appeal seeks the revision of the text of Condition no.19. They request that the first paragraph of Condition no.19 be removed.

#### *Current Application*

- Of import to this appeal is the spatial and temporal ownership arrangements of the first party, who acquired the site in 2017. Details are given of ownership and folio nos.
- The Site Location Map submitted with the current application indicates the application site boundary and the ownership boundary that reflects the irregular folio extent.
- The larger original land use was the subject of Reg.Ref. 04/2073. The extent of the application boundary of Reg.Ref.04/2073 and succeeding permission: Reg.Refs 06/146 and 06/168 are presented in Figs. 3.1, 3.2 and 3.3.
- No live planning application remained on the lands upon purchase. Therefore, the first party prepared the application the subject of this appeal.

#### *Planning History - Development under Reg.Ref. 04/2073*

- They refer to the residential development permitted under Reg. Ref. 04/2073 where permission was granted over a site of 6.48ha for housing.
- Condition nos. 34 and 38 relate directly to development bond and taking in charge matters.
- They note that a commencement notice was recorded with a commencement date of 20<sup>th</sup> of February 2006.

## **Other Planning History**

### *Reg.Ref.06/148*

- Reference is had to Reg.Ref.06/146 Revision to parent permission for 0.6ha in the south eastern corner of the parent site. This allowed for a change of house type through the full extent of Road No.2.
- Final permission was subject to 14no. conditions including condition no.6 that required surety or bond and no. 14 that required observance of local authority 'Taken in Charge Protocol'.

### *Reg.Ref.06/168*

- They note Reg.Ref. 06/168 and the revisions to the parent permission for 1.07ha in the south western corner of the subject site.
- The final permission granted in August 2010 was subject to 12no. conditions including condition no.7 that required surety or bond. No reference was made to the local authority 'Taken in Charge Protocol'.
- Application for extension of duration in August 2010 under Reg.Ref. 10/478 claimed that the 'new effect of this permission' was for 32no. residential units, one of which was an apartment associated with the creche permitted under Reg.Ref. 04/2073.
- The Planner's Report associated with that permission recorded that no works had commenced in this part of the original site and that further negotiations were 'advanced' in transferring these lands for Part V purposes. No commencement notices are recorded on the online planning file.

### *Reg.Ref.10/79*

- This application was for an extension of duration of parent permission refused in April 2010. This was refused.

### *Reg.Ref.10/478*

- Extension of duration of the parent permission (Reg.Ref. 04/2073) was granted. Condition no.1 (noted in the Planning History Section above).

- The condition on the extension of duration was for '*further security for satisfactory completion of the remaining phases of the development as the existing bond does not cover the entire development*'. They submit that the authority acknowledgement of the bond of €200,000 for phase 1 of the development acted as an acknowledgement of bond for the entire development permitted under Reg.Ref.04/2073.
- They also noted the application (Sept 2010) has subsequent discussion with the Housing Section to cede the south-western portion of lands for the purpose of Part V. They note that this is altered from the Planning Officer's report associated with Reg.Ref. 04/2073 that recorded the intention to satisfy Part V by financial condition.
- An application for extension of duration in August 2010 under Reg.Ref. 10/478 claimed that the new effect of this permission for 20 no. units was to reduce the overall numbers of units permitted under Reg.Ref. 04/2073 to 124 no. houses. It was further declared that no work had commenced on foot of this permission at this time.
- This declaration is contrary to actual progression of development on site recorded at the Planner's Report (Reg.Ref.10/478) associated with the extension of duration.

#### *Summary of Planning History of current Development*

- They provide a detailed analysis of the Planning Permissions granted and a summary is provided including note of conditions relative to bonds for the surety for satisfactory completion of development. This is noted further in the Assessment below.

#### *Suspension of development of subject lands*

- The developer of the parent permission was Brendeck Ltd. Development stalled c.2010. In April 2015 a liquidator was appointed by Brendeck Ltd. It is assumed and evidenced by unfinished housing estate information issued by the local authority that no further development took place on site. In December 2015 a Receiver was appointed to Brendeck Ltd. Notice of cessation of the Receiver is recorded in October 2019.

- They have regard to folio details in Figures 1 and 2 of their Appeal. At Figure 2 is a copy of the site location map submitted with Reg.Ref. 20/413. This indicates the application site boundary and the ownership boundary that reflects the irregular folio extent.
- The land unit formerly developed by Brendick Ltd to which the planning permissions relate was sold by the Receiver, subsequently to their undertaking site clearance and remediation works including transfer of lands for the purpose of satisfying planning requirements and making the lands ready for sale.
- By the time of acquisition of the lands by the First Party in July 2017; the lands approximately the subject of Reg.Ref.06/168 (1/07ha) south west of the original parent site had been transferred by the Receiver to the Local Authority.
- They submit and believe that this transfer satisfied Part V requirements under the parent permission and was made by the Receiver.
- They provide details of the state of completion of the lands then purchased by the First Party. This notes the no. of units and the entrance.
- Figure 4 is a copy of the site layout approved under the parent permission in September 2005 and Figure 5 is an Estate Map of the development as it currently exists illustrating the location of each dwelling as of 2021.
- They note and provide details that the local authority identified the receivership status of the development company and deployed best efforts to manage development then completed.

*Unfinished housing estate status*

- As recession hit, construction on housing estates was impacted. In order to quantify the unfinished housing development issue, government required a local authority survey of unfinished housing estates. 'Castlehyde' was amongst those recorded.

- The entire of the subject site as identified by the parent permission boundary (Reg.Ref.04/2073) is recorded at the *Unfinished Housing Survey 2011* as 'Castlehyde Park' Dept ref. 1418). Appendix 2.1 includes a copy of this.
- They refer to government policy to try to resolve unfinished housing estates. They note the number of 'occupied' and 'unoccupied' houses recorded on site. That in 2017 the site was recorded as having no construction activity.
- They refer to the Local Property Tax (LPT) which came into effect in 2013. They note that the extant houses in this location are not subject to an LPT waiver by reason of being in a recorded Unfinished Housing Estate. As such, it is indicated that the lands are not recorded now as an unfinished housing estate and have been resolved.

*Development Bond called upon*

- They submit that the unfinished housing estate surveys of 2016 recorded development on the lands under Reg.Refs. 04/2073 and 06/146 and that development extended to that undertaken by Bendeck Ltd. to 2015.
- They refer to the documented progression of development taking place on site and under construction in 2010.
- They submit that this correspondence proves that a bond was lodged with the local authority for the parent permission and the local authority made a claim on that bond.
- This is the only correspondence related to the calling in of a planning permission development bond related to the subject lands.
- They submit that this bond claim has been satisfied as the lands remained unaltered from that relative to the subject lands in December 2016, until the purchase of the site by the first party development company in 2017.
- That this bond claim satisfied the proportionate taking in charge requirements of the development as it existed on site and was enabled via development bond requirements arising from condition no.34 of the parent permission.

- They submit that having regard to the statement part of para 1 of condition no. 19 of Reg.Ref. 20/413, that the authority has not disbursed the monies collected in 2016 for the purposes for which they were intended.

*Other local authority active management interventions by the local authority.*

- Part of the subject lands were entered onto the Derelict Sites Register in 2019 as Reg.Ref. 10/09. A Section 11 Notice was issued in July 2019 to Bellerin Ltd. Who managed the site on behalf of the first party - Appendix 3 refers.
- The works outlined in this notice relate to making safe and improving the appearance of the lands and was complied with resulting in the lands being from the Derelict Sites Register.
- Castlehyde Park is recorded as the subject of a Taking in Charge application re. TC153 in 2019. It was one of 42 no. 'current taking in charge applications in 2019'.

*No progression of taking in charge works of the lands*

- The first party appellant bought the land at Figure 1 in July 2017 from the Receiver. The Receiver had undertaken some actions to resolve the planning compliance of the lands and make them ready for sale and details are provided of these.
- After 2017, Castlehyde has not been recorded as an unfinished housing estate. Therefore, the provisions put in place by government to 'resolve' such developments all outstanding issues have been 'resolved'.
- They submit that the first party has been an active land manager and is demonstrably capable of undertaking building contracting works and provide details of this.
- They identified that the entrance as constructed under Reg.Ref. 04/2073 and extended under Reg.Ref. 10/478 did not meet sightline standards as set down in DMURS, published in 2013 after the original grant of permission. The current application seeks to rectify this and bring it up to standard.
- A schedule of works was assumed to have been complied for the purposes of making the claim on the bond for the parent permission that was satisfied in

December 2016. The letter and enclosure of development completed (i.e outstanding works) - Appendix 4 refers.

- Having undertaken as much remediation work as possible of the extant houses within the development, and the emergency works to the entrance the first party sought the planning permission the subject of this appeal for 6no. houses. They submit that this is a quantity of housing capable of being absorbed by the market demand for the area.

*Condition no.19 of Reg.Ref. 20/413 outside statutory provisions*

- The subject of this appeal is not the decision to grant permission but the imposition of condition no.19 that, they submit, requires the provision of development guarantee that is disproportionately in excess of the development for which planning permission was sought. This has the effect to provide an undue burden which is not supported by statute.

*Conclusion*

- The Receiver for the lands undertook site remediation over 2015 and 2016 and the authority called in the development bond for the parent permission Reg.Ref.04/2073.
- The First Party has undertaken works to improve the appearance and performance of their lands since purchase in 2017 for existing and future residents, including works under the Derelict Sites Notice in 2019 and upgrade of sightlines via emergency works in 2020 and by the planning permission and subject appeal.
- The local authority declared themselves satisfied in respect of their claim on the bond for Reg. Ref. 04/2073 in December 2016, but in contrast have not utilised these monies either directly or indirectly to bring the development, as it exists to taking in charge standard, as is the purpose of the bond and intention of the underlying status.
- The first party has satisfactorily demonstrated their own construction contracting capabilities. They contend that best value will be obtained by the local authority in agreeing a schedule for taking in charge works with the first party and for the latter to arrange for there necessary works to be undertaken.



- They conclude that condition no.19 as it is currently worded is outside of the provisions of the enabling statute and further that it subverts the purpose of that statute, having the effect as to '*burden unduly the person in whose favour the permission operators*' which is a prescription under the Act.
- They request the Board to uphold this grant of planning permission but omit the first paragraph of condition no.19 as it is currently worded. The first party reiterate their acceptance of a requirement to provide a development bond, but request that the condition gives rise to that requirement relate exclusively to the development permitted, as provided for by statute.
- They provide a List of Figures and Appendices with the Grounds of Appeal.

## 6.2. Planning Authority Response

Their response to the First Party Grounds of Appeal includes the following:

### *Development Bond*

- Parent planning permission Reg.Ref. P04/2073 granted permission for 125 houses, 44 of which were subject to subsequent permissions: with a net effect of 119 units finally granted permission. A bond to the value of €200,000 was in place for Phase 1 of the development (39 houses). Only 28 out of the total of 119 dwellings were initially substantially completed.
- They note that Liberty insurance inherited the bond liability from Quinn Insurance and following non-renewal of the bond in 2012, the Council made a formal claim against the bond. The original developer had ceased trading, leaving significant issues with respect to roads and water services infrastructure unresolved.
- As the cost of implementing the site resolution plan was in excess of the bond amount, Liberty insurance proposed paying €196,500, which was accepted by the Council in October 2016.
- Emergency works to the public lighting system were undertaken upon receipt of the funds, and the lights added to the Council's maintenance list. As there was no taking in charge application for the development, the remaining funds of €189,000 were lodged in a joint deposit account.

### *Taking in charge*

- In 2017 the entire estate, including the un-commenced sections, were purchased by Bellerin Ltd c/o Focus Capital Partners (their Property Manager) and they engaged with the Council - with a view to completing the 'completed' section of the development and having it taken in charge, as well as providing units for the Council's Housing Section.
- As the new owner of the site Bellerin Ltd, inherited all defects and issues highlighted. In December they applied to the Council to have the development taken in charge.

### *Schedule of Works*

- They provide details of the schedule of works to fund the site resolution works with Bellerin to undertake the works and the Council to release the funding (bond held) on a yet to be agreed stage basis.
- Focus Capital estimated the cost of their site resolution plan and provided a commitment that Bellerin would fund any overrun in costs over and above the bond monies currently held by the Council.
- The Council note that Focus Capital's site resolution plan omitted a significant volume of works and provide details of these. Therefore, their proposal was deemed inadequate and insufficient to reach agreement.
- Neither the Council nor Irish Water would be in the position to take the development in charge in the absence of the items listed. The Council will only commence the implementation of the SRP where upon completion the development is in a fit stage for taking in charge.
- The Council note subsequent meetings with Focus Capital/Bellerin with a view to agreeing a site resolution plan and looking at potential funding options. In August 2018 the Council agreed in principle to the cost of the entrance works from the bond money on the basis that it would be less than €50,000. However, quotations submitted by the developer demonstrated that the cost is significantly in excess of the figure agreed therefore, an agreement could not be reached.

### *Planning Reference P.20/413*

- They refer to item no.4 of the Council's F.I request. This notes a current taking in charge application for Castlehyde Park Estate and seeks clear details in writing to be agreed by the Council of the remedial works to be agreed, associated costs, responsibility and phasing of the proposed works etc.
- They refer to the remaining outstanding works, bond available and proposed development and to Council recommendations. They note the First Party response and provide that subsequently in view of the outstanding works the Council decided to grant permission and for the inclusion of Condition no.19.
- The Council provide a detailed Summary and Conclusions (referred to in the Assessment below) as to why Condition no.19 was included.
- They request the Board to include Condition no.19 of Reg.Ref. P20/413.

### **6.3. First Party Response**

Cunnane Stratton Reynolds has submitted a response on behalf of the First Party to the Council's response to the Grounds of Appeal. This includes the following:

- They submit that the Council does not offer any new or material facts opposite to those presented in the First Party Appeal Statement.
- That this is mainly concerned with the previous planning permission and is not the subject of this appeal. The correspondence does not respond to the first party appeal matters.
- As such the First Party remains as per the appeal statement and relative to Condition no.19 of the Council's permission.
- To seek to impose a requirement on the current development to guarantee and undertake works outside of the planning application boundary that does not serve the proposed development contravenes and is outside of legislative provisions for this planning permission and disproportionate.
- They summarily restate the position of the first party in light of the circulated correspondence, providing that the material facts present to the Board in the First Party Appeal do not alter. The content of this appeal is set out in Table 1

- This summary includes regard to the following:
  - First Party Appeal Statement Resubmission
  - Further Summary of Planning and Development History
  - Reasonable scope of appeal case condition for surety
  - Conclusion
- They submit that Condition no.19 as it is currently worded is outside of the provisions of the enabling statute and further subverts the purpose of that statute it relating to non-amenity development not the subject of the current proposal thus having the effect to *burden unduly the person in whose favour the permission operators* which directly contravenes S34(4) of the Act.
- They request the Board to uphold the grant of permission in this instance but to omit the first paragraph of condition no.19 as it is currently worded.
- The Frist Party response reiterates their acceptance of a requirement to provide a development bond, but request that the condition gives rise to that requirement exclusively to the development permitted, as provided by the statute.

## 7.0 Assessment

### 7.1. First Party Appeal against Condition

- 7.1.1. The First Party request that the Board uphold the grant of permission in this instance but omit the first paragraph in condition no.19 as it is worded in the notification of grant of permission as they consider that it seeks to impose a requirement for surety for the undertaking of works outside of the current development which they submit is inequitable and contrary to S.34(4) of the Planning and Development Act, 2000 as amended.
- 7.1.2. They submit that the application was made and notified a decision and conditions applied in accordance with Section 34 of the Planning and Development Act 2000 (as amended). They refer to S.34(4) which sets out the type of conditions that maybe applied to a decision to grant permission (a) through (q) and consider that condition

no.19 directly contravenes S.34(4)(g) i.e: *Conditions for requiring the giving and maintaining of adequate security for satisfactory completion of the proposed development.* They contend that this is because the ‘adequate security’ sought requires surety beyond the needs of the development applied for under the current application, referring to lands outside its boundary.

- 7.1.3. It is of note that Condition no.19 of the subject Council permission Reg. Ref. P.20/413 is as follows:

*The developer shall be responsible to bring the full estate to taking -in-charge standard and complete all necessary outstanding works. The bond money currently held by Kilkenny County Council can be used to contribute to the cost, with the developer covering the balance of all outstanding works. The “Taking in Charge Protocol” as operated by Kilkenny County Council shall apply.*

*For this planning permission, the applicant/developer shall lodge with Kilkenny County Council a cash deposit, a bond of an insurance company, or other security to secure the provision and satisfactory completion and maintenance for the purposes of taken in charge by the Council of roads, footpaths and other services required in connection with the development, coupled with an agreement empowering the Council to apply such security or part thereof for the satisfactory completion or maintenance of any part of the development. The form and amount of the security shall be subject to the agreement of the Planning Authority.*

*The amount of the bond shall be reviewed at not greater than 3 year intervals and increased/decreased in accordance with the Wholesale Price Index – Building and Construction, capital Goods Price Indices, the base applicable at the time of this permission.*

*Reason: To ensure the timely and satisfactory completion of the development.*

- 7.1.4. Section 139(1)(c) of the Planning and Development Act 2000 (as amended) is of note and this provides where: *The Board is satisfied, having regard to the nature of the condition or conditions, that the determination by the Board of the relevant application as if it had been made to it in the first instance would not be warranted.* In summary this provides that where an appeal relates only to a condition or conditions

and the Board is satisfied having regard to the nature of the conditions that a determination by the Board of the relevant application as if it had been made in the first instance would not be warranted. Therefore, the application does not need to be considered *de novo* and the Board at its discretion may attach, amend or remove such conditions.

7.1.5. Section 8.11 of the Development Management Guidelines 2007 concerns 'Appeals against Conditions'. This is of note in that it provides: *The Board has complete discretion to give to the planning authority whatever directions it considers appropriate relating to the attachment, amendment of or removal from the grant of permission of the condition or conditions the subject of the appeal, or any other conditions. However, in appeals relating to section 48/section 49 financial contributions conditions only, the Board is restricted to consideration of the matters under appeal.*

7.1.6. As has been noted in the documentation submitted, this appeal is against Condition no.19 concerning a development bond. It does not relate to Development Contributions. Therefore S.139(1)(c) of the Planning and Development Act 2000 (as amended) applies. It is also noted that other than the First Party Appeal there are no third party appeals or observations submitted. Having regard to the legislation, guidelines and the documentation submitted and taking into account, the issues raised, I would recommend that it would be appropriate in this instance for the Board to deal with this as an appeal against condition no.19 only, rather than *de novo*.

## 7.2. **Regard to Planning History – First Party Case**

7.2.1. As outlined in the Planning History Section above, and in the First Party Grounds of Appeal, the parent permission for the larger development site (6.48ha) was granted in 2005 – Reg.Ref. 04/2073 refers. While the description of development notes that this permission was for 160 houses, together with associated services, condition no.4 provided for an exclusion of some of the houses to be the subject of separate later applications. It is of note that Condition no.4 (b) of this permission provides:

*This grant of permission excludes development of the area outlined in blue of the attached map which contains 6no. houses accessed from Road no. 2. The area shall be the subject of a separate planning application which re-designs*

*the outlined area to provide for a “Focal Feature” as required by the Urban Design Study for New Ross, 2005.”*

- 7.2.2. It appears that the current application, encompasses part of the area. It is also of note that Condition nos. 34 and 38 of the parent permission provide provision for a development bond and taking in charge matters.
- 7.2.3. The extent of the application boundaries of Reg.Ref. 04/2073 (parent permission) and succeeding permissions Reg.Refs. 06/146 and 06/168 are presented in Figures 3.1, 3.2 and 3.3 of the Appeal Statement. Below is a summary of the planning history of the current development as has been noted in the Appeal Statement. This is subsequent to the parent permission, which has been noted above.
- The extension of duration permission Reg.Ref.10/478, was for 125no. houses by reference to condition nos.4 and 5 where the permission excluded two areas of the application site (south east and south west). The First Party note 2 commencement notices were recorded.
  - Reg.Ref.06/146 was the first of two revisions permitted to the parent permission. Condition no. 6 requires surety for satisfactory completion of development. They refer to a retrospective commencement notice.
  - Reg.Ref. 06/168 is the second of two revisions to the parent permission and Condition no.7 required surety for satisfactory completion of development.
  - The extension of duration of Reg.Ref.04/2073 under Reg. Ref. 10/478 ended in November 2015 and the two altering permission Reg.Refs 06/146 and 06/168 were withered in 2011. No other extensions of duration are associated with these lands.
  - They note stages towards completion (no. of houses built and entrance constructed) of development in 2010. This entrance is that which the current appeal site utilises and proposed to upgrade to current standards (DMURS) that supersedes the standards then in place.
  - By the time the second application for extension of duration of permission in August 2010 it appeared that construction on site was stalled and was contingent upon units being sold.

- There are no further planning applications on the lands until the current application. Therefore, it is noted that planning permissions on these lands have withered.

7.2.4. The First Party submit that the Council's seeks additional surety, outside of the permitted development requirements or site area for development already undertaken under previous planning permission for which a bond was agreed by the local authority, called up and that claim declared satisfied by them. The development bond under Reg.Ref.04/2073 has been called upon and in excess of €196k was paid which settled the claim. They provide that these monies appear to have been retained by the local authority, rather than put to their intended use in the intervening years, as they are referred to as being held by the authority in paragraph 1 of condition no.19 of the notification of permission Reg.Ref. 20/413.

7.2.5. They provide details of the current application. The appeal statement is supported by a number of illustrative figures and appendices, listed at the end of the text. Regard is had to correspondence to same effect with the insurance bond provided of December 2016, Appendix 1 of their response refers and reinforced by the absence of Castlehyde from the schedule of unfinished housing estates exempt from Local Property Tax.

7.2.6. It is of note that Figure 5 of their Appeal Statement provides a 'Copy of Estate layout map at 1st of April 2021' that indicates the development as exists overlain with indications of house completions and ownership. This also shows the lack of completions and unfinished nature of the estate.

### 7.3. **The Council's Case**

7.3.1. The Council's response to the First Party Appeal provides details on their reasoning for the inclusion of Condition no.19 of Reg.Ref. P20/413. In this respect, their Summary and Conclusion include the following points:

- The original developer ceased trading, leaving significant issues with respect to roads and water Services infrastructure unresolved.



- Kilkenny County Council claimed and accepted the maximum bond money available i.e €196,500. However, the Council estimates that €366,000 is required to bring the estate to taking-in-charge standard.
- The entire Development, including the un-commenced sections, was purchased by Bellerin Limited, c/o Focus Capital Partners. The Council engaged with Focus Capital Partners to agree a site resolution plan and potential funding options.
- As the new owner of the site, Bellerin Ltd. inherited all defects and issues highlighted in their response to the appeal.
- Focus Capital Partners prepared a schedule of works that broadly overlapped with the works identified by the various services areas of the Council.
- Correspondence from Focus Capital Partners dated 15<sup>th</sup> of February 2018 concedes *Bellerin will be liable to complete the requisite works to have the estate taken in charge.*
- Focus Capital Partners proposed a Site Resolution Plan which omitted a significant volume of works. The Council estimated the cost of the omitted works to be €210,000. They will only commence the implementation of an SRP where upon completion the development is in a fit state for taking in charge. Therefore, they provide that Focus Capital's proposal was deemed inadequate and insufficient to reach agreement.
- Subsequent to this the Council agreed in principle to contribute to the cost of the entrance works from the bond money on the basis that it would be less than €50,000. However, quotations submitted by the developer demonstrated that the cost is significantly in excess of the figure agreed, therefore an agreement could not be reached.
- Having exhausted all avenues of discussion with Focus Capital Partners, the Planning Authority deem Condition no.19 of Reg.Ref. P.20/413 to be reasonable, proportionate and necessary to bring the development to taking in charge standard in the interests of orderly development.
- €189,000 bond money remains available as a contribution towards works to bring the estate to taking in charge standard.

7.3.2. The Council response notes that Focus Capital's site resolution plan omitted a significant volume of works. In particular, that the following items appeared to be omitted:

- 75m of foul sewer replacement
- 15m of storm sewer replacement
- Provision of storm water attenuation
- Repairs to manholes
- Locate buried manholes, undertake additional CCTV and complete any repairs identified
- Landscaping including provision of blockwork wall to rear of 2no. properties and contribution in lieu of playground
- Signage and markings

7.3.3. It is noted that the Council having considered the remaining works, bond available and proposed development recommended the following:

- a) The developer be conditioned to bring the full estate to taking-in-charge standard.
- b) The bond money, held by the Council be used to contribute to the cost, with the developer covering the balance.
- c) The mechanism of procurement and payment can be agreed at a later date.

They provide a list of the works required, this includes reference to 'Castlehyde – Site Entrance Works.

7.3.4. Having regard to these issues and to the outstanding works, I would consider that it appears that the inclusion of the first paragraph in Condition no.19 is to allow for the provision of a bond that is sufficient to bring the full estate up to taking-in-charge standard and that the existing bond currently held by the Council would be used to contribute towards the cost. Also, that the bond submitted under the parent application Reg.Ref. 04/2073 is not now sufficient to meet current costs for taking-in-charge of the unfinished estate. In this respect it maybe that this issue relative to the development of the estate as a whole is not a matter for the current application.

#### 7.4. Regard to Development Bond issue

- 7.4.1. Section 7.13 of the Development Management Guidelines 2007 refers to 'Conditions requiring security for completion'. This includes: *The condition should require that the lodgment of the security should be coupled with an agreement that would empower the planning authority to realise the amount of the security at an appropriate time and apply it to meet the cost of completing the specified works.*
- 7.4.2. It further provides: *A security condition could also provide for the recalculation of the amount specified in the condition by reference to the House Building Cost Index (or other appropriate Index) if the development to which the permission relates is not commenced within a specified period after the granting of the permission. The bond should be refunded on satisfactory completion of the development.*
- 7.4.3. The First Party submit that the first paragraph of Condition no.19 causes confusion and creates the disproportionately as it refers to the 'full estate', which was permitted under Reg.Ref. 04/2073, it being the parent permission and the reference no. provided in the description is for of the development for Reg.Ref.20/413. They note that this first paragraph of the Council's permission refers to the bond currently held by the Council. They contend that the monies held by the Council are those in satisfaction of the local authority claim on the development bond for Reg.Ref. 04/2073. That satisfaction was declared in December 2016 and cannot now be revisited as no compliance requirement with that permission for development surety remains.
- 7.4.4. They support the provision of a bond to guarantee the development as permitted in the current application to be completed to taking in charge standard and demonstrably required having regard to national policy and site planning history as referred to above. That the proposed development under Reg.Ref.20/413 was carefully considered in order that the entire service requirements of the 6no. units proposed could be delivered within a single application boundary; water supply and discharge and site access being especially considered. However, they submit that Condition no.19 seeks to apply to lands clearly outside of the application site and relates to development surety. That this directly conflicts with the relevant legislation governing the purpose and content of conditions of planning permission.

7.4.5. The Council considers that as the new owner of the site, inherited all defects and issues associated with the development that the developers are now responsible for dealing with this. The Council offered to contribute all of the remaining bond money towards works to bring the development to taking in charge standard. However, they provide that Focus Capital's proposal was deemed inadequate and insufficient to reach agreement.

### **Conclusion**

7.4.6. I note that the current application site as shown within red line boundary on the plans submitted and at F.I stage, is shown adjoining the greater land area and is part of the original site development area, although this is not shown in blue. However, as submitted, the current application site forms a separate entity to that originally permitted. I would consider that in this respect it should be seen as an application in its own right, albeit that it is subsequent to the parent permission. The bond condition should refer to the works to be carried out within the red line boundary i.e. the proposed development of the 6no. houses, all associated site development works including alterations to the existing site entrance and the storm attenuation tank, as referred to in the description of development.

7.4.7. While it is stated that the former permissions have withered, the conditions of these permissions pertaining to sites that have been partially developed remain valid. If there are any conditions relative to these permissions, that remain outstanding they would be more appropriately dealt with by Planning Enforcement, which is in the remit of the Council, and not within that of the Board. Alternatively, it may be considered in the interests of clarity that a new application for the development of the estate as a whole should be submitted, rather than in a piecemeal manner. However, this is not the subject of the current application.

7.4.8. In the current application case, I would consider taking into account, the planning history, including (as documented) and the payment of the bond relative to Reg.Ref. 04/2073, that it would be equitable and in the interests of clarity, to remove the first paragraph of Condition no.19. I would further recommend that a standard bond condition be inserted relative to surety for the works involved in the proposed development as described on the Public Notices. In this respect I would recommend that Condition no.19 be amended.

## 8.0 Recommendation

I recommend that Condition no.19 of the Council's permission be amended for the reasons and considerations below.

## 9.0 Reasons and Considerations

Having regard to the planning history of the subject site, including the documentation submitted and of the details of the development bond paid relative to the parent permission register Reference: 04/2073, I would consider that the amendment of Condition no.19 of the permission granted by Kilkenny County Council in register reference. 20/418 would be in order in the interests of clarity. The subject permission relates to the area as shown within the redline boundary on the drawings submitted, including the Site Layout Plan, delineating the application site. The amendment of this condition would be in accordance with the proper planning and sustainable development of the area.

### Condition 19

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

**Reason:** To ensure the satisfactory completion of the development.

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Angela Brereton  
Planning Inspector

6<sup>th</sup> of October 2022