



An
Bord
Pleanála

Inspector's Report

320961-24

Development	Point of detail referral on the application of a condition for security or bond in relation to permission (An Bord Pleanála ref. 314951-22) for completion of works associated with permission for New foul sewer to facilitate Irish Water in the completion of the Kilcummin Sewage Scheme and the connection of Páirc Chuimin to same, construction of turning bay to serve pumping station and construction of 34 houses with associated site development works.
Location	Pairc Chuimin, Kilcummin, Killarney, Co. Kerry.
Planning Authority	Kerry County Council
Planning Authority Ref./ ABP Ref.	22/660/ 314951-22
Applicant (PA ref. 22/660)	Barth O'Neill
Type of Application (PA ref. 22/660)	Permission
Planning Authority Decision	Grant permission subject to conditions
An Bord Pleanála Decision	Grant Permission subject to conditions
Type of Case	Referral for Determination on a condition
Referrer	Barth O'Neill
Inspector	Suzanne Kehely

1.0 Background

- 1.1. This point of detail referral is pursuant to provisions of section 34(5) in relation to a Condition of permission attached by the Board (now the Commission) under reference ABP 314951-22. (File attached.) This case solely concerns a condition requiring security for the completion of development, namely condition 21. My understanding of Section 34 of the Planning and Development Act 2000 as amended is such that the scope of consideration for the Commission is confined to such matters only relating to this condition. Accordingly, the principle of the development or other planning matters are outside the scope of consideration. Furthermore, I note reference in the submissions which includes email dialogue between the referrer in his capacity as developer and the planning authority regarding section 48 contributions and it would appear that there was/is some dispute regarding the special contribution as determined on appeal and seeking a pro rata reduction. For clarity, no determination is sought on this or the general contribution amount but information is provided as analogous in support of the case made by the referrer.
- 1.2. In short, the referrer disputes the amount of security sought as required by condition no.21 on the basis of seeking a pro rata reduction for houses already built under a separate permission (from 2019) on a smaller site within the subject site notwithstanding the inclusion of this smaller site as part of the application site for 34 dwellings. In its application of condition 21, the planning authority has maintained the rate of €200,000 as used in its decision to grant permission in 2022 and this condition was, I note not specifically included in grounds of the first party appeal in ABP 314951.
- 1.3. I use the former name 'An Bord Pleanála' or 'The Board' pertaining to documentation pre-dating the statutory name change.

2.0 Planning Permission Decisions

- 2.1. **Decision to Grant Permission – PA Ref 22/660**
- 2.1.1. On 3rd October 2022, Kerry County Council issued a notification of its decision to grant permission subject to 33 no. conditions for Construction of **34 dwellings** to the rear of the existing housing in Pairc Chuimin through which it is proposed to access the development site. It is an expansion of an existing housing development and includes a variety of house types with 30 semi-detached units and a terrace of 4

units. The layout incorporates a .08 ha green space alongside the new Irish Water pump station in addition to 3 residual open space areas of 100, 130 and 340 sq.m. 17 visitor car park spaces are proposed with one disabled space in addition to 2 off street spaces from 33 of the 34 houses. Other elements include:

- Laying of a **new foul sewer in the road network** to facilitate Irish Water in the completion of the Kilcummin Sewage Scheme and connection of Pairc Chuimin. (This facilitates the decommissioning and removal of the private wastewater treatment facility and sand filter within the development site.)
- Construction of a **turning bay** to serve the new Uisce Eireann pumping station.

2.1.2. Condition no. 5 required security for €200,000. It states:

Before the development commences the developer shall lodge with the planning authority a cash deposit or bond of an insurance company to secure the provision and satisfactory completion and maintenance until taken in charge by the council of service road, footpaths, drains, public open space, public lighting and other services required in connection with the development coupled with an agreement empowering the council to apply such security or part thereof for the satisfactory completion and maintenance as aforesaid of any part of the development. The amount of the security shall be €200,000

2.2. **Decision on appeal of ABP**

Following a third-party appeal against the grant of permission and first party appeal against a special contribution under section 48(2)(c) a decision to grant permission was upheld by An Bord Pleanála. Condition 21 states

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, watermains, 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 an agreement, shall be referred to An Bord Pleanála for determination.

Reason: to ensure satisfactory completion and maintenance of the development until in charge.

3.0 The Point of Detail referral

3.1. Referrer's grounds for determination by An Bord Pleanála

3.1.1. Pursuant to the provisions of S.34(5) of the Planning and Development Act and in view of the disagreement between the applicant and the local authority the applicant is seeking a determination by the Board. The Board is requested to confirm the applicant's position in respect of complying with the terms of condition 21.

3.1.2. The case is made that:

- The amount of security should be reduced as 8 of the 34 houses have been constructed pursuant to a prior permission and that the bond for €70,000 was complied with. This should be offset.
- The basis for the PA seeking €200,000 upfront and then refunding the € 70,000 is queried. The referrer seeks legal basis for this decision.
- Drawings submitted set out the relevant areas to which it is considered the respective bonds amounts should apply.
- The PA is only seeking financial contribution for 26 houses.
- Reliance on the Dwyer Nolan case is irrelevant – it is questioned having regard to the different circumstances - the subject case has more 'separability'
- Functus officio: This term is used to question the validity of the altering of the terms of condition 3 of PA ref 19/3 and substitute any value for the bond other than the €70,000. The issue of certainty of status for future sale of property is of concern.
- The wording of condition 21 allows for discretion. It does not mean that all of the site is required to be captured by this- this interpretation is by reference to the words 'of any part'

- Disputes that this is 'not practical'. Case law suggests discretionary powers and ordinary principles of administrative law apply.

3.1.3. In opposition to the PA position described as concern about 'cross-pollination' of permissions, the following cases are cited in support of referrer's position on severability of planning units:

- Donegal County Council v Planree [2024]: the judgement refers to the application of 'fact and degree' in determining divisibility.
- The Dwyer Nolan v Dublin City Council [1986]: this case as relied upon by the PA is dismissed on grounds of its complexity and lack of relevance. The concept of 'mutually inconsistent permission' is also disregarded on the basis of the referrer's stance that both permissions are consistent.

3.1.4. The submission encloses the following documents:

- Email communications between KCC and referrer which relate to financial contribution conditions.
- Drawings

3.2. **Planning Authority Response to the referrer as developer (as forwarded by email to An Bord Pleanála)**

3.2.1. The planning authority responded to the referrer in his capacity as developer and has stated in an email dated 27th September

'The council is not agreeable to accepting your proposals below. Our position as communicated previously has not changed.

Lodge the entire bond of €200,000 (cash or insurance bond) conditions for An Bord Pleanála 314951-22 (KCC PRN 22/660) and once lodged the bond lodged for PRN19/3 can be refunded.

Alternatively please put in writing that you are satisfied to reassign the €70,000 cash bond held for 19/3 to for An Bord Pleanála 314951-22 (KCC PRN 22/660). A balance of €130,000 (cash only) will be required in this instance to fulfil condition 21.'

The developer is advised of the option to refer in default of an agreement and of the status of the development in the absence of a bond in place.

These above options were set out in response to a proposal by the developer (referrer) to meet the terms of condition 21 by way of:

A legal charge over property independently valued in excess of €250000 or a 'cash bond of 130000 redeeded in 3 equal stages as the works progress with two interim inspections and a final inspection by the planning authority to satisfy themselves that they have at all times adequate security for the satisfactory completion of the works in accordance with the provisions of S.34(4) (g)

3.2.2. In the email thread forwarded to the Board the following positions are taken:

- Email KCC to B. O'Neill (18/9/24): KCC position is that it is not possible from a practical point of view to fully comply with two inconsistent planning permissions which cover the same red line. This is by reference to Dwyer Nolan Development Ltd. v Dublin City Council.
- Email B. O'Neill to KCC on (3/9/24, 11/9/24, 13/9/24 and 18/9/24): In seeking to make formal submission on bond agreement legally referenced rationale is sought from KCC regarding basis of its decision on applying Condition 21.
- Email KCC to B. O'Neill: It is explained that the red line overlaps between ABP 314951/KCC 22/660 and KCC19/3 and that they differ materially in terms of layout and therefore not possible to comply with these two incompatible planning permissions.
 - Commencement of permission under 314951 requires a bond of €200,000 in place prior to commencement to ensure satisfactory completion of roads and services
 - As previously stated, the PA is agreeable to refunding €70,000 lodged under 19/3 once €200000 is in place. Alternatively, the €70,000 can be assigned by agreement with a cash balance of €130,000 to be lodged.
- Emails B.O'Neill to KCC (2/9/24, 23/8/24, 20/8/24, 13/8/24, 9/8/24) - seek legal basis for decision of 8/8/24.
- Email KCC to B.O'Neill (8/8/24) - sets out its position as set out above.

- Email B.O'Neill to KCC. (30/7/2024) - enquiry amount bond amount due having regard to €70,000 in place for the 'same spot'. In this thread there is reference to an initial enquiry on 24/7/24 but no address was provided for KCC to respond.

3.3. **Planning Authority Response to the referrer's submission.**

The planning authority was invited to respond to the submission. An email on 11th October 2024 from KCC confirms the dispute by inclusion of emails disputing the application of condition 21. The owner of the lands is confirmed to be the applicant, and no other parties are slated to be involved. There are also numerous emails concerning the financial contributions attached.

4.0 **Relevant Legislation**

4.1. **Planning and Development Act 2000, as amended**

4.1.1. **Section 34(5) states:**

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 to whom the permission is granted and that in default of agreement the matter is to be referred to the Board for determination:

The Act was amended by Substituted (17.12.2021) by Planning and Development (Amendment) Act 2018 (16/2018), s. 23(4), S.I. No. 714 of 2021.

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,
or
(b) where none of the events referred to in subparagraph (i) or in clause
(I) or (II) of subparagraph (ii) occur within those 8 weeks or such longer period as
may have been so agreed, then that authority shall be deemed to have agreed to
the points of detail as so submitted.

5.0 Ministerial Guidance

5.1. Development Management Guidelines

- 5.1.1. Section 7.13 sets out types of conditions for residential development. Conditions requiring security for completion are included. In this regards it is stated: It is essential that permissions for residential development are subject to a condition under which an acceptable security is provided by way of bond, cash deposit or otherwise so as to secure its satisfactory completion. The amount of the security, and the terms on which it is required to be given, should enable the planning authority, without cost to themselves, 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. The condition should require that the lodgement of the security should be coupled with an agreement that would empower the planning authority to realise the amount of the security at an appropriate time and apply it to meet the cost of completing the specified works. Planning authorities should also ensure that the bond is of sufficient duration to allow them time to inspect the development after the expiration of permission and still call in the bond if necessary. A security condition could also provide for the recalculation of the amount specified in the condition by reference to the House Building Cost Index (or other appropriate Index) if the development to which the permission relates is not commenced within a specified period after the granting of the permission. The bond should be refunded on satisfactory completion of the development.

6.0 Planning History

- 6.1. The subject site decision to which this referral relates is as set out in section 2.

Previous decisions are also set out in the inspector's report in file 314951 and the PA planning report of 15/8/22 therein. Notably reference is made to the Board's previous grant of permission (ABP248967/PA ref 16/247) for 33 houses relating to substantially the same site. The PA refers generally to a number of permissions on site but does not individually refer to the 2019 decision.

PA ref 19/3 refers to permission granted in 2019 to construct 9 no housing units on site no's 86-94. consisting of 1 no. detached dwelling house and 8 no. semi-detached dwelling houses, together with all associated site development works and subject to houses not being occupied until the proposed Kilcummin sewerage scheme is commissioned, Pairc Chuimin Clashnagarrane Kilcummin, Killarney Clashnagarrane County Cork. Condition 3.

Construction of 8 semi-detached houses stated commencement is July 2023.

7.0 Assessment

7.1. Issues

- 7.1.1. This assessment relates to the determination of the amount and means of security to be provided as required in principle by way of condition 21 in the Board's Order granting permission for development in the case of An Bord Pleanála ref. 314951. In the first instance I set out what I consider to be the relevant site area to which the security applies and then consider the reasonableness of the amount and means by which this should be covered in order to comply with the terms of condition 21 while having regard to the options proposed by the referrer.

7.2. Application of the Condition 21 to entire site

- 7.2.1. Condition 21 of the decision in the case of An Bord Pleanála ref 314951 requires lodgement of a bond for the development permitted. This is in line with Ministerial guidance in the Development Management Guidelines (2007/2020) in that it is to secure the provision and satisfactory completion and maintenance until taken in charge by the local authority of roads, footpaths, watermains, 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.

- 7.2.2. The development that this relates to is for all the works proposed within the site as outlined in red. The scope of the permission includes 34 dwellings and ancillary works serving the houses in addition to the works relating to the completion of works associated with permission for a new foul sewer to facilitate Irish Water in the completion of the Kilcummin Sewage Scheme and the connection of the overall housing development namely Páirc Chuimin to same, and construction of turning bay to serve pumping station. As Irish Water is responsible for the sewage scheme there is an element that could be interpreted as not directly concerning the local authority however the inclusion of 'other services required' gives reasonable weight to the interpretation that the bond is for the security of completion of other services in addition to ancillary house associated works.
- 7.2.3. Concurrently, the developer has opted to exercise a live permission from 2019 for 8 of 9 houses which correspond to part of the site and more precisely incorporates 8 of the house plots (nos. 86-93 inclusive) as proposed in ABP314951 but these do not necessarily fully align in terms of site layout when taking account of the requirements under condition 2. As I understand it, the construction of 8 houses under a separate permission even wholly within the subject site and even complying with that previous permission does not necessarily comply with the more recent permission. Any material deviance however from the more recent subject permission or otherwise, is, I consider, a compliance matter not within the scope of this referral.
- 7.2.4. The case is made that as security has been provided for associated works as outlined in green in the submitted layout plan for 8 houses, that are deemed by the referrer as essentially the same houses, that security is not therefore required for the more recently permitted houses as only 26 are in effect are to be constructed on foot of ABP314951.
- 7.2.5. The planning authority holds the view that it is not possible to fully comply with two inconsistent planning permissions. I would not go as far to say that the PA is stating that it cannot split the subject permission. It is simply saying, as I understand it, that it is more straightforward to treat the site as a whole entity for the purpose of security for completion of works for the entire site.

- 7.2.6. Essentially as I see it, the discounting of security for a separate development or in a manner, a separate planning unit, notwithstanding the overlapping of the site area, does not address the entirety of associated works serving the entire site.
- 7.2.7. A reasonable interpretation of Condition 21 is that it relates to everything except the actual houses and as the road fronts the 8 houses, even assuming houses can be severed from the larger planning unit, the road, associated footpath and infrastructure, notwithstanding any overlap, all remain integral to the completion of the entire housing and associated development as permitted in ABP314941 having regard to all conditions. While, in a manner, a section of the road may be indistinguishable between the two consents, such infrastructure could for example be modified or damaged during the outstanding construction works.
- 7.2.8. Accordingly, I consider it reasonable that the PA seeks security for all ancillary works and other services within the site as outlined red. Should part of the works be completed to the satisfaction of the planning authority I consider it should be at its discretion as to when and if security should be reduced pending full completion of works.

7.3. The amount and form of security

- 7.3.1. The amount of security was unspecified in Condition 21 and the amount being sought by the PA remains at €200,000 which I note was the amount specified in its condition 5 of its decision to grant permission prior to the appeal of this decision. The referrer makes the case that as security of €70,000 has already been provided for 8 houses within the subject site and that as this overlaps with the subject development that this is double counting. Security is then offered in the form of €130,000 or, of property in lieu to the value of €250,000. This is proposed by way of a legal charge over property to be independently valued in excess of €250,000 or a 'cash bond of €130,000 rededicated in 3 equal stages as the works progress with two interim inspections and a final inspection by the planning authority to satisfy themselves that they have at all times adequate security for the satisfactory completion of the works.'
- 7.3.2. The council has stated it is not agreeable to accepting proposals and holds the position that the referrer only has the option to either lodge the entire bond of €200,000 in the form of either cash or an insurance bond but does provide for a

refund for the bond lodged for the 8 houses constructed under PRN19/3. An alternative option provided to the referrer is to reassign the €70,000 cash bond held for PA ref.19/3 to PA ref 22/660 whereupon a cash balance of €130,000 would be required in this instance to comply with condition 21. The referrer however rejects these options.

- 7.3.3. The referrer draws parallels with the principle of a pro rata application of s.48 contributions and taking account of constructed house in calculating this. I note in this regard that the PA has based the general contribution on houses to be built rather than permitted and reduced the financial contributions accordingly as they were based on house numbers. As I have stated the construction of 8 houses under a separate permission within and even complying with that permission does not necessarily comply with 8 houses and moreover, does not address the entirety of associated works serving the entire site. I therefore consider the position of the PA to be reasonable in either requiring an entire bond of €200,000 in the first instance while then also providing for a refund for the separate permission subject to its terms and conditions. The PA has also provided for an alternative by allowing for a reassigning of the €70,000 and submission of a cash balance of €130,000 thereby still securing a €200,000 security for all works. While ordinarily there is provision in the wording of this type of condition to provide for an arrangement between the two parties it is clear that the parties are in disagreement. I consider it reasonable and that the PA is within its rights to reject an alternative offer of security that is not specified in the development guidelines and for which issues remain outstanding. In the absence of further details I conjecture that relying on another property could be administratively protracted and perhaps be an inadvertent burden on KCC but I say this in the absence of any stated reasons by the PA. While there is provision in the condition and the Guidelines for more creative arrangements it is only by consensus between the parties which is evidently not the case. In this scenario the reasonable default is a bond or cash to which the PA only appears amenable, but with some flexibility in reassigning existing security. The cash balance could be replaced by an insurance bond for the same amount. I consider this option could be inserted into the wording of the condition by providing for an arrangement as specified by the planning authority rather than by agreement.

8.0 Recommendation

It is my recommendation that the Commission determines that:

The amount of security off €200,000 is reasonable in respect of the permission granted. This is based on the following reasons and considerations.

9.0 Reasons and Considerations

The Commission had regard to:

- (a) Section 34(5) of the Planning and development Act 2000 as amended,
- (b) the nature and extent of works covered by condition 21 which relate to the whole site as outlined in red in the submitted application details for permission for the proposed development as described, and
- (c) the Development Management Guidelines for Planning Authorities, published by the Department of the Environment, Heritage and Local Government (2007 and 2020).

10.0 Condition 21 as determined:

Prior to commencement of development, the developer shall lodge with the planning authority a bond of an insurance company, a cash deposit, or other security to secure the provision and satisfactory completion, and maintenance until taken in charge by the local authority, of roads, sewers, watermains, drains, car parks, open spaces 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 security to be lodged shall be as follows -

(a) an approved insurance company bond in the sum of € 200,000 (two hundred thousand euro), or

(b) a cash sum of €200,000 (two hundred thousand euro) to be applied by the planning authority at its absolute discretion if such services are not provided to its

satisfaction, or

(c) such other security for the sum of €200,000 as may be specified in writing by the planning authority.

Reason: To ensure the satisfactory completion and maintenance of the development until taken in charge.

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.

Suzanne Kehely
Senior Planning Inspector

5th August 2025