



An
Bord
Pleanála

Inspector's Report

ABP-314302-22

Development	Construction of 55 dwellings, childcare facility and all associated site works.
Location	Smithstown, Shannon, Co. Clare
Planning Authority	Clare County Council
Planning Authority Reg. Ref.	211397
Applicant(s)	Woodhaven Developments Ltd.
Type of Application	Permission
Planning Authority Decision	Grant Permission
Type of Appeal	First Party v. Condition
Appellant(s)	Woodhaven Developments Ltd.
Date of Site Inspection	26 th January 2023
Inspector	Liam Bowe

1.0 Site Location and Description

- 1.1. The site is located in the northern part of Shannon town in Co. Clare, approximately 500m to the northeast of the town centre (Sky Court Shopping Centre). The site has a stated site area of 2.47 hectares and forms part of a larger landholding of approximately 5.64 hectares. It is located to the rear/northeast of Tracey's Oakwood Hotel and is bound to the west by the first phase of residential development on this landholding. The northern boundary of the site is low hedgerow, and an informal pedestrian / cycling trail runs along the entire length of this boundary. Smithstown Innovation Park and three one-off houses are located further to the north. Some commercial units are located immediately to the west of the appeal site. Vehicular access to the appeal site is to be achieved from the local road (L-7178) to the west via the residential development under construction. The southern site boundary is open with a hedgerow further to the south running long the field boundary with the R471 Airport Road. The subject site is undeveloped and appears to most recently have been used for agricultural purposes.
- 1.2. This is a first party appeal against a financial contribution condition which was attached to the Planning Authority's notification of intention to grant permission for the development of 55 houses and a childcare facility. As this is an appeal in respect of a condition requiring a financial contribution, the provisions of section 48 (13) of the Planning and Development Act 2000 apply, and the Board is restricted to considering this matter alone and cannot consider the matter de novo. I have therefore confined my assessment to the condition in question.

2.0 Proposed Development

- 2.1. The proposed development comprises the construction of 55 houses, a childcare facility, and all ancillary works. Access to the development is proposed to be via housing development under construction to the west. There would be 1 detached, 42 semi-detached and 12 terraced houses in the scheme. The principal open space serving the development would be located centrally. The development would be served by a mains water supply and public sewer.

3.0 Planning Authority Decision

3.1. Decision

- 3.1.1. On 28th July 2022, the Planning Authority issued a notification of their intention to grant permission subject to 28 no. conditions. Condition No.28 of the permission states:

Before development commences a Special Development Contribution shall be paid Clare County Council as a special contribution towards the upgrading of the surface of a section of the L-3172, as well as a contribution towards the lighting of a section of the L-3172, necessary to facilitate the development of the subject site and to facilitate safe pedestrian and cycle access. The contribution payable will be based on the contribution rate applicable at the time of payment and not the rate in existence when permission is granted. The amount of the development contribution is set out below and is subject to annual revision with reference to Wholesale Price Index (Building and Construction), and in accordance with the terms of the Council's Development Contribution Scheme. The amount is currently **€70,000.00**.

Reason: In the interests of the proper planning and sustainable development of the area and in accordance with Section 48(2)(c) of the Planning and Development Act 2000, as amended.

3.2. Planning Authority Reports

3.2.1. Planning Reports

There are two Planning Reports on file dated 24th February 2022 and 26th July 2022, respectively. The Planning Officer in the initial report stated that the principle of houses was acceptable on this site but highlighted the possible prematurity of the proposed development pending consent for access being granted permission under an appeal (ABP-311994-21 refers). The report recommended further information be requested regarding relocating the proposed creche, lighting to pedestrian/cycle path, details of a second storm water attenuation tank, boundary treatment proposals, details of footpaths and an Archaeological Impact Assessment, which is reflected in the decision of the Planning Authority.

Appropriate Assessment was carried out and concluded that there is no likely potential for significant effects to any Natura 2000 site.

A second Planner's Report (dated 26th July 2022) refers to the further information submitted and considered that, having regard to the additional information, outline permission should be granted subject to 28 no. conditions.

3.2.2. **Other Technical Reports**

Roads & Transportation – The initial report dated 20th January 2022 sought further information in relation to public lighting design.

Roads Design Office – The initial report dated 10th February 2022 sought further information in relation to public lighting design.

Taking in Charge Estates Team – The initial report dated 4th February 2022 sought further information in relation to the location of a second storm water attenuation tank referenced in the Engineering Report submitted with the application.

3.3. **Prescribed Bodies**

Irish Rail – No observations to make.

Irish Aviation Authority – No observations to make.

Irish Water – No objections. Conditions recommended.

Mid-West NRDO – No observations to make.

Department of Housing, Local Government & Heritage – No objections. Conditions recommended.

Health & Safety Authority - No objection.

3.4. **Third Party Observations**

There was one submission made to the planning authority, which outlined concerns in relation to boundary treatment, overlooking, the location of pedestrian/cycling access, and construction noise/dust.

4.0 Planning History

4.1. Appeal site:

ABP-306417-20 – Section 9 appeal under the Urban Regeneration and Housing Act 2015 with the Board determining that the site was a vacant site within the meaning of the Act.

4.2. Adjacent sites:

ABP-311994-21 (P.A. Ref. No. 21/372) – Permission granted for 48 houses immediately to the west of the appeal site.

5.0 Policy Context

5.1. Planning and Development Act, 2000 (as amended)

- 5.1.1. Section 48 of the Planning and Development Act 2000, as amended provides as follows:

48.—(1) A planning authority may, when granting a permission under section 34, include conditions for requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority and that is provided, or that it is intended will be provided, by or on behalf of a local authority (regardless of other sources of funding for the infrastructure and facilities).

(2) (a) Subject to paragraph (c), the basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section, and a planning authority may make one or more schemes in respect of different parts of its functional area.

(b) A scheme may make provision for payment of different contributions in respect of different classes or descriptions of development.

(c) A planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development.

(3) (a) A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme.

(b) In stating the basis for determining the contributions in accordance with paragraph (a), the scheme shall indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities which are provided or to be provided by any local authority and the planning authority shall have regard to the actual estimated cost of providing the classes of public infrastructure and facilities, except that any benefit which accrues in respect of existing development may not be included in any such determination.

(c) A scheme may allow for the payment of a reduced contribution or no contribution in certain circumstances, in accordance with the provisions of the scheme.

(12) Where payment of a special contribution is required in accordance with subsection (2) (c), the following provisions shall apply—

(a) the condition shall specify the particular works carried out, or proposed to be carried out, by any local authority to which the contribution relates,

(b) where the works in question—

(i) are not commenced within 5 years of the date of payment to the authority of the contribution (or final instalment thereof, if paid by phased payment under subsection (15)(a)),

(ii) have commenced, but have not been completed within 7 years of the date of payment to the authority of the contribution (or final instalment thereof, if paid by phased payment under subsection (15)(a)), or

(iii) where the local authority decides not to proceed with the proposed works or part thereof. The contribution shall, subject to paragraph (c), be refunded to the applicant together with any interest that may have accrued over the period while held by the local authority,

(c) where under subparagraph (ii) or (iii) of paragraph (b), any local authority has incurred expenditure within the required period in respect of a proportion of the works proposed to be carried out, any refund shall be in proportion to those proposed works which have not been carried out.

5.2. Development Management Guidelines for Planning Authorities, June 2007

5.2.1. Section 7.12 states:

“‘special’ contribution requirements in respect of a particular development may be imposed under section 48(2)(c) of the Planning Act where specific exceptional costs not covered by a scheme are incurred by a local authority in the provision of public infrastructure and facilities which benefit the proposed development. A condition requiring a special contribution must be amenable to implementation under the terms of section 48(12) of the Planning Act; therefore, it is essential that the basis for the calculation of the contribution should be explained in the planning decision. This means that it will be necessary to identify the nature/scope of works, the expenditure involved and the basis for the calculation, including how it is apportioned to the particular development. Circumstances which might warrant the attachment of a special contribution condition would include where the costs are incurred directly as a result of, or in order to facilitate, the development in question and are properly attributable to it. Where the benefit deriving from the particular infrastructure or facility is more widespread (e.g., extends to other lands in the vicinity) consideration should be given to adopting a revised development contribution scheme or, as provided for in the Planning Act, adopting a separate development contribution scheme for the relevant geographical area. Conditions requiring the payment of special contributions may be the subject of appeal.”

5.3. Clare County Development Contribution Scheme 2017-2023

5.3.1. Special Contributions:

“In addition to the requirements of this scheme, Clare County Council may require the payment of a Special Contribution in respect of a particular development where specific costs are not covered by this Scheme or incurred in respect of public infrastructure and facilities which benefited the proposed development. Where payment of such a contribution is required, a planning condition shall be attached to specify the particular works carried out or proposed to be carried out by Clare County Council or any other local authority.”

5.3.2. The basis for the determination of the Development Contribution Scheme is set out in Appendix 1- Capital Projects. Roads related projects are listed in Section 2.

6.0 The Appeal

6.1. Grounds of Appeal

6.1.1. The applicant states that he wishes to appeal Condition No.28 of the Planning Authority's decision to grant permission. The grounds of the appeal can be summarised as follows:

- States that the appeal is made under Section 48(2)(c) of the 2000 Act.
- Contends that the terms of the Development Contribution Scheme have not been properly applied in respect of a condition attached to the notification of decision by the planning authority.
- Highlights Section 2 of the general Scheme where 'Footpaths – Extensions to and remediation of existing footpath infrastructure' and 'General Improvements Scheme – Streetscape improvement works and pedestrian linkages in the 4 Municipal Districts' are covered.
- Quotes precedent under ABP-311994-22 where pedestrian linkages were deemed to be covered by the terms of general Development Contribution Scheme.
- The basis for the calculation of the amount levied in the condition is not explained in the planning decision.
- Quotes permissions issued on adjoining sites where no such levy was attached, namely: P.A. Ref. No.'s 21/372, 19/155 and others.

6.2. Planning Authority Response

6.2.1. The planning authority clarifies that the road number included in Condition No.28 should reference L-31271, which is the laneway running along the northern boundary of the appeal site. It states that the development includes access onto the laneway and that laneway would see an increase in foot traffic and cyclists as a direct result of the development. As the laneway requires public lighting and surface upgrading, Condition No.28 was to provide a contribution towards these upgrades.

6.2.2. A breakdown of estimated costs for the provision of paving and public lighting is included. The total estimated cost for the upgrade of the full length of the pathway (425m) is €91,125.00 + VAT. The planning authority do not consider these costs to be covered under the general contribution scheme and, therefore, request the Bord to uphold Condition No.28.

6.3. **First Party Response**

6.3.1. The first party's response to the planning authority's submission can be summarised as follows:

- State that it is now clear that Condition No.28 refers to the L-31271 laneway running along the northern boundary of the appeal site and not a public road.
- Contends that there is no clarification as to how the planning authority's calculation of €91,125 plus VAT for re-surfacing and lighting the 425m laneway equates with the €70,000.00 special development contribution.
- Disputes the breakdown of costs and the method of calculation.
- Highlights another precedent (ABP-306680-20) where the planning inspector deemed the contribution for a footpath to be provided for in the general Development Contribution Scheme.

7.0 **Assessment**

7.1. As the appeal is solely against the special contribution condition (No.28), Section 48 (13) of the Act provides that the Board shall not determine the relevant application as if it had been made in the first instance but shall determine only the matters under appeal, in effect the condition being appealed against and to considering the proper implementation of the Clare County Council's adopted scheme. In general terms, Development Contribution Schemes apply as a general levy on development and Special Contributions apply to particular developments where, for example, a specific exceptional cost would arise for the authority, which is not covered by a Scheme or a Supplementary Scheme, resulting from the carrying out of the development in question.

7.2. The amount of €70,000.00 towards "the upgrading of the surface of a section of the L-3172, as well as a contribution towards the lighting of a section of the L-3172,

necessary to facilitate the development of the subject site and to facilitate safe pedestrian and cycle access” in Condition No.28 is expressly stated as specific exceptional costs not covered in the Council’s General Contributions Scheme. As outlined earlier in this report, the specific explanation as to when a planning authority may require the payment of a Special Contribution is covered in Section 48(2)(c) of the Planning and Development Act 2000. It is clear that such a request should only be made in respect of a particular development, which is likely to incur specific exceptional costs not covered by the General Development Contribution Scheme of the Council, as stated within the condition attached to the grant of permission. They are in addition to the terms of the general scheme and might cover specific developments whereby the scale of the development and the demand the proposed development is likely to place on public services and facilities is deemed to be exceptional.

- 7.3. The road/laneway that is the subject of this appeal runs from its junction with the Tullyvarra Road at its western point to the junction of the Smithstown Road and Bóthar na Luachra at its western point. It is comprised of approximately 100m of road, 300m of pedestrian/cycle laneway, and 25m of an area that traverses an unsurfaced car parking area associated with a commercial unit. On the day of my site inspection, I walked the length of the road/laneway. I observed the frequent use of this laneway by both pedestrians and cyclists. I concur with the opinion of the planning authority that this laneway is poor in terms of surface condition and the absence of public lighting. I consider that the use of the laneway by both pedestrians and cyclists will increase as a result of 55 new houses as proposed in this application.
- 7.4. In their response to the first appeal, the planning authority outlined the estimated costs involved in the provision of public lighting and upgrading the surface of the entire length of the laneway (L-31271 per appeal response). These are:
- Paving - €65,500.00 + VAT
 - Lighting - €25,625.00 + VAT

The planning authority states that the full length of the laneway is 425m. I measure that the appeal site bounds the laneway for a length of approximately 165m.

7.5. Having considered the wording and provisions of section 48(2)(c) it would appear the necessity of the works is clear and does not need further consideration. I consider the main considerations are whether the works are:

- Specific exceptional costs, and
- Public infrastructure and facilities which benefit the proposed development.

7.6. **Specific Exceptional Costs**

7.6.1. The requirements of section 48(2)(c) detail 'specific exceptional costs' that are not specifically covered by Clare County Councils Development Contribution Scheme 2017-23. I refer to the 'projected capital programme' detailed in Appendix 1 of the same scheme. Appendix 1, Section 2 details a number of road schemes to be included. The road works set out in Condition No.28 are not included here and are therefore applicable for consideration as a Special Contribution.

7.6.2. Section 2 also details the following as covered under the general contribution scheme:

- Footpaths - Extensions to and remediation of existing footpath infrastructure.
- General Improvement Schemes - Streetscape improvement works and pedestrian linkages in the 4 Municipal Districts.

7.6.3. The upgrading of the surface of the laneway and the provision of lighting detailed in Condition No.28 was not considered an extension of the existing footpath infrastructure in the area. However, it would provide pedestrian and cycling linkages from the Tullyvarra Road (L-7178) along the L-31271 road/laneway via the northern boundary of the appeal site and connecting to the footpath at the junction of the Smithstown Road and Bóthar na Luachra.

7.6.4. I consider that the provision of this pedestrian/cycling linkage form an extension of the existing footpath infrastructure and, in this context, is provided for under the General Contribution Scheme and the provision of lighting and upgrading the surface of the laneway at a cost of €70,000.00 should therefore not be included for in Condition No.28.

7.7. Public infrastructure and facilities which benefit the proposed development

- 7.7.1. The area of the works specified in Condition No.28 are not located within the applicant's landholding and would have to be completed by the local authority. The fact that the works would be 'public infrastructure and facilities' is not questioned.
- 7.7.2. The works specified in Condition No.28 relate to public lighting and surface upgrading of the L-3172 (corrected to L-31271 per the planning authority's response to the appeal). The first party contends that the extension of any footpaths and public lighting are generally infrastructure classes, provided for under the development contribution scheme.
- 7.7.3. As stated earlier in this report, I concur with the opinion of the Planning Authority that the road/laneway is poor in terms of surface condition and the absence of public lighting, and as there are two proposed pedestrian and cycling access points to the laneway from the appeal site, that pedestrian/cyclist activity will increase as a result of 55 new dwellings as proposed in this application. I, therefore, have no doubt that the works specified in Condition No.28 would be public infrastructure and facilities which benefits the proposed development.
- 7.7.4. However, I draw the Board's attention to the wording in the Development Management Guidelines and requote them hereunder as I consider them to be most relevant:
- "Circumstances which might warrant the attachment of a special contribution condition would include where the costs are incurred directly as a result of, or in order to facilitate, the development in question and are properly attributable to it. Where the benefit deriving from the particular infrastructure or facility is more widespread (e.g., extends to other lands in the vicinity) consideration should be given to adopting a revised development contribution scheme or, as provided for in the Planning Act, adopting a separate development contribution scheme for the relevant geographical area."
- 7.7.5. In particular, I note the location of the laneway within the settlement boundary of Shannon and the 'Core Intervention Area' as outlined in the Shannon Town Centre Masterplan. As stated earlier in this report, on the day of my site inspection I noted the frequent use of the existing road/laneway. I am satisfied that this road/laneway forms an important part of the pedestrian/cycling connections between Shannon

town centre and the housing located to the south/southwest of the town centre to/from the Smithstown Business Park located to the north of the appeal site. If upgrade works to the road/laneway are carried out by the local authority, I consider that the use of this link would increase significantly and bring even greater benefit to the wider area.

- 7.7.6. I note the planning authority's response to the appeal and their list of costs associated with the upgrade of the full length (stated as 425m) of the road/laneway (€91,125.00 plus VAT). I consider it worth noting that the special development contribution of €70,000.00 attached to the notification of decision under this appeal appears disproportionate to the length of the laneway (c.165m) immediately to the north of the appeal site.
- 7.7.7. In relation to this appeal, I am satisfied that the costs are not incurred directly as a result of, or in order to facilitate, the development in question and are not properly attributable to it. Similarly, the benefit deriving from the infrastructure proposed under the upgrade of the laneway is more widespread (i.e., the benefits extend to other lands in the vicinity) and it may be more appropriate to have a separate development contribution scheme for Shannon town, per the Development Management Guidelines or that the costs of the Study / Project be integrated into the Section 48 scheme.
- 7.7.8. I consider that the costs (€70,000.00) associated with the provision of public lighting and surface upgrading should be omitted as I am satisfied that the provision of 'pedestrian linkages' is covered by the terms of the Clare County Council Development Contribution Scheme, 2017-2023 as set out in Appendix 1, Section 2, Roads, General Improvement Schemes.

7.8. Conclusion

- 7.8.1. Having reviewed the application documents, the grounds of appeal and the planning authority's development contribution scheme, I conclude that the planning authority acted ultra vires its powers under the Planning and Development Acts, 2000 as amended in attaching the requirement for a special contribution of €70,000.00. This contribution does not accord with the provisions of Section 48(2)(c) of the Planning and Development Act, 2000 with reference to the payment of a special contribution

and the said contribution is not amenable to being applied in accordance with the provision of Section 48(12) of the Act.

8.0 Recommendation

I recommend that Condition No.28 be omitted from the grant of permission for the reasons and considerations set down below.

9.0 Reasons and Considerations

The Board considered that the contribution of €70,000.00 imposed under condition number 28 as a special development contribution for the public lighting and surface upgrading of the L-31271 road/laneway is not in accordance with the provisions of Section 48(2)(c) of the Planning and Development Act 2000. The Board considered that the planning authority had failed adequately demonstrate specific exceptional costs proposed to be carried out relating to the contribution sought as required by section 48(12)(a) of the Planning and Development Act, 2000, as amended and determined that the condition should be removed.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Liam Bowe
Senior Planning Inspector

25th April 2023