



An
Bord
Pleanála

Inspector's Report 317200-23

Referral	Point of detail regarding condition number 81 of Planning Authority Register Reference: 04/7674 (PL04.212515)
Location	Lehenagh Beg, Lehenagh More, Pouladuff Road, Togher, Cork
Planning Authority	Cork City Council (formerly Cork County Council)
Planning Authority Reg. Ref.	Cork Co. Co. 04/7674
Referrer	Ruden Homes Ltd.
Type of Application	Point of Detail
Type of Appeal	First Party
Observer(s)	None
Date of Site Inspection	5 th May 2024
Inspector	Mary Kennelly

1.0 Introduction

- 1.1. This is a referral under Section 34(5) of the Planning and Development Act, 2000 (as amended) requesting a determination on the appropriate implementation of points of detail relating to Condition 81 (S48 Special Financial Contribution) attached to permission register reference 04/7674. An appeal against Condition 80 (Financial Contribution under GDCS) and Condition 81 (PL04.212515) was subsequently determined by the Board in respect of both of these conditions.

2.0 Site Location and Description

- 2.1. The site is situated approximately 1.5km to the south of the N40 Cork Ring Road in the suburb of Pouladuff, Togher. Pouladuff Road (L2455) travels south-westwards from the N40 (formerly the N25) through an industrial and bulk-retail area to a roundabout and onwards to the junction with Forge Hill which links with the Kinsale Road (N27). The site is located to the south of this junction and to the west of Forge Hill. The site consists of a substantially complete housing estate (now known as Manor Farm to the north and Coolkellure to the south), which was originally permitted as a large-scale housing development in 2005, comprising 537 residential units in a variety of styles and sizes, together with a creche, a shop and associated works. The applicant (developer) was Ruden Homes Ltd. and the same developer had previously developed a further housing estate to the south-southwest, known as Matthew Hill, which has frontage to Pouladuff Road.
- 2.2. The site is accessed from Pouladuff Road at two locations. The northern entrance is directly off Pouladuff Road at Courtlawn/Manor Crescent and the second entrance is accessed via Ardross/Coolkellure Road, which branch off Pouladuff Road. The original planning permission (04/7674, PL04.212515) included proposed works to Pouladuff Road near these two entrances, which were required to be carried out by the developer in accordance with Condition 52 of that permission.
- 2.3. Pouladuff Road (L2455) is a substandard urban road which is in poor condition and is poorly aligned. Although it serves several housing estates, industrial estates and commercial premises, it is severely deficient in pedestrian facilities, public lighting and is narrow and winding in parts with poor forward visibility. The road has been the subject of road improvement proposals for many years to upgrade and improve it

from the roundabout just south of the N40 to the junction with Togher Road, which is located to the south of the Matthew Hill estate. It is noted that road improvement works have been carried out on the L2455 in the vicinity of each of the two junctions referred to above. These include road widening, right-turning lanes, footpaths and street lighting for the length of the site's road frontage in respect of the northern entrance and for a short section to the north and south of the second entrance. In addition, Coolkellure Road and Coolkellure Rise, (which link the development site with the L2455), have also been upgraded.

3.0 **Planning Permission**

- 3.1. The development permitted under planning register reference 04/7674 (PL04.212515) relates to planning permission for the development of a site with a stated area of 49.9 acres (c. 20ha) comprising 537 residential units, a creche, a shop, 3 ESB substations, 2 no. vehicular accesses and associated works. Permission was granted by Cork County Council on 9th May 2005. An appeal against Conditions 80 and 81 was submitted to the Board, Ref. PL04.212515.
- 3.2. **Condition 80** required the payment of a financial contribution of €1,965,489 in accordance with the General Development contribution Scheme prior to the commencement of development. **Condition 81** required the payment of a special contribution in respect of sports and recreation facilities (€1,850,000) and road improvement works (€1,630,869).
- 3.3. **Condition 81** reads as follows:

At least one month before commencing development, the developer shall pay a special contribution of €3,480,869.00 to Cork County Council in accordance with the Consumer Price Index from the date of grant of permission to the date of payment, in respect of specific exceptional costs not covered in the Council's General Contributions Scheme in respect of works proposed to be carried out for the provision of:

- (i) Sports and recreation facilities which would otherwise be required on site in accordance with the Council's recreational policy - €1,850,000.
- (ii) Roads improvement works - €1,630,869.

The payment of the said contribution shall be subject to the following

- (a) Where the Council has decided not to proceed with the works in question, the return of the contribution.
- (b) Where the works in question are not commenced within 5 years of the date of payment of the contribution or final installment thereof or have not been completed within 7 years of that date, the return of such proportion of the contribution as shall correspond to the proportion of the works not carried out within those periods.
- (c) Payment of interest at the prevailing interest rate payable by the Council's Treasurer on the Council's General Account on the contribution or any instalments thereof that have been paid, so long and insofar as it is, or they are retained unexpended by the Council.

No development shall take place until the monies have been paid to the Council.

Reason: - It is considered appropriate that the developer should contribute towards these specific exceptional costs, for works which will benefit the proposed development.

3.4. The Board decided, on 6th October 2005, to **ATTACH Condition No. 80** and the reason therefor, and to **AMEND Condition No. 81**, to read as follows:

- 81. The developer shall pay the sum of €3,480,869 (three million four hundred and eighty thousand eight hundred and sixty-nine euro) (updated at the time of payment in accordance with changes in the Wholesale Price Index - Building and Construction (Capital Goods), published by the Central Statistics Office), to the planning authority as a special contribution under section 48 (2)(c) of the Planning and Development Act 2000 in respect of (a) the provision of sport and recreational facilities which could otherwise be required on site in accordance with the Council's recreational policy - €1,850,000 (one million eight hundred and fifty thousand euro) and (b) road improvement works. This amount may be offset by the cost of works pursuant to condition No. 52 which directly overlaps with the said road improvement scheme, and which were carried out to the satisfaction of the planning authority. This contribution shall be paid prior to the commencement of the development or in

such phased payments as may be agreed between the planning authority and the developer. Payment is subject to the provisions of section 48(12) of the Planning and Development Act 2000. In default of agreement, this matter shall be referred for determination by An Bord Pleanála.

- 3.5. For the Board's information, **Condition No. 52** of planning permission Reg. Ref. 04/7674 reads as follows:

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

Reason: In the interests of orderly development.

4.0 **The Question**

- 4.1. The current referral on a point of detail is made under Section 34(5) of the Planning and Development Act 2000 (as amended). The point of detail at issue relates to the intent of Condition 81 attached to the permission granted on application 04/7674, following amendment under appeal PL04.212515, which requires the payment of a special contribution in respect of road improvement works. The question arising seeks firstly, a determination on whether the levy required by Condition 81 is valid and secondly, how much of the contribution payable can be offset by the cost of road improvement works already carried out at the developer's expense pursuant to Condition 52 of 04/7674, which overlaps with the overall road improvement works referred to in Condition 81.
- 4.2. Central to the cause of disagreement between the parties is that at the time that the planning decision was made (6/10/05), the nature and extent of the Road Improvement Scheme had not been properly designed, specified and identified. Furthermore, no road improvement scheme had been formulated and adopted by Cork County Council pursuant to Section 179 of the PDA 2000 and Part 8 of the PD

Regulations 2001 respectively, between the date of the Board Order (6/10/05) and the adoption of the Part 8 Scheme by Cork City Council on 8/02/21, notwithstanding the fact that the developer had carried out and completed the road improvement works required by Condition 52. On this basis it is submitted that the Special Development contribution under Condition 81 is nil.

- 4.3. It is further stated that the developer (Ruden Homes Ltd.) has paid a substantial portion of the special contribution levy relating to the road improvement works (€1,095,680) and, therefore, considers that this should be refunded in full (with interest), as the works have not been completed within the timeframe set out in the legislation.
- 4.4. In addition, it is sought that the monies spent in respect of the works carried out by the developer pursuant to Condition 52, (i.e. the offset works), which has already been acknowledged by Cork County Council as amounting to €551,211.06, should be refunded to the developer (with interest).

5.0 **Planning History**

- 5.1. **04/7674** - Permission granted for a development of 537 no. residential units, a creche, a shop, 3 no. ESB substations and 2 no. vehicular/pedestrian entrances. Permission was subject to conditions.
- 5.2. **PL04.212515** - A first party appeal was lodged against Conditions 80 and 81 (as noted above). The appellant had sought -
 - (a) A review of the method of calculation used for the general development contribution required under condition 80.
 - (b) Deletion of condition 81 on the grounds that the special development contribution was unwarranted and excessive having regard to condition 80 and land transfers, as well as for other reasons.

The Board decided **not to change Condition no. 80** (financial contribution under GDCS) but decided **to amend Condition no. 81**. The amendment related specifically to the contribution for the proposed road improvement works and it added a requirement to offset the amount to be paid in respect of the works to be carried out by the Developer (pursuant to condition 52) where these works would

directly overlap those that were to be carried out as part of the road improvement scheme.

5.3. ABP-307091-20 - Point of Detail Referral in respect of Condition No. 81

submitted by developer (Ruden Homes Ltd.). Several issues raised but, in summary, the Referrer sought firstly, to determine what costs could be included in the offset provision as set out in the amended Condition No. 81 of ABP decision (212515) and secondly, whether the exclusion of certain specific costs by the P.A. was reasonable.

The first issue arose from the developer's contention that all of the road improvement works carried out by the developer pursuant to condition 52 should be included in the offset, i.e. those relating to the L2455 and the L6453 (Coolkellure Road/Rise).

However, the P.A. had considered that only the works which related to those sections of the L2455 where there was a direct overlap with the works carried out pursuant to Condition 52 should be included. The second issue related to whether the specific costs should include land acquisition, cartage and waste disposal. The P.A. had considered that only the land acquisition costs should be included.

The Board agreed with the P.A. on both issues i.e. it was determined that -

“the works in view are those works that have been undertaken by the developer to the public road, the L2455, only and that the basis for assessing the cost of these works includes land acquisition costs but not cartage and waste disposal costs.”

- 5.4. CH28.314650** – Lehenaghmore Road and Togher Road Acquisition Order – this application which relates to a Road Improvement Scheme for the L2455 Lehenaghmore Road and the L2454 Togher Road has been submitted by Cork City Council is currently before the Board.

6.0 The Referral

- 6.1. The referral submission was made by HBMO Solicitors on behalf of the first party, Ruden Homes Ltd. Following the submission of the referral, HBMO Solicitors merged with Clark Hill Solicitors LLP, and the firm is now known by this name. The grounds of referral regarding this point of detail are summarised as follows:

1. **Contribution under Condition 81 is NIL** - The Special Development Contribution due under Condition 81 of the planning permission (04/7674), as amended by the Board's decision of the 06/10/05, is considered to be NIL for the following reasons -

- **No Road Scheme at time of decision** - At the time of the planning decision, (06/10/05) the 'said Road Improvement Scheme' did not exist as it has not been technically designed, properly formulated or specified, notwithstanding the mandatory obligation to do so, and the fact that the said 'Road Improvement Scheme' was expressly referred to and described in the text of Condition No. 81. The correspondence from the planning authority dated the 6th April 2005 stated that it was at 'Preliminary Design Stage'. Thus, conditions 52 and 81 were formulated on this basis, not on the basis of an approved or adopted Scheme.
- **No approved or adopted Road Scheme** - No such Road Improvement Scheme was approved or legally adopted by Cork County Council as is required under the provisions of Section 179 of the Planning and Development Act 2000 (as amended) and Part 8 of the Planning and Development Regulations 2001 (as amended).
- **No specification of particular works** – Section 48(12), at the time of the decision in 2005, required that the special contribution condition specify the particular works to be carried out, or proposed to be carried out, by any local authority to which the contribution relates. It is submitted that as no Road Scheme was technically designed, approved or legally adopted, this requirement was not fulfilled. It is acknowledged, however, that in response to the First Party Appeal (212515), the P.A. had provided a "Summary of Estimate Bill of Quantities", but this did not equate to a Road Scheme.
- **Road Scheme not completed within required timeframes** - The said 'Road Improvement Scheme' never existed and, in any case, the road scheme was not completed within the timeframe envisaged by Section 48 (12) of the Planning and Development Act 2000 (as amended). At

the time of the decision, the provisions of S48(12)(b) required that special contributions be repaid either (i) where the works in question are not commenced within 5 years of the date of payment of the contribution, or (ii) where the works have commenced but have not been completed within 7 years of the date of payment, or (iii) where the L.A. decides not to proceed with the proposed works or part thereof. It is acknowledged, however, that the amendment to Section 48(12)(b), which introduced time limits for repayment of special contributions by reference to the payment of the final instalment of a phased payment scheme, did not commence until October 2010.

- **Lehenaghmore Road Improvement Scheme** – it is acknowledged that Cork City Council (the successor to Cork County Council) has adopted a scheme providing for road improvement works in the Lehenaghmore area on the 8th February 2021. However, not only was this scheme not adopted within the period envisaged by S48(12) or within the lifetime of the permission, it is impossible to confirm that this scheme accords with the works the subject matter of the roads element of the special contribution condition, as the P.A. failed to comply with its obligations under S48(12) to specify the “*particular works carried out or proposed to be carried out*”.

2. **Refund of Contributions paid under Condition 81** - On the basis that the special contribution payable under Condition 81 is NIL, the developer is seeking a full refund of that part of the contribution paid to date plus interest in accordance with S48(12)(c) which states -

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

The amount of the Special Contribution €1,630,869 as stated in condition 81 was calculated on the basis of €3,037 per unit and there were 537 units permitted. It was agreed between the developer and the planning authority that the contribution would be paid in phased payments as follows:

- (a) A part/proportion of the Special Contribution for each phase of the development should be paid immediately prior to the commencement of that phase.
- (b) The amount of special contribution for each phase should be determined by the number of dwellings in that phase, rather than the cost of the specific works required to facilitate that phase.

The developer paid a substantial part of the contribution in this manner prior to 2008. As the road scheme was never designed, approved or implemented, it is stated that these payments, amounting to €1,095,000, should be refunded in full, with interest, as the said scheme was not delivered within either 5 or 7 years of each of the phases. It is submitted that as soon as the portion of special contribution attributable to each phase was paid, the planning authority was obliged to either -

- (i) Commence the said works within 5 years of the receipt of payment for that phase, or
- (ii) Refund the proportion of special contribution paid for that phase of development in full.

However, as the Road Improvement Scheme never existed, as it was never technically designed, identified, formulated or adopted, and as it has not been completed by the Local Authority, it is submitted that the amount due is nil and hence, the payments to date should be refunded in full, with interest.

3. Refund of costs of road works undertaken pursuant to Condition 52 -

Notwithstanding the foregoing, it is noted that the planning authority has confirmed in writing, (20/01/11 and 22/07/13), that the value of the “*attributable works*” (aka offset works) has been calculated at €551,221.06. It is submitted that at a very minimum, this amount should be repaid to the Developer. This sum represents the amount of monies spent by the developer on carrying out road works on the L2455 in the vicinity of the two entrances to the permitted housing estate, which were required by Condition 52 of the parent permission, and which overlapped with the section of road that would be subject to the proposed road scheme along the L2455.

The Referrer states that:

“it follows that, there being no concluded and approved scheme within the period envisaged by S48 or in the lifetime of the permission, Ruden Homes Ltd. is entitled to the refund of the sum of €551,221.06 in addition to the sum of €1,095,680 (plus interest)”.

The non-existence of a properly formulated and adopted road improvement scheme, (in accordance with S179 of the PDA and Part 8 of the PDR), has resulted in substantial financial loss to the developer on the basis that the road improvement works pursuant to condition 52 were carried out in good faith in the belief that the roads element of the Special Contribution would be offset against the entire cost of these works.

7.0 Planning Authority Submission

- 7.1. The site to which the Point of Detail Referral relates is located within the newly expanded boundary of Cork City Council. However, at the time of the grant of planning permission, subject to conditions by the P.A. (Reg. Ref. 04/7674) and following an appeal against conditions by the Board (PL04.212515), (some conditions of which are pertinent to the current referral), the site was located within the jurisdiction of Cork County Council. The Board has notified both planning authorities.
- 7.2. The response from **Cork City Council Planning Authority** (16/06/23) disputed that Cork City Council is either the “Planning Authority” or the “Local Authority” as “successor to Cork County Council”. It is pointed out that Section 31(1) of the Local Government Act 2019 provides:-

“For the purposes of the Act of 2000 or any instrument under that Act and subject to subsection (2), the said county council shall, after the transfer day, be the planning authority in relation to any planning application made before the transfer day in respect of development or proposed development in the relevant area.”

As such, it was confirmed that Cork County Council remains the relevant planning authority and it was stated that the developer had been advised of this fact directly.

It was further stated that any monies paid to Ruden Homes Limited to Cork County Council in relation to this development were not transferred to Cork City Council as part of the boundary extension process.

- 7.3. **Cork County Council Planning Authority** responded on the **13th July 2023**. The response to the grounds of referral states that all of the relevant issues have been addressed in the technical reports which have already been forwarded to the Board and the planning authority has no further comments to make on this matter. However, correspondence between the developer and the planning authority was enclosed with the response. The correspondence forwarded to the Board includes the following:

List of correspondence between Developer and P.A. forwarded by P.A.

- (i) Letter from P.A. to Developer dated 7th February 2012
- (ii) Letter from P.A. (Andrew Hind Senior Planner) undated in response to letter of August 2014
- (iii) Letter from Developer's Solicitor to P.A. dated 22nd February 2016
- (iv) Letter from P.A. to Developer dated 2nd June 2021
- (v) Letter from P.A. to Developer dated 8th June 2021
- (vi) Letter from HMBO Solicitors to Cork City Council dated 30th November 2021
- (vii) Letter from HMBO Solicitors to PA dated 11th January 2022

- 7.4. It should be noted that the first three pieces of correspondence, (i) to (iii), predate the Board's most recent decision in relation to this matter (issued 22/09/20). Items (iv) and (v) relate to condition 80, which required the payment of a financial contribution under the General Development Scheme. The remaining items, (vi) and (vii) are letters from the Referrer's solicitors which contain similar arguments to those in the current Point of Detail Referral.

- 7.5. The salient points made within this exchange of correspondence may be summarised as follows:-

- The position of Cork County Council is that the "said Road Improvement Scheme" is the "L2455 Lehenaghmore Road Widening Scheme" which was

initially explored in 2004/2005 but was not included as a Specific Objective in the 2003 County Development Plan. It was submitted that the road improvement works were deemed necessary as the existing L2455 was substandard for the current and proposed level of development along the route. The proposed Road Improvement Scheme was intended to facilitate the recent and proposed residential developments adjacent to the local road and that it would benefit the residents of the new development in the area.

- The P.A. confirmed that the intention of Condition 52 was to ensure that the developer paid for all of the works to the public road network that were considered necessary to facilitate the development. It was pointed out that the validity of this condition was not appealed, whereas the validity of conditions 80 and 81 were appealed (212515). It was re-iterated that the Board had confirmed Condition 80 and amended condition 81 in so far as making provision for part of the contribution to be offset by the cost of the road works carried out pursuant to condition 52, but only in respect of those works which directly overlapped with the said Road Improvement Scheme, and which were carried out to the satisfaction of the P.A.
- The P.A. clarified that the only 'Road Improvement Scheme' relevant to this permission is the 'L2455 – Lehenaghmore Road Widening Scheme' and that only those works carried out by the developer which affect the L2455 and that directly assist in the delivery of the Local Authority's L2455 Lehenaghmore Road Widening Scheme can be accepted in lieu of the payment of the monetary contribution required by Condition 81.

7.6. It is further noted from the correspondence between the parties that following the Board's determination (22/09/20) that "the works in view are those works that have been undertaken by the developer to the L2455 public road only and that the basis for assessing the cost of these works includes land acquisition costs but not cartage and waste disposal cost", the Referrer's solicitors continued to insist on the repayment in full of the special development contributions for road improvement works paid under Condition 81, in addition to the reimbursement of the cost of the improvement works carried out by Ruden Homes to the public road bordering the site under Condition 52.

8.0 Planning Policy

- 8.1. The Permission was granted under the then Cork County Development Plan 2003. Following the expansion of the boundary of Cork City Council, the site now lies within the jurisdiction of Cork City Council. The current plan for the area is the Cork City Development Plan 2022-2028. However, for the purposes of the Act of 2000, Cork County Council remains the relevant planning authority in relation to any planning application that had been made before the transfer day in respect of proposed development. Thus, whilst the policies and objectives of the cork city Plan are relevant to the site, the planning authority for the purposes of the planning permission granted in 2005 (04/7674) remains as Cork County Council.
- 8.2. Chapter 4 of the Cork City Development Plan 2022-2028 contains the policies and objectives regarding Transport and Mobility. It is noted that the National Transport Authority published the cork Metropolitan Area Transport Strategy in 2020, the key objectives of which are to improve current mobility in the city, plan for the transport needs of the population growth and to support modal shift towards more sustainable transport modes, walking, cycling and public transport.
- 8.3. The Lehenaghmore Road Improvement Scheme is listed as one of the Walking and Cycling Initiatives in Table 4.3 and is described as containing:
- “...a suite of measures aimed at improving pedestrian connectivity including new footpaths, pedestrian crossings and a new pedestrian cycling bridge which will link to the planned Greenway on the former Cork-Bandon railway line. This scheme will provide connectivity between Togher and Lehenaghmore and further on to the City Centre and western suburbs and will address the infrastructural deficit which has been more acute as the area developed in recent years.”

9.0 Relevant Legislation and Guidelines

9.1. Planning and Development Act 2000 (as amended).

Under **Section 34 (1)** where (a) an application is made to a planning Authority in accordance with permission regulations for permission for the development of land,

and (b) all requirements of the regulations are complied with, the authority may decide to grant the permission subject to or without conditions, or to refuse it.

Section 34(5) states that ‘...the conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development and that in default of agreement the matter is to be referred to the Board for determination.’

Section 48 provides for a planning authority, when granting planning permission under section 34, to include conditions requiring the payment of a contribution in respect of public infrastructure and facilities benefitting development in the area of the planning authority and that is provided, or that is intended will be provided, by or on behalf of a local authority (regardless of other sources of funding for the infrastructure and facilities). **S48(2)(c)** states

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.

S48(12) states

(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—

*F456[(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.

[*F456 Substituted \(5.10.2010\) by Planning and Development \(Amendment\) Act 2010 \(30/2010\), s. 30, S.I. No. 477 of 2010](#)

9.2 Development Management Guidelines issued by Department of Environment, Heritage and Local Government 2007.

These Guidelines provide guidance for Planning Authorities and seek to promote best practice in the development management process. At 7.12, Conditions requiring development contributions, it is stated

“Development contributions conditions may only be attached if they accord with the provisions of either section 48 or 49 of the Planning Act and they are based on the application of the terms of one or more development contribution schemes which have been formulated and adopted in accordance with those sections of the Act, or on the need for a special financial contribution.Section 48(general) schemes relate to the existing or proposed provision of public infrastructure and facilities benefiting development within the area of the planning authority and are applied as a general levy on development.”

10.0 Assessment

10.1. The issue to be determined in this referral relates primarily to condition 81 (Special contribution condition), but also relates to works required to be carried out pursuant to condition 52 of the planning register reference PL04.212515 (04/7674).

Condition 81, which was amended by the Board reads as follows:

The developer shall pay the sum of €3,480,869 (three million four hundred and eighty thousand eight hundred and sixty-nine euro) (updated at the time of payment in accordance with changes in the Wholesale Price Index - Building and Construction (Capital Goods), published by the Central Statistics Office), to the

planning authority as a special contribution under section 48 (2)(c) of the Planning and Development Act 2000 in respect of -

(a) the provision of sport and recreational facilities which could otherwise be required on site in accordance with the Council's recreational policy - €1,850,000 (one million eight hundred and fifty thousand euro), and

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

This contribution shall be paid prior to the commencement of the development or in such phased payments as may be agreed between the planning authority and the developer. Payment is subject to the provisions of section 48(12) of the Planning and Development Act 2000. In default of agreement, this matter shall be referred for determination by An Bord Pleanála.

Reason: It is considered reasonable that the developer should contribute towards the specific exceptional costs incurred by the planning authority which are not covered in the General Development Contribution Scheme, and which will benefit the proposed development.

10.2. **Condition 52** (which was not appealed) reads as follows –

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

Reason: In the interests of orderly development.

10.3. The substantive issues in dispute relate to the contention of the first party that

1. No contribution is payable in connection with Condition 81, on the basis that the said Road Improvement Scheme did not exist at the time of the planning

decision, and has never existed, on the basis that it has never been technically formulated, designed or approved, and furthermore, that the particular works to be carried out were never *specified* in accordance with the requirements of S48(12).

2. The amount of contribution already paid by the developer under Condition 81 (€1,095,680) should be refunded in full, with interest, in accordance with S48(12)(c), as the said 'Road Improvement Scheme' was not completed within the timeframe envisaged by Section 48 (12) or within the lifetime of the permission. As such, the amount due is 'nil' and the monies paid to date under condition 81 should be refunded in full, with interest.
3. Notwithstanding the foregoing, that a sum of €551,221.06, being the value of the 'attributable works' which was calculated by Cork County Council as the monies expended by the developer on the L2455 in the vicinity of the two entrances, required by condition 52 and which overlapped the said road improvement scheme.
4. In light of the non-existence of a properly formulated and adopted 'Road Improvement Scheme', against which the road works carried out pursuant to condition 52 could be offset, the developer is entitled to a refund of both the sum of €551,221.06 and the sum of €1,095,680 (plus interest).

10.4. In advance of addressing these issues, I would draw the Board's attention to matters which have already been established in previous decisions by the Board in respect of the issues of contention.

Firstly, it should be noted that the validity of only two conditions, Cond. 80 (GDSC contribution) and Cond. 81 (Special contribution) of the planning permission granted in 2005 under 04/7674, was challenged. The Board (PL04.212515) confirmed Condition 80, and made just one amendment to Condition 81, namely, to provide for the offset of the cost of the road works required under Condition 52 where there was an overlap with the 'said Road Improvement Scheme'.

Secondly, a Point of Detail was referred to the Board in March 2020 by the applicant relating to the intent of Condition 81 in respect of part (b), road improvement works, (ABP.307091-20). The question had arisen as to whether the road works pertained to the L2455 alone or included works to the L6453, in order to establish the quantum

of costs that could be offset by the referrer. The Board determined that the works related to those that had been undertaken by the developer to the L2455 public road only, and that the basis for assessing the cost of the works included land acquisition costs only, but not cartage and waste disposal costs.

1. Amount of Contribution payable under Condition 81 is 'Nil'

- 10.5. The Referrer bases this claim on the absence of a 'Road Improvement Scheme' which had either been technically designed, properly formulated or formally adopted and as the condition did not *specify the particular works to be carried out*. I would point out at the outset, that this matter was comprehensively addressed in the previous Inspector's report (307091, paragraphs 5.1-5.8). The Referrer in that instance had contended, *inter alia*, that the 'road improvement works' appeared to have been based on a Roads Design Report dated 6th April 2005, and that the 'particular works' could only be elucidated once the detailed design and construction works required by condition 52 had been prepared.
- 10.6. However, the Inspector did not accept this argument as it was pointed out that the said Road Design Report had referred to a major road improvement scheme on the Pouladuff Road (i.e. the L2455), that the applicant had been requested to liaise with the Senior Engineer in respect of upgrading the existing public road "bordering the site" and that, in addition, Further Information had been submitted by the applicant on the 29th March 2005, which showed the proposed road works, which exclusively related to these works (Drawing Nos. MHL RH-ENT1-PO1/PO2).
- 10.7. The arguments advanced in the current referral seem to repeat the previous arguments, irrespective of the previous Board determination on the matter, and in addition claim that as a Part 8 application had not been legally approved for the road improvement scheme, that no contribution is payable under this condition. I do not accept this argument as I am not aware of any legal requirement to have a formally approved road scheme (Part 8) in place in order to attach a condition requiring the payment of a Special contribution in respect of road improvement works. Government guidance on this matter is available in the Development Management Guidelines for Planning Authorities, 2007, (7.12). However, it should be noted that this guidance was published two years after the condition was attached to the permission. This states –

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.

10.8. As previously addressed by the Board's Inspector (307091), the need for and basis for the calculation of the contribution were set out in the reports and correspondence submitted by the planning authority, and this was accepted by the Board.

Furthermore, the validity of Condition 81 had already been challenged in the earlier appeal (212515), when the Board had confirmed the planning authority's condition with the additional requirement of offsetting the costs of overlapping section of road works. In conclusion, I do not accept that the financial contribution payable pursuant to Condition 81 is 'Nil'.

2. Amount of contribution paid under Condition 81 should be refunded in full

10.9. The First Party contends that the amount of contribution already paid by the developer under Condition 81 (€1,095,680) should be refunded in full, with interest, as the said road Improvement Scheme never existed and, in any case, it was not completed within the timeframe envisaged by Section 48(12) of the PDA 2000 (as amended), or within the lifetime of the permission. Reference is made to S48(12)(b), which, at the time that the planning permission was granted, had required that such special contributions must be repaid in certain circumstances. These were

- (i) Where the works in question had not commenced within 5 years of the date of payment of the contribution, or
- (ii) Where the works have commenced but have not been completed within 7 years of the date of payment, or
- (iii) Where the local authority decided not to proceed with the proposed works or part thereof.

10.10. The first party acknowledged that the amendment to the Act introduced in October 2010, which had introduced time limits for repayment of such contributions by reference to the payment of the final instalment of a phased payment scheme, had not commenced at the time that the permission was granted. Irrespective of this, it is considered that the requirement for repayment is triggered by failure of the local authority to commence the works within 5 years or completed them (if commenced) within 7 years of either the payment of the **contribution in full** or the payment of the **final instalment of the contribution**.

10.11. The Referrer states that payments were made on an agreed phased basis up to the value of €1,095,680, which is substantially short of the total contribution required under Cond. 81 of €1,630,869 in respect of road improvement works. It is clear, therefore that neither the full contribution nor the final instalment of the contribution had been paid. Whilst I would agree that the road improvement scheme has not been commenced nor completed by the local authority, as the final instalment or full amount of contribution has not been paid, I do not agree that the amount of contribution paid to date should be refunded, as the time limits have not been invoked.

10.12. Reference is also made to S48(12)(c), which relates to circumstances where a local authority has incurred expenditure within the required period, in respect of a proportion of the works proposed to be carried out, stipulating that any refund shall also be in proportion to those works not carried out. It is argued that as the said 'Road Improvement Scheme' was not completed within the timeframe envisaged by Section 48 (12) or within the lifetime of the permission, the amount due is 'nil' and the monies paid to date under condition 81 should be refunded in full, with interest. However, I am not aware that the local authority has incurred such expenditure or that it is claiming a reduction in any refund in this regard.

10.13. In conclusion, I do not accept that the amount of contribution already paid by the developer should be refunded or that the amount of monies payable is 'nil' under this condition. It is also worth noting that the Pouladuff Road, or Lehenaghmore Road, (i.e. the L2455), is seriously substandard and is in an extremely poor condition, with no footpaths on either side of the road, apart from the short stretches on either side of the two entrances in question. Thus, notwithstanding the significant level of residential development that has occurred in the past 20 years, together with the

considerable commercial development at the northern end, the condition of the road has not been improved. It continues to be very narrow and winding with sharp bends and there is no safe means of pedestrian or cycle access along the road linking these developments with facilities and amenities.

10.14. It is further noted that the Lehenaghmore Road Improvement Scheme has now been approved by Cork City Council (Part 8) and that funding has been allocated as part of the NTA's Active Travel Programme. This includes –

- A footpath on the outbound/eastern side of the L2455
- A footpath on the inbound/western side of the L2455.
- A new 2m wide on-road segregated cycle lane on the outbound/eastern side of the L2455.
- Widening of the carriageway to 6m.
- Public lighting, signalling and traffic calming.

10.15. The application for the associated Compulsory Purchase Order for the Lehenaghmore Road Improvement Scheme and L2454 Togher Road is also currently before the Board (CH28.314650).

3. The attributable works should be repaid.

10.16. Having reviewed the submissions from the planning authority and the referrer, I would agree that it has been agreed between the parties that the value of the 'attributable works', (i.e. the road works along the L2455 in the vicinity of the two entrances to the permitted residential development to be offset against the cost of the works to be carried out as part of the road improvement works to the L2455), was calculated as €551,221.06. It is submitted that the sum represents the amount of money spent by the developer on carrying out the said road works on the L2455 at this location as required by condition 52, where these works overlapped those to be carried out as part of the proposed road scheme. There is no dispute on this matter, and I would agree that this amount should be refunded to the developer.

10.17. However, I do not agree with the developer's stance that in light of the non-existence of a properly formulated and adopted 'Road Improvement Scheme', against which the road works carried out pursuant to condition 52 could be offset, the developer is

entitled to a refund of both the sum of €551,221.06 and the sum of €1,095,680 (plus interest). As set out at 10.11 above, it is considered that no refund of the monies paid to date pursuant to condition 81 is payable as the works have not commenced and neither the full contribution, nor the final instalment of the contribution, has been paid. Thus, the only refund that is payable is in respect of the offset works as agreed between the parties.

10.18. On this basis, I consider that the special contribution as required under condition 81 of the permission granted under 04/7674 is payable in full and that the only reduction that should apply is in respect of the cost of the works to be offset against the works required by condition 52 and which overlap the road improvement works to be carried out on the L2455 by the local authority.

11.0 Recommendation

11.1. It is recommended that the Board determine this referral in accordance with the following draft order:

WHEREAS by order dated the 6th October, 2005, An Bord Pleanála, under appeal reference number PL04.212515 (04/7674), confirmed Condition no. 80 and amended Condition no. 81 attached to the planning permission granted to Ruden Homes Ltd. for the construction of a total of 554 no. residential units comprising:

- (a) 45 no. five-bed detached, 8 no. three-bed detached, 26 no. four-bed semi-detached, 144 no. three-bed semi-detached, 8 no. four-bed terraced, 292 no. three-bed terraced and 31 no. two-bed apartments,
- (b) 1 no. creche (586sq.m)
- (c) 1 no. shop (163.8sq.m)
- (d) Associated car parking
- (e) 3 no. electricity sub-stations
- (f) Construction of a new vehicular and pedestrian entrance from the existing road on the northwestern frontage of the site,
- (g) A second entrance for vehicular and pedestrian access from the existing road at the western frontage of the site onto Matthew Hill crossroads, and

(h) Provision of bin storage, plant, landscaping/recreational amenities and all other site development and ancillary works.

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

AND WHEREAS condition 81 attached to the said permission required the developer to pay a special contribution in respect of road improvement works for an amount to be offset by the cost of works pursuant to condition 52, which directly overlaps with the said road improvement scheme.

AND WHEREAS the developer and the planning authority have failed to agree on the amount of contribution that is payable under condition 81 and the amount of contribution that should be refunded to the developer, and so the matter has been referred to the Board on the 12th of May 2023 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, hereby determines that the special contribution in respect of the road improvement works as required under condition 81 (part b) of the permission granted under 04/7674, and amended by the Board under PL04.212515, is payable in full and that the only reduction that should apply is in respect of the cost of the works to be offset against the works required by condition 52 and which overlap the road improvement works to be carried out on the L2455 by the local authority. The Board agrees that the amount of refund payable within the terms and conditions of the permission in respect of these offset works is €551,1221.06 in accordance with the terms of Condition 81, as amended by An Bord Pleanála under PL04.212515 on the 6th day of October 2005.

MATTERS CONSIDERED

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

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.

Mary Kennelly

Senior Planning Inspector

9th May 2024