



An  
Bord  
Pleanála

**Inspector's Report**  
**ABP-322093-25**

**Question**

Referral: Section 96 - Part V dispute in relation to grant of permission by Wicklow County Council reference number 20764.

**Location**

Newcastle Lower, Newcastle, Co.  
Wicklow

**Declaration**

Planning Authority

Wicklow County Council

Planning Authority Reg. Ref.

20764

Applicant for Declaration

John Murphy

Planning Authority Decision

Grant Permission with Conditions

**Referral**

**Referred by**

John Murphy

**Owner/ Occupier**

John Murphy

**Observer(s)**

No

**Inspector**

Catherine Hanly

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## **1.0 Introduction**

- 1.1. The development granted permission under ABP Ref. **310294** and P.A Ref. **20764** for 9 no. residential units and 1 no. commercial unit.
- 1.2. The dispute relates to whether the development of 9 no. residential units is exempt from Part V requirements. The applicant considers that the development is exempt, as when the application was lodged, the Part V requirement applied only if developments included 10 or more residential units. The Planning Authority considers that the development is not exempt from Part V requirements as the Affordable Housing Act 2021 was in place when permission was granted. The Affordable Housing Act 2021 requires that an exemption certificate for Part V may be granted for developments of 4 or fewer houses.

## **2.0 Site Location and Description**

- 2.1. The subject site is located in Newcastle, Co. Wicklow. The site is located to the north and north-eastern rear of 2 no. dwellings at the corner of the Newcastle Road and Leamore Lane junction. Approximately 16 m of the western boundary of the site abuts the R761 Newcastle Road. The boundary to Newcastle Road consists of a low level wall with a pedestrian gate and a field gate. Approximately 65 m of the southern boundary of the site abuts Leamore Lane, the boundary of which is formed by hedgerow.
- 2.2. The northeastern boundary of the site adjoins a residential dwelling, and the northern boundary of the site abuts the Rockingham residential development.
- 2.3. The site measures 0.336 ha.

## **3.0 The Question**

- 3.1. This is a referral under Section 96(5) of the Planning & Development Act 2000, as amended, of a dispute relating to social and affordable housing which may be subject to an agreement between the Planning Authority and an applicant. The question is as follows:
  - Is the development an application for permission for development to which Part V of the Planning and Development Act 2000 applies?

#### 4.0 **Current Permission on Site**

4.1. ABP Ref. **310294** and P.A Ref **20764**. Construction of 9 no. residential units and 1 no. commercial unit. 07/08/2020 lodged with Wicklow County Council. 09/02/2022 **Grant** by An Bord Pleanála following Third-Party appeal.

4.2. Condition no. 19 requires that *“prior to commencement of development, the applicant or other person with an interest in the land to which the application relates shall enter into an agreement in writing with the planning authority in relation to the provision of housing in accordance with the requirements of section 94 (4) and section 96(2) and (3) (Part V) of the Planning and Development Act 2000, as amended, unless an exemption certificate shall have been applied for and been granted under section 97 of the Act, as amended. Where such an agreement is not reached within eight weeks from the date of this order, the matter in dispute (other than a matter to which section 96(7) applies) may be referred by the planning authority or any other prospective party to the agreement to An Bord Pleanála for determination.*

*Reason: To comply with the requirements of Part V of the Planning and Development Act 2000, as amended, and of the housing strategy in the development plan of the area.”*

#### 5.0 **Planning History**

##### Relevant Planning History on the Referral Site:

5.1. Ref. **2017**. Construction of 11 no. residential units and 4 no. commercial units. 2020 **Refusal**. Refused for 3 no. reasons relating to design, overlooking, lack of fenestration to bedrooms, lack of public open space and communal open space, the design of the pedestrian access from the R761 and the development would endanger public safety by reason of a serious traffic hazard.

#### 6.0 **Policy Context**

##### **Wicklow County Development Plan 2022 - 2028**

6.1.1. CPO 6.9: *“To implement the provisions of the Wicklow Housing Strategy and in particular, to apply a 10% (or a greater percentage if provided for in future*

*legislation) social housing requirement pursuant to Part V of the Planning and Development Act 2000 (as amended) to land zoned for residential use, or for a mixture of residential or other uses, except where the development would be exempted from this requirement. In certain circumstances, as set out in the Affordable Housing Act 2021, this requirement will be 20% devoted to social and affordable housing.”*

## **7.0 The Referral**

### **7.1. Referrer's Case**

- 7.2. The referral is submitted by Dunbar Lunn Consulting Engineers on behalf of the owner of the site, John Murphy.
- 7.3. The referral states that they were in contact with Wicklow County Council and requested that it be confirmed that the development remain exempt from the Part V requirements as it is a development of 9 or less homes.
- 7.4. The referral outlines that during the application process the Planning and Development Act was substituted by the Affordable Housing Act 2021 (24/2021), s. 47 (a), S.I no. 450 of 2021 which resulted in the Part V requirements for applications seeking exemptions, adjusting from applications of 9 or less homes, to applications of 4 or less homes. The referral outlines that the application was lodged before the Affordable Housing Act 2021 changed the legislation. As such, the referral considers that the original requirements under the previous legislation should be applicable to the development and that the development is therefore exempt from Part V requirements.
- 7.5. The referral outlines the following dates:
- Application lodged with Wicklow County Council: 7<sup>th</sup> August 2020
  - Application granted by Wicklow County Council: 23<sup>rd</sup> April 2021
  - Appeal refused by An Bord Pleanála: 4<sup>th</sup> February 2022.
- 7.6. Whilst the referral states that the appeal was refused on the 4<sup>th</sup> February 2022, this is an error in their documentation, and it was in fact granted by An Bord Pleanála on the 9<sup>th</sup> February 2022.

7.7. The referral states that they hope to have this issue resolved so that they can commence works on site.

#### **7.8. Planning Authority Response**

7.8.1. The Planning Authority considers that the referral is not a matter subject to Section 96 (5) of the Planning and Development Act, 2000, as amended, as no dispute has arisen in relation to a Part V agreement. The Planning Authority outline that on the 02/04/2025, the applicant submitted a Part V proposal, albeit similar to the contents of the referral and that this is being assessed by the Planning Authority.

7.8.2. The Planning Authority consider that the referral is not a matter for a section 96 (3) or a section 96 (7) referral.

7.8.3. The Planning Authority outline the following relevant dates of the application:

- The application for 9 no. residential units was lodged with the Planning Authority on 07/08/2020.
- The application was granted by the Planning Authority on 23/04/2021.
- The application was subject to a Third-Party appeal and was subsequently granted by An Bord Pleanála on 09/02/2022.

7.8.4. The Planning Authority consider that in accordance with Section 96 (1) and (2) of the Planning and Development Act 2000, as amended, the Board correctly attached condition no. 19 to the permission in relation to Part V housing provision. The provisions of Section 96 (13) and Section 97 (3) did not apply as no S97 certificate had been granted.

7.8.5. The Planning Authority outlines that despite the Planning Authority's reports stating that Section 96 did apply, the Planning Authority in error, did not attach a Part V condition.

7.8.6. The Planning Authority have stated that they consider there to be a misunderstanding in relation to Section 97 (3). In accordance with Section 97 (3) if a certificate is granted prior to the granting of permission, a condition in accordance with Section 96 is not required. However, the certificate has to be applied for before applying for planning permission. This did not happen with the subject application and no Section 97 certificate was granted prior to the Board's decision.

- 7.8.7. The Planning Authority state that the applicant applied for a Section 97 certificate on the 20/12/2023 for 9 no. dwellings. The Planning Authority considered that they were required to assess the Section 97 certificate application in accordance with the legislation applicable at that time. As the 9 no. dwellings exceeded the 4 or fewer dwellings requirement specified in Section 97 (3) at that time, a Section 97 certificate could not be granted.
- 7.8.8. The Planning Authority state that retrospective Section 97 certificates cannot be applied for to deal with a Part V condition.
- 7.8.9. The Planning Authority state that they did not ask the applicant to withdraw their referral.

## 7.9. Further Responses

- 7.9.1. No further responses were received.

## 8.0 Statutory Provisions

### 8.1. Planning and Development Act, 2000

- 8.1.1. The legislative requirements in respect of the provision of social and affordable housing are set out in Part V, Section 96 of the Planning and Development Act 2000 (as amended). Relevant sections are set out below:
- **Section 96 (1)** *Subject to subsection (14) and section 97 , where a development plan objective requires that a specified percentage of any land zoned solely for residential use, or for a mixture of residential and other uses, be made available for housing referred to in section 94 (4)(a), the provisions of this section shall apply to an application for permission for the development of houses, or where an application relates to a mixture of development, to that part of the application which relates to the development of houses, in addition to the provisions of section 34 .*
  - **Section 96 (2)** *A planning authority, or the Board on appeal, may require as a condition of a grant of permission that the applicant, or any other person with an interest in the land to which the application relates, enter into an*

*agreement with the planning authority, concerning the development for housing of land to which a specific objective applies in accordance with section 95 (1)(b).*

- **Section 96 (4)** *An applicant for permission shall, when making an application to which this section applies, specify the manner in which he or she would propose to comply with a condition to which subsection (2) relates, were the planning authority to attach such a condition to any permission granted on foot of such application, and where the planning authority grants permission to the applicant subject to any such condition it shall have regard to any proposals so specified.*
- **Section 96 (5)** *In the case of a dispute in relation to any matter which may be the subject of an agreement under this section, other than a dispute relating to a matter that falls within subsection (7), the matter may be referred by the planning authority or any other prospective party to the agreement to the Board for determination.*
- **Section 97 (3)** *A person may, before applying for permission in respect of a development—*
  - (a) consisting of the provision of 4 or fewer houses, or*
  - (b) for housing on land of 0.2 hectares or less,**apply to the planning authority concerned for a certificate stating that section 96 shall not apply to a grant of permission in respect of the development concerned (in this section referred to as a “certificate”), and accordingly, where the planning authority grants a certificate, section 96 shall not apply to a grant of permission in respect of the development concerned.*
- **Section 97 (12)** *A planning authority shall not grant a certificate in relation to a development if the applicant for such certificate, or any person with whom the applicant is acting in concert—*
  - (a) has been granted, not earlier than 5 years before the date of the application, a certificate in respect of a development, and the certificate at the time of the application remains in force, or*

*(b) has carried out, or has been granted permission to carry out, a development referred to in subsection (3), not earlier than—*

*(i) 5 years before the date of the application, and*

*(ii) one year after the coming into operation of this section, in respect of the land on which it is proposed to carry out the first-mentioned development, or land in its immediate vicinity, unless—*

*(I) the aggregate of any development to which paragraph (a) or (b) relates and the first-mentioned development would not, if carried out, exceed 4 houses, or*

*(II) (in circumstances where the said aggregate would exceed 4 houses) the aggregate of the land on which any development to which paragraph (a) or (b) relates, and the land on which it is proposed to carry out the first-mentioned development, does not exceed 0.2 hectares.*

## **8.2. Affordable Housing Act 2021**

- 8.2.1. The Bill was signed into law on the 21/07/2021. Section 47 (a) of the Act reduced the number of houses from 9 or fewer to 4 or fewer. This came into operation on 03/09/2021 under S.I no. 450/2021.

## **9.0 Assessment**

- 9.1. There are in effect, two disputes before the Board. The first concerns the jurisdiction of the Board to deal with the matter. The second is the substance of the dispute, whether the development of 9 residential units is subject to Part V requirements. I will deal with the jurisdiction matter first.

### Jurisdiction

- 9.1.1. Section 96 of the Planning and Development Act 2000, as amended, relates to agreements to provide for social and affordable housing arising from a grant of permission for residential development. Both planning authorities and the Board are obliged to include a condition in a grant of permission to require the developer or others to enter into an agreement in relation to the provision of social and affordable housing as part of the development.
- 9.1.2. Section 96 (5) of the PDA 2000 states that:

*'In the case of a dispute in relation to any matter which may be the subject of an agreement under this section, other than a dispute relating to a matter that falls within subsection (7), the matter may be referred by the planning authority or any other prospective party to the agreement to the Board for determination.'*

Subsection 7 refers to matters concerning the Property Arbitrator.

9.1.3. An Bord Pleanála granted planning permission in this instance and included a condition in relation to the provision of such housing in Condition 19 of ABP Ref. **310294**.

9.1.4. Section 96 (5) provides for any matter in relation to an agreement for social and affordable housing to be determined by the Board, other than monetary disputes. Therefore I am satisfied that the Board has jurisdiction to determine this dispute.

Does Part V apply to 9 units?

9.1.5. Having regard to the information presented by the referrer, I consider that the key issues can be addressed under the following general headings and questions:

- Quantity of Residential Units
- Section 96 Exemption Certificate
- Is Part V applicable in this case?

## **9.2. Quantity of Residential Units**

9.2.1. The application was for permission for 9 no. residential units. I note that the applicant applied for permission on 07/09/2020.

9.2.2. During the application process the Planning and Development Act was substituted by the Affordable Housing Act 2021, which resulted in the Part V requirements for applications seeking exemptions, adjusting from applications of 9 or less homes to applications of 4 or less homes. The applicant considers that they should have the benefit of the Social and Affordable Housing Scheme in operation at the time of the lodgement of the application, as opposed to that operating on the date of the grant of permission.

9.2.3. Condition no. 19 requires the developer to enter into agreement to provide for social and affordable housing within 8 weeks of grant of permission, unless an exemption

certificate had been granted. I am satisfied that no such exemption certificate had been applied for.

- 9.2.4. As such, when the applicant submitted their application to the Planning Authority, an exemption certificate could have been applied for the subject development, as it consisted of 9 no. units and therefore accorded with the criteria of 9 units or less. Had an exemption certificate been granted, the development would not have been subject to Part V requirements, notwithstanding the Affordable Housing Act, which came into operation during the application process. However, an exemption certificate was not applied for before the submission of the application. This is discussed in further detail in the following section.

### 9.3. Section 96 Exemption Certificate

- 9.3.1. When the application was originally submitted to Wicklow County Council, the applicant submitted a completed application form. Section 16 of the Application Form relates to Social and Affordable Housing. I note the applicant, under section 16, stated that the application is an application for permission for development to which Part V of the Planning and Development Act 2000 applies. The application form states that *“if the answer to the above question is ‘yes’ and the development is not exempt (see below), you must provide, as part of your application, details as to how you propose to comply with section 96 of Part V of the Act”*.
- 9.3.2. The application form further states:
- 9.3.3. *“If the answer to the above question is ‘yes’ but you consider the development to be exempt by virtue of section 97 of the Planning and Development Act 2008, a copy of the Certificate of Exemption under section 97 must be submitted (or, where an application for a certificate of exemption has been made but has not yet been decided, a copy of the application should be submitted).”*
- 9.3.4. The applicant has included a note under section 16 of the application form which states to *“see attached documents”*.
- 9.3.5. The applicant submitted a cover letter dated 05/08/2020 which accompanied the application to the Planning Authority. Page 4 of the cover letter states that the applicant had been in contact with the Housing Services Department of Wicklow County Council, and it is the intention of the Housing Section to acquire the 1 no. 2

bed apartment via a Housing Agency. The cover letter further states that the applicant is agreeable to the transfer under Section 96 (3) paragraph (b)(i) of the Planning and Development Act 2000. The cover letter states that they have attached a letter confirming the Part V agreement in principle from the Housing Section of Wicklow County Council and indicative costings for the 2 bed apartment.

- 9.3.6. I have reviewed the documentation on the file and note that a letter was submitted from the applicant stating that they were in agreement in principle with the proposed future transfer of the apartment unit in relation to compliance with Part V obligations. I note that the subject line of the letter states the following, "*Re: Proposed Planning Application for Development of 11 units at Newcastle Lower*". The letter is dated 13<sup>th</sup> January 2020.
- 9.3.7. I have also reviewed the letter from Wicklow County Council's Housing Department, dated 13<sup>th</sup> January 2020. The letter states that Wicklow County Council is agreeable in principle that the Part V obligations may be satisfied by the provision of 1 no. two bedroom apartment.
- 9.3.8. The documentation also includes indicative costings which were submitted by the applicant for the proposed Part V unit.
- 9.3.9. From a review of the documentation, it is evident that when the applicant was liaising with the Housing Department in relation to the Part V proposal on 13/01/2020, the development was for 11 no. units. When the applicant submitted the application on 07/09/2020, the application was for 9 no. residential units and 1 no. commercial unit. However, as outlined above, the applicant did not update the Part V proposals, and the applicant stated that they were in agreement in principle with the proposed future transfer of the apartment unit in relation to compliance with Part V obligations.
- 9.3.10. I have examined the Planner's Report from the Planning Authority which states that given the number of houses proposed, Part V is not applicable. The Planner's Report further states that a Section 97 cert is required to avoid the requirement for a Part V condition. Subsequently a notification of decision to grant permission was issued by the Planning Authority. I note that a condition was not included in the notification of decision to grant permission in relation to Part V. I note however that condition no. 19 was included in the decision issued by An Bord Pleanála. As noted above, condition no. 19 requires the applicant to enter into an agreement in writing with the

planning authority in relation to the provision of housing in accordance with the requirements of section 94(4) and section 96(2) and (3) (Part V) of the Planning and Development Act 2000, as amended, unless an exemption certificate shall have been applied for and been granted under section 97 of the Act, as amended.

9.3.11. I have examined the documentation submitted to Wicklow County Council under ref. **20764**. There is no evidence that an exemption certificate was submitted to the Planning Authority.

9.3.12. I note the response from the Planning Authority to the referrer, which states that the applicant did not apply for an exemption certificate before applying for permission. The Planning Authority have further stated that the applicant applied for an exemption certificate on 20/12/2023 following the grant of permission. I note that the Planning Authority considered that they were required to assess the Section 97 certificate application with the applicable legislation at that time and as such an exemption certificate could not be granted.

9.3.13. As noted above, in accordance with Section 97 (3) of the Planning and Development Act 2000, as amended, a person may apply for an exemption certificate stating that section 96 shall not apply, before applying for permission in respect of development. Section 97 (3) specifically states that the certificate shall be applied for, before applying for permission. As such, an exemption certificate cannot be applied for following the grant of permission.

9.3.14. When an applicant applies for an exemption certificate, the applicant has to swear a statutory declaration stating certain facts, including the history of the ownership of the land and whether they have, or had within the previous five years, interests in land within the immediate vicinity, in order to allow the local authority to determine eligibility for the certificate.

9.3.15. Section 97 (12) of the Planning and Development Act 2000, as amended, sets out the instances where the Planning Authority shall not grant an exemption certificate. The purpose of this subsection is to prevent a developer avoiding the Part V requirement by splitting an application into smaller applications.

9.3.16. I note that no evidence has been submitted to identify that the referrer applied for and received an exemption certificate before applying for permission. As noted above, the applicant submitted a letter to Wicklow County Council stating that they

were in agreement in principle with the proposed future transfer of the apartment unit in relation to compliance with Part V obligations. The applicant also submitted indicative costings for the two bed apartment and a letter from the Housing Department in Wicklow County Council. I am therefore satisfied that an exemption certificate was not issued to the applicant in respect of the development proposed before applying for permission. Furthermore, I concur with the Planning Authority, that there is no provision in the legislation to apply for an exemption certificate after planning permission has been applied for or granted.

#### **9.4. Is Part V applicable in this case?**

- 9.4.1. I understand the referrer's concerns that the original requirements under the previous legislation should be applicable to the development and not those introduced under the Affordable Housing Act 2021 and that the development is therefore exempt from Part V requirements. However, the grant of planning permission issued after the enactment of the Affordable Housing Act. In the absence of an exemption certificate, the provisions of the Affordable Housing Act apply to the development permitted.

#### **10.0 Recommendation**

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

**WHEREAS** a dispute has arisen between the planning authority, Wicklow County Council and the developer, John Murphy, in relation to whether or not the development is exempt from Part V requirements and condition no. 19 of the grant of permission made by An Bord Pleanála on the 9<sup>th</sup> February 2022 under planning register reference number PL27.310294 in respect of a development at Newcastle Lower, Newcastle, Co. Wicklow

**AND WHEREAS** the said dispute was referred to An Bord Pleanála by the owner John Murphy on 10<sup>th</sup> March 2025:

**AND WHEREAS** An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Sections 96 and 97 of the Planning and Development Act (as amended).
- (b) The Affordable Housing Act 2021,
- (c) The planning history of the site:

**AND WHEREAS** An Bord Pleanála has concluded that the development is not exempt for the provisions of Part V and the provision of the Affordable Housing Act, 2021 apply to the grant of permission.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred by Section 96(5) of the Planning and Development 2000 Act, as amended, hereby decides that, having regard to the submissions made, the developer shall enter into an agreement in accordance with the requirements of section 94 (4) and section 96 (2) and (3) (Part V) of the Planning and Development Act 2000, as amended, in relation to the 9 no. residential units.

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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Catherine Hanly  
Planning Inspector

24<sup>th</sup> June 2025