



An  
Bord  
Pleanála

## Inspector's Report ABP-314930-22

### Details of Referral

Point of detail in relation to condition number 18 of ABP-304659-19 (SD18A/0310)

### Location

Site north of the N4 Lucan by-pass and to the east (end of) Ardeevin Avenue, Lucan, Co. Dublin

### Planning Authority

South Dublin County Council

### Planning Authority Reg. Ref.

SD18A/0310

### Applicant

Phoenix Croft Ltd.

### Type of Referral

Point of Detail

### Referred by

Killross Properties Ltd.

### Observer(s)

None

### Date of Site Inspection

21<sup>st</sup> July 2023

### Inspector

Philip Maguire

## 1.0 Introduction

- 1.1. This case concerns a point of detail in dispute between the referrer / developer and the planning authority regarding a condition imposed by An Bord Pleanála in relation to a grant of planning permission for a housing development in Lucan, Co. Dublin.
- 1.2. Condition 18 of ABP-304659-19 requires the lodgement of a security bond, and the referrer is seeking a determination from the Board whether this includes the payment of a tree / hedgerow bond, as no agreement was reached with the planning authority.

## 2.0 Site Location and Description

- 2.1. The referral site, known as Ardeevin Manor, is located to the north of the N4 Lucan by-pass and to the east of Ardeevin Avenue in Lucan, Co. Dublin. Access is via the estate roads which lie to the west of the site. The existing estate road has been extended into the referral site, albeit closed to traffic other than construction vehicles.
- 2.2. The referral site is an active construction site with 13 no. houses complete or substantially complete and a further 3 no. at an advanced stage. Public footpaths, some lighting columns and wearing course are also *in situ*. Tree protection measures are in place along the southern boundary which is defined by an existing block wall. Paladin fencing defines the north-eastern boundary, beyond which lies mature trees. The north-western boundary is defined by a 2m high wall, capped and rendered.

## 3.0 Background to Referral

- 3.1. On 27<sup>th</sup> September 2019, the Board granted permission under ABP-304659-19, for 25 houses and associated site development works including roads, footpath and landscaping at Ardeevin Avenue, Lucan, Co. Dublin, subject to 19 no. conditions.
- 3.2. Condition 18, which is the subject matter of this referral, required the developer to lodge a security bond with the planning authority prior to commencement as follows:

*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 and maintenance until taken in charge by the local authority of roads, footpaths, drains, public 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 or maintenance 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 and maintenance of the development until taken in charge.*

- 3.3. It would appear that the planning authority are seeking a cash deposit of €164,360 and a tree bond of €50,000. The dispute over the tree bond appears to have crystallized in or around the 23<sup>rd</sup> of September 2022 which can be adduced from email correspondence between the developer and planning authority on the referral file.

## 4.0 Planning History

### 4.1. Referral site:

**PA ref. SD22A/0396:** Permission **granted** in January 2023 for the replacement of a previously permitted detached house under ABP-304659-19 (PA ref. SD18A/0310) with a pair of semi-detached houses etc. The following condition is relevant:

**Condition 2**            Apart from the proposed development hereby permitted, the conditions of the parent permission, SD18A/0310 shall apply.

**Reason:** In the interest of clarity.

**PA ref. SD18A/0310:** Permission **granted on appeal** (ABP-304659-19) in September 2019 for a 25-unit housing development. In addition to Condition 18, outlined above, the following conditions are also of relevance to the subject referral:

**Condition 4**            The site shall be landscaped in accordance with a comprehensive scheme of hard and soft landscaping, details of which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall include for protection of trees and hedgerows on and adjacent to the site and shall comply with the requirements of the Planning Authority with regard to a post completion tree survey.

All planting shall be adequately protected from damage until established. Any plants which die, are removed or become seriously damaged or diseased, within a period of five years from the completion of the development or until the development is taken in charge by the local authority, whichever is the sooner, shall be replaced within the next planting season with others of similar size and species, unless otherwise agreed in writing with the planning authority.

**Reason:** In the interest of the protection of trees and landscape features and the implementation of an approved landscape design.

**Condition 10**

The development hereby permitted, including all roads, footpaths, and public lighting, shall be carried out in accordance with the standards and requirements of the planning authority for taking in charge. The development shall be maintained by the developer until taken in charge by the authority and shall not be operated or maintained by a private management company.

**Reason:** In order to comply with national policy in relation to the maintenance and management of residential estates, and to ensure that the development, when completed, can be taken in charge by the planning authority.

**Condition 11**

The areas of open space shown on the lodged plans shall be reserved for such use and, other than the play area, shall be levelled, contoured, soiled, seeded, and landscaped in accordance with the detailed requirements of the planning authority. The play area shall be developed in accordance with details to be submitted to, and agreed in writing with, the planning authority prior to commencement of development. All of this work, including the play areas, shall be completed before any of the dwellings are made available for occupation and shall be maintained as public open space by the developer until taken in charge by the local authority. When the estate is taken in charge,

the open spaces and play area shall be vested in the planning authority, at no cost to the authority.

**Reason:** In order to ensure the satisfactory development of the public open space areas, and their continued use for this purpose.

**Condition 12**

All trees shown shall be retained on the site and shall be adequately protected during the period of construction in accordance with BS: 5837. Such measures shall include a protection fence which shall be erected beyond the branch spread, and no construction work or storage shall be carried out within the protective barrier.

**Reason:** In the interest of visual amenity and of protecting the residential amenities of adjoining properties.

- 4.2. It is important to note that the Notification to Grant under PA ref. SD18A/0310 contained both a 'Tree Bond' condition (Condition 9 – €50,000) and a security bond condition (Condition 22 – (a) €158,360.00 cash deposit or (b) €189,010.00 insurance bond). The tree bond condition stated:

*Prior to the commencement of any permitted development or any related construction activity or tree felling on the site, the applicant shall lodge a Tree and Hedgerow Bond to the value of €50,000 with the Planning Authority. This is to ensure the protection of trees on and immediately adjacent to the site to make good any damage caused during the construction period.*

*The bond lodgement shall be coupled with an Arboricultural Agreement, with the developer, empowering the planning authority to apply such security, or part thereof, to the satisfactory protection of any tree/hedgerow or trees/hedgerows on or immediately adjoining the site, or the appropriate and reasonable replacement of any such trees/hedgerows which die, are removed or become seriously damaged or diseased within a period of three years from the substantial completion of the development. Any replacement planting shall use large semi-mature tree size(s) and species or similar as may be stipulated by the planning authority.*

*An Arboricultural Assessment Report and Certificate is to be signed off by a qualified Arborist after the period of 3 years of completion of the works. Any remedial tree*

*surgery, tree felling works recommended in that Report and Certificate shall be undertaken by the developer, under the supervision of the Arborist. The bond will only be refunded upon receipt by SDCC Public Realm Section of a satisfactory post-construction arboricultural assessment, carried out by a qualified arborist and provided that the hedges/trees proposed for retention are alive, in good condition with a useful life expectancy.*

**Reason:** *To ensure the protection, safety, prudent retention and long-term viability of trees to be retained on and immediately adjacent to the site.*

## **5.0 Statutory Provisions**

### **5.1. Planning and Development Act 2000**

5.1.1. Section 34(1) of the Planning and Development Act 2000 (as amended) ('PDA 2000 or the Act') outlines that a planning authority may decide to grant the permission subject to or without conditions, or to refuse it.

5.1.2. Section 34(4) of the Act lists condition-types that may or may not be imposed on a grant of permission. The following sub-paragraphs are relevant:

*(d) conditions for requiring provision of open spaces;*

*(e) conditions for requiring the planting, maintenance and replacement of trees, shrubs or other plants or the landscaping of structures or other land;*

*(g) conditions for requiring the giving and maintaining of adequate security for satisfactory completion of the proposed development; and*

*(j) conditions for the maintenance, until taken in charge by the local authority concerned, of roads, open spaces, car parks, sewers, watermains or drains and other public facilities or, where there is an agreement with the local authority in relation to such maintenance, conditions for maintenance in accordance with the agreement.*

Sub-paragraph (g) is the statutory basis for Condition 18 of ABP-304659-19, the subject of this referral. Sub-paragraph (e) is basis for Condition 4, sub-paragraph (j) is the basis for Condition 10 and sub-paragraph (d) is the basis for Condition 11, as outlined above.

5.1.3. Section 34(5) of the Act states:

*The conditions under subsection (1) may provide that points of detail relating to a grant of permission be agreed between the planning authority and the person carrying out the development and, accordingly—*

*(a) where for that purpose that person has submitted to the planning authority concerned such points of detail, then that authority shall, within 8 weeks of those points being so submitted, or such longer period as may be agreed between them in writing, either—*

*(i) reach agreement with that person on those points, or*

*(ii) where that authority and that person cannot so agree on those points, that authority may—*

*(I) advise that person accordingly in writing, or*

*(II) refer the matter to the Board for its determination,*

*and, where clause (I) applies, that person may, within 4 weeks of being so advised, refer the matter to the Board for its determination etc.*

5.1.4. Section 37(1)(b) of the Act states that:

*[...] where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance [...] and subsections (1), (2), (3) and (4) of section 34 shall apply etc.*

## **6.0 Policy Context**

### **6.1. Circular Letter PD 1/08**

6.1.1. The Annex to Circular Letter PD 1/08 (Taking in Charge of Residential Developments and Management Arrangements) sets out a *Framework for a Comprehensive Taking in Charge Policy*. In respect of security bond conditions, it states *inter alia* that:

*It is a matter for the planning authority to determine both the level of the security and the type of security (e.g. the lodgement of a bond from a financial institution - e.g. bank, insurance company, building society - a cash lodgement or a letter of guarantee*

*from the Construction Industry Federation) that will be required for each residential development. The amount of the security, and the terms on which it is required to be given, must enable the planning authority, without cost to itself, to complete the necessary services (including roads, footpaths, water mains, sewers, lighting and open space) to a satisfactory standard in the event of default by the developer.*

## 6.2. **Circular Letter PL 11/2013**

- 6.2.1. This Circular sets out further guidance and direction regarding the provision of security provided under section 34(4)(g) of the Planning Act for the satisfactory completion of residential housing developments.

## 6.3. **County Development Plan**

- 6.3.1. The South Dublin County Development Plan 2022-2028 is the current statutory plan for the area. However, the decision to grant permission on 27<sup>th</sup> September 2019 was made under the 2016-2022, as varied, as detailed in the Board Order under ABP-304659-19. Section 9.3.4 of that plan related to non-designated sites. The following objective set out therein is relevant:

**HCL15 Objective 3**      To protect existing trees, hedgerows, and woodlands which are of amenity or biodiversity value and/ or contribute to landscape character and ensure that proper provision is made for their protection and management in accordance with Living with Trees: South Dublin County Council's Tree Management Policy 2015-2020.

- 6.3.2. A similar policy approach is detailed in NCBH11 Objective 3 of the current Plan.

## 6.4. **Living with Trees –Tree Management Policy**

- 6.4.1. Section 7.1 of SDCC's Tree Management Policy 2015-2020 relates to tree retention and aftercare on development sites and outlines the following policy:

*The Council will use its powers to ensure that where it is conducive with the objectives of the County Development Plan, and other planning objectives there is maximum retention of trees on new development sites.*



6.4.2. The subsequent text states *inter alia*:

*In the processing of planning applications, the Council will seek the retention of trees of high amenity / environmental value taking consideration of both their individual merit and their interaction as part of a group or broader landscape feature.*

6.4.3. There is no specific mention of security bond conditions, or tree bonds specifically.

6.4.4. The Tree Management Policy for 2021-2026 was launched on 20<sup>th</sup> December 2021, after the appeal decision of 27<sup>th</sup> September 2019. Section 7.1 of this document relates to trees on development sites and outlines an identical policy to that set out above.

6.4.5. In addition to the text under section 7.1 of the 2015-2020 Tree Management Policy, it states *inter alia*:

*Tree bonds are routinely applied to existing trees on development sites which merit retention, to ensure their protection and retention. The Council has sequestered tree bonds, or parts thereof, from several sites where tree protection was inadequate and there was resulting damage to, or loss of trees, as a result.*

## 6.5. Taking in Charge Policy

6.5.1. SDCC's Taking in Charge Policy (2<sup>nd</sup> revision, June 2018) outlines the following:

*It is a matter for the planning authority to determine both the level of the security and the type of security (e.g. the lodgment of a bond from a financial institution - e.g. bank, insurance company, building society - a cash lodgment or a letter of guarantee from the Construction Industry Federation) that will be required for each development permitted, and what such security provides for. The amount of the security, and the terms on which it is required to be given, must enable South Dublin County Council, without cost to itself, to complete the necessary services (including roads, footpaths, water mains, sewers, lighting and open space etc.) to a satisfactory standard in the event of default by the developer and to provide for any risk liabilities of the Council arising from a developer not adhering to the terms of a permission or completing a development satisfactorily.*

## 7.0 The Referral

### 7.1. Referral Question

7.1.1. The referrer has submitted the following question for the Board's determination:

***Whether Condition No. 18 or any other condition of the permission requires the payment of a tree / hedgerow bond of €50,000 or of any other amount?***

### 7.2. Referrer's Case

7.2.1. The referrer's case can be summarised as follows:

- The referrer submits that Condition 18 does not provide for, or permit, the planning authority to impose a tree/hedgerow bond-type of any amount.
- They note that the permission and schedule of conditions makes no reference to the requirement for a tree bond and refers to the wording of Condition 18 i.e. for the "satisfactory completion and maintenance until taken in charge".
- They state that the trees to be retained as part of the permission do not form part of the proposal and no works or maintenance is required.
- They note that Condition 12 of the permission requires that trees are retained and "protected during the period of construction" and state that there is no reference to "hedgerows". They also note that they are bound to comply with Condition 12 and non-compliance could result in enforcement proceedings.
- Significantly, they note that it is the Board's practice to attach the requirement for a tree bond as a separate condition and no such condition exists.
- Finally, the referrer submits that any requirement to pay a financial contribution or any monetary payment to the Council would, as a principle of law, require the clearest possible wording so that the applicant or the developer would be in no doubt as to what monies are to be expended. The Council cannot seek to infer payment of a bond implicitly by interpretation of conditions of the permission.

7.2.2. The referrer does state however, that they are agreeable to a 'security bond' of €164,360. The basis for this calculation is detailed in Clause 1 of South Dublin County Council's Record of Executive Business and Manager's Order (P/0075/13) relating to

the 'scale of charges for security/bond' to be attached to housing development permissions (Appendix 2 of the referral). The following extract is relevant:

<b>Dwellings</b>	<b>Cash per dwelling</b>	<b>Bond per dwelling</b>
First 1 – 20 dwellings	€6,994	€8,043
Next 21 – 50 dwellings	€4,896	€5,630

### **7.3. Planning Authority Response**

- 7.3.1. Comments were sought from the planning authority on 5<sup>th</sup> January, 3<sup>rd</sup> February and 4<sup>th</sup> April 2023. As there was no documentation from the planning authority on this point of detail referral, a notice under section 132 of the Planning Act issued to South Dublin County Council on 16<sup>th</sup> May 2023, giving until 6<sup>th</sup> June 2023 to respond.
- 7.3.2. This correspondence noted that if the 'comments on the grounds of the referral' are not received before the end of the specified period, the Board will dismiss or otherwise determine the referral without further notice. No response has been received to date.

## **8.0 Assessment**

### **8.1. Preliminary Points**

- 8.1.1. This referral on a 'point of detail' is made pursuant to section 34(5) of the Planning Act as cited earlier in this report. It relates specifically to Condition 18 of ABP-304659-19 and the failure of the parties to reach an agreement on whether this condition requires the payment of a 'tree bond', specified by the planning authority as €50,000.
- 8.1.2. Having examined the referral details and all other documentation on the referral file, including the submission, and inspected the site, and having regard to relevant local, regional and national policies and guidance, I consider that the main issues in this referral are those raised by the referrer. The issues can be addressed under the following headings:
- The Board Order
  - Scale of Charges
  - Taking in Charge Policy

## 8.2. The Board Order

- 8.2.1. I have reviewed the Inspector's Report under ABP-304659-19 and note that section 7.9.2 considered the visual impacts of the proposal generally and the removal of trees and hedgerow specifically. In particular, I note that the Inspector was satisfied that the development could be accommodated without significant alteration to the existing established character of the area, subject to the full implementation of the landscaping plan etc. This was provided for under Condition 4 of the Board Order and explicitly required the protection of trees and hedgerows on, and adjacent to, the referral site. Condition 12 of the Board Order further detailed the level of protection required etc.
- 8.2.2. Whilst I disagree with the referrer's inference that the trees to be retained do not form part of the proposal/permission, I fully agree that Conditions 4 and 12 provide for the protection of these trees during the construction phase and non-compliance could result in enforcement action. I am also satisfied that there are no other conditions set out in the Board Order that would require the lodgement of a cash deposit or security bond etc. in order to protect the trees and hedgerows during the construction phase.
- 8.2.3. The stated reason for Condition 18 is 'to ensure the satisfactory completion and maintenance of the development until taken in charge.' It refers to the provision of 'roads, footpaths, watermains, drains, public open space and other services required in connection with the development'. Other conditions also refer to taking in charge.
- 8.2.4. Condition 10, as cited above, details the standard taken in charge requirements. It refers explicitly to 'all roads, footpaths, and public lighting', excluding public open space. I also note that Condition 11 requires the provision of open space etc. prior to occupation of any of the permitted houses and its subsequent maintenance until taken in charge at which time the open spaces etc. shall be vested in the planning authority.
- 8.2.5. Read in conjunction with Condition 10 and Condition 11, I am satisfied that Condition 18 provides for the lodgement of cash deposit or security bond to ensure the satisfactory completion and maintenance of *inter alia* the proposed open space and landscaping thereof until taken in charge. This includes the retention of trees and hedgerows insofar as they form part of the site landscaping proposals but excludes any tree and hedgerow to be retained under Condition 4 and not to be taken in charge.
- 8.2.6. I also agree with the referrer's contention that its Board practice to attach a tree bond condition should it be warranted in such circumstances. Evidently, this is not the case.

### 8.3. Scale of Charges

- 8.3.1. The referrer submits that the basis for the security bond calculation is set out in South Dublin County Council's Record of Executive Business and Manager's Order (P/0075/13). The relevant extract from Clause 1 is set out above including the basis for the €164,360 security bond calculation i.e. 20 units at €6,994 and 5 units at €4,896.
- 8.3.2. There is no scale of charge for tree bonds outlined in this Manager's Order. The genesis of the €50,000 bond is the internal Parks Department report dated 3<sup>rd</sup> May 2018. I have no other information before me which details the calculation of this figure.

### 8.4. Taking in Charge Policy

- 8.4.1. I have also reviewed the County Council's Taking in Charge Policy (2<sup>nd</sup> revision, June 2018) and whilst I accept that it is a matter for the planning authority to determine both the level (i.e. amount) and type (e.g. cash deposit, financial bond etc.) of security, there is no specific mention of a 'tree / hedgerow bond' or the basis for the calculation thereof, let alone the requirement to submit an arboricultural report/agreement etc.
- 8.4.2. That is not to say that such a figure could not have been agreed were a specific 'tree bond' condition attached to the Board's decision, but it is clearly not in this instance.

### 8.5. Conclusion

- 8.5.1. Finally, the referrer submits that any monetary payment to the Council would, as principle of law, require the clearest possible wording so that the developer would be in no doubt as to what monies are to be expended and the Council cannot seek to infer payment of a bond implicitly by interpretation of conditions of the permission.
- 8.5.2. I fully agree. It, therefore, appears to me that it is outside the scope of Condition 18 to seek additional security above that provided for within the existing scale of charges which evidently includes the open space and landscaping thereof in addition to the retention of trees and hedgerows insofar as they form part of the landscaping proposal.
- 8.5.3. Protection of the trees and hedgerows outside of the landscaping proposal and "adjacent to the site" was considered by the Board and provided for under Condition 4. To seek any additional security for their protection would appear to be *ultra vires*.

## 9.0 Recommendation

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

**WHEREAS** by Order dated the 27<sup>th</sup> day of September, 2018 An Bord Pleanála, under planning register reference number ABP-304659-19 granted subject to conditions a permission to Phoenix Croft Limited care of CKPM of Landscape Avenue, Churchtown, Co. Dublin for a development comprising the construction of a 25 unit residential housing development on a site extending to 0.96 hectares consisting of the following: one number detached, two and a half storey five bedroom house (Type 1, 295 square metres), one number detached, two and half storey five bedroom house (Type 1a, 270 square metres), one number detached, two and a half storey four bedroom house (Type 1b, 270 square metres), one number detached, two and a half storey five bedroom house (Type 1c, 280 square metres), one number detached, two and a half storey five bedroom house (Type 1d, 270 square metres), eight number detached, two and a half storey houses (Type 2, 150 square metres each), a two-storey, semi-detached block consisting of: one number two bedroom house (Type 3, 70 square metres), one number two bedroom house (Type 3a, 74 square metres), 10 number semi-detached two and a half storey houses (Type 4, 150 square metres each), all associated site development works including landscaping works, public lighting, ground works, (reduction of existing site level), boundary treatment, roads, footpaths, foul drainage, surface water drainage including attenuation, water main and site entrance piers (with no gates). All on a site to the north of the N4 Lucan by-pass and to the east (end of) Ardeevin Avenue, Lucan, County Dublin.

**AND WHEREAS** condition number 18 attached to this permission required the developer to lodge with the planning authority 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 local

authority of roads, footpaths, drains, public open space and other services required in connection with the development, prior to commencement of development, and where 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.

**AND WHEREAS** the planning authority required the developer to pay a security bond of €164,360 and a tree bond of €50,000 in order to comply with the terms of condition number 18 of this permission.

**AND WHEREAS** the developer and the planning authority failed to agree on the amount of security to be paid pursuant to condition number 18, and on the application of the scope of this condition, in or around the 23<sup>rd</sup> day of September 2022 and the matter was referred by the developer to An Bord Pleanála on the 21<sup>st</sup> day of October 2022 for determination:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 34(5) of the Planning and Development Act, 2000, as amended, and based on the Reasons and Considerations set out below, hereby determines that condition number 18 of this permission, or any other condition of the Board Order dated 27<sup>th</sup> day of September 2019, does not require the payment of a specific tree / hedgerow bond of €50,000 or of any other amount other than that set out in Clause 1 of the Record of Executive Business and Manager's Order (P/0075/13) dated 26<sup>th</sup> day of July 2013.

## 10.0 Reasons and Considerations

10.1. Having regard to:

- (a) The Inspector's Report and Board Order under ABP-304659-19,
- (b) section 34(5) of the Planning and Development Act, 2000, as amended,
- (c) South Dublin County Council's Taking in Charge Policy (2<sup>nd</sup> revision, June 2018),

(d) Clause 1 of South Dublin County Council's Record of Executive Business and Manager's Order (P/0075/13) relating to the scale of charges for security bond conditions to be attached to permissions for housing developments,

(e) the submission on file, and

(f) the general practice of applying specified 'Tree Bond' conditions where deemed necessary and in accordance with proper planning and sustainable development,

the Board considers that the terms of condition number 18 of ABP-304659-19 do not provide for payments other than those prescribed in Clause 1 of the aforementioned Manager's Order (P/0075/13).

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.

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Philip Maguire

Planning Inspector

22<sup>nd</sup> September 2023