



An
Bord
Pleanála

Inspector's Report RH91.RH2048

Subject Matter	Dispute of Condition No 16 under Section 96 of the Planning & Development Act 2000 (Register Reference 15/645 & PL91.246960)
Location	Ennis Road, Roses Avenue & North Circular Road, Limerick City
Planning Authority	Limerick City & County Council
Planning Authority Reg. Ref.	Reg Ref 15/645
An Bord Pleanála Reg Ref	PL91.246960
Applicant(s)	Eoin Ryan, Budelli Construction Ltd
Referrer	Limerick City & County Council
Date of Site Inspection	27 th November 2017
Inspector	Mary Crowley

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1.0 Introduction

- 1.1. A dispute has arisen between Limerick City and County Council and Eoin Ryan, Budelli Construction Ltd in relation to an agreement under Section 96 of the Planning and Development Acts 2000 (as amended) following the grant of permission by An Bord Pleanála on 21st November 2016. Section 96(8) of the Planning and Development Act 2000 (as amended) states that where an agreement is not entered into before the expiration of 8 weeks from the date of the grant of permission because of a dispute, the applicant, the planning authority or any other person with an interest in the land may refer the dispute to the Board. In this case the matters have been referred to the Board for determination by Limerick City and County Council under Section 96(5) of the Planning and Development Acts 2000 (as amended).

2.0 Site Location and Description

- 2.1. The appeal site is located in an inner suburb of Limerick City c.1.5km west of the city centre. It is bounded by the Ennis Road to the north, Roses Avenue to the east and by North Circular Road at the south-eastern corner. To the west of the site are the grounds of the Woodfield Hotel, with established residential development to the southwest off North Circular Road. There is currently vehicular access to the site from the Ennis Road and from Roses Avenue.
- 2.2. The site is currently occupied by the former Clarion Suites which include the historic Ardhu House, a protected structure, and a modern 6-storey block, located centrally on the site. Surface car parking occupies the north-eastern quadrant of the site, while a bar / restaurant occupies the north-western quadrant, fronting the Ennis Road. The Ardhu Bar is located outside the boundaries of the appeal site. Lands generally fall to the south. According to the history file the commercial business closed in 2010 and the site has been vacant and falling into disrepair since that time.
- 2.3. I refer the Board to the photographs of the appeal site and environs available to view throughout the history appeal file, (PL91.246960 refers) together with photos taken during my most recent site inspection.

3.0 Planning History

- 3.1. **PL 91.246960 (Reg Ref 15/645)** – The decision of Limerick City and County Council to grant permission for the change of use from commercial to residential, 4 No. apartments, change of use of aparthotel from commercial to residential, 61 No. apartments, construct 9 No. houses, at a protected structure at Ardhu House, Ennis Road, Roses Avenue and North Circular Road Limerick was appealed by 2 no third parties. An Bord Pleanála granted planning permission on **21st November 2016** for a reduced scheme comprising 4 No. apartments, change of use of aparthotel from commercial to residential, 59 No. apartments, construct 7 No. houses subject to 19 no conditions.
- 3.2. It is set out in the Inspectors Report of PL91.246960 that there is evidence of 4 no previous planning appeals on this site. The two most recent appeals may be summarised as follows:
- 3.3. **PL30.235688 (Reg Ref 08/489)** – The decision of Limerick City Council to grant permission for the amendment to mixed-use development, within the curtilage of a protected structure, substitute 30 no. residential units and aparthotel (24 no. units) with 44 no. residential units at Clarion Hotel Suite / Ardhu House Site, Ennis Road, Roses Avenue, North Circular Road, Limerick was appealed by a third party. The Board granted permission subject to 24 Conditions. Condition No 21 required compliance with Part V. It is further noted that permission was granted in 2015 for an extension to the duration of planning permission PL30.235688 (Reg Ref 08/489) until 17th May 2020 (Reg Ref 15/7019 refers).
- 3.4. **PL30.212383 (Reg Ref 04/01 ABP)** – The decision of Limerick City Council to refuse planning permission for a mixed use development including Aparthotel Units, Apartments and Commercial (Business Meeting Rooms, Bar and Restaurant) elements was appealed by the first party. The Board granted permission subject to 18 Conditions.

4.0 Referrers Case

- 4.1. The referral is submitted by Limerick City and County Council. It is noted that the referral refers to Condition No 17. However, the subject of this referral clearly relates

to the requirement to comply with Part V which is set out in Condition No 16 and not Condition No 17.

4.2. The referral states that no agreement has been reached with the developer and that specific clarification is required as follows:

- In understanding if a Part V obligation applies it is queried if the Protected Structure, Ardhu House, and the aparthotel block is regarded as “one building”
- If classed as “one building”, it is recognised that the provisions of Part V may not apply, in accordance with Section 96(13) of the Planning and Development Act 2000 (as amended) where it states that “*50 percent or more of the external fabric of the building is retained*”. Queried what is the definition of “external fabric” in this regard?

4.3. The referral was accompanied by documentation received from the developer that may be summarised as follows:

- In response to a request for further information the development was revised down to 4 No. apartments, change of use of aparthotel from commercial to residential, 59 No. apartments, construct 7 No. houses. A copy of the permitted site layout plan is enclosed.
- The applicant wishes to seek confirmation that the requirements of Part V do not apply to the apartment element of the permitted element, having regard to the provision of Section 96(13) (b) of the Act. Section 96(13) (b) states:

*96(13) This section shall not apply to applications for permission for.....
(b) the conversion of an existing building or the reconstruction of a building to create one or more dwellings provided that 50 percent or more of the existing fabric of the building is retained.*

- The permitted development incorporates the historic Ardhu House, a protected structure, and a modern “aparthotel” block located centrally on the site, all comprising the former commercial tourism operation known as the Clarion Suites premises that ceased trading in 2010.
- When the Clarion Suites was operating a continuous internal connection between Ardhu House and the “aparthotel” block was installed in the form of

a single storey link corridor. The link was constructed pursuant to Reg Ref 15/40 refers. Drawings attached.

- The link corridor was subject to the provision of a “Failte Ireland Hotel Classification Scheme” which specified that at any one premises, buildings providing accommodation for visitors must be physically linked via “*well lit, covered or insulated walkways*”. This had the effect of making the facility a single unit complex, for operational and servicing purposes.
- The applicant wants to seek confirmation from the Planning Authority that the premises, comprising Ardhu House and the “apartment block”, may be regarded as “one building” for the purposes of Section 96(13) of the Planning and Development Act 2000 (as amended) by reason of the internal link corridor which still remains at the time of writing and which is to be removed as part of the permitted scheme.
- If classed as “one building”, for the purposes of Section 96(13) the applicant notes that the provisions of Part V shall not apply provided that “*50 percent or more of the external fabric of the building is retained*”.
- An assessment of the areas of material alteration to existing external fabric under the terms of the planning permission has been undertaken in order to determine the extent of alteration of fabric, relative to the extent of overall external fabric. Drawings provided. The assessment concluded that cumulatively less than 50% of the overall extent of external fabric is to be altered by reason of the permitted development.
- In relation to the housing element of the permitted development it is the applicants understanding that the provision of Section 96(2) and Section 96(3) do not apply as the social housing obligations contained in Section 96 are not applicable in respect of developments consisting of 9 or fewer houses pursuant to Section 97(3)(a) of the Planning and Development act (as amended).
- The Planning Authority is requested to confirm that there is no obligation on the applicant to enter into an agreement with the Planning Authority in relation to the provision of housing in accordance with the requirements of Section 96 of the Plannign and Development Act (as amended).

5.0 Applicants Response

- 5.1. Town & Country Planning and Development Consultants on behalf of the applicant Eoin Ryan, Budelli Construction Ltd submitted the following comments as summarised:
- 5.2. The applicants position remains the same as that set out in their submission to Limerick City and County Council.
- 5.3. The premises, comprising Ardhu House and the “aparthotel block” may be regarded as “one building” for the purposes of Section 96(13) of the Planning and Development Act (as amended) by reason of the internal link corridor which still remains at the time of writing.
- 5.4. Section 96(13) of the Planning and Development Act 2000 (as amended) provides that Part V shall not apply provided that “50 percent or more of the existing external fabric of the building is retained”. In this case, cumulatively, less than 50% of the overall extent of external fabric is to be altered by reason of the permitted development.
- 5.5. In relation to the housing element of the permitted development, the provision of Section 96(2) and Section 96(3) do not apply, as the social housing obligations contained in Section 96 of the Act are dis-applied in respect of development consisting of 9 or fewer houses, pursuant to Section 97(3)(a) of the Planning and Development Act (as amended).

6.0 Policy Context

6.1. Development Plan

- 6.1.1. In September 2014, in accordance with Section 28 of the Electoral, Local Government and Planning and Development Act 2013, the Planning Authority proposed not to commence the review of the Limerick County Development Plan 2010 - 2016 and the Limerick City Development Plan 2010 - 2016. Therefore, the City and County Development Plans will continue to have effect until a new Development Plan for Limerick City and County is prepared. Accordingly, the

operative plan for the area is the **Limerick City Development Plan 2010 – 2016 (as extended)**.

- 6.1.2. The site is zoned **ZO.2 (A) Residential** where the objective is to *provide for residential development and associated uses*. Chapter 6 Housing states that one of the overall objectives is to *require 20% of land zoned for residential use or a mixture of residential and other uses, subject to certain exemptions, shall be reserved for the purpose of the provision of social and affordable housing*.

7.0 Legislative Context

- 7.1. 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 (13) 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 on land to which such an objective applies, or where an application relates to a mixture of developments, to that part of the application which relates to the development of houses on such land, in addition to the provisions of section 34.*

Section 96(13) *This section shall not apply to applications for permission for:*

- a) *development consisting of the provision of houses by a body standing approved for the purposes of section 6 of the Housing (Miscellaneous Provisions) Act, 1992, for the provision of housing F228[required for households assessed under section 20 of the Housing (Miscellaneous Provisions) Act 2009 as being qualified for social housing support], where such houses are to be made available for letting or sale,*
- b) *the conversion of an existing building or the reconstruction of a building to create one or more dwellings, provided that 50 per cent or more of the existing external fabric of the building is retained,*
- c) *the carrying out of works to an existing house, or*

d) development of houses pursuant to an agreement under this section

Section 97(3)(a) *A person may, before applying for permission in respect of a development*

a) consisting of the provision of 9 or fewer houses, or

b) for housing on land of 0.1 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.

7.2. Part V of the Planning and Development Act 2000 was amended with effect from 1 September 2015. Since 31 August 2015, 2 guidance circulars have been issued by the Department and one Guideline under Section 28 of the Planning and Development Act 2000 (as amended):

- Circular Housing 33 of 2015 of 31 August 2015 - Urban Regeneration and Housing Act 2015 – amendments to the operation of Part V of the Planning and Development Act 2000.
- Circular PL 10/2015 and Housing 36/2015 of 30 November 2015 - Part V - Implementation of Article 22(2)(e) of the Planning and Development Regulations 2001, as amended – Validation of Planning Applications.
- Guidelines on Application of Part V of the Planning and Development Act 2000, after 1 September 2015, to developments granted permission prior to 1 September 2015, May 2016
- Ministerial Guidelines Part V of the Planning and Development Act 2000 - Guidelines issued by the Minister for Housing, Planning, Community and Local Government under section 28 of the Planning and Development Act 2000 (January 2017). The advice here supersedes any differing advice on any particular issue given in earlier Guidance/Circulars referred to above.

8.0 Assessment

8.1.1. A dispute has arisen between Limerick City and County Council and Eoin Ryan, Budelli Construction Ltd in relation to an agreement under Section 96 of the Planning and Development Acts 2000 (as amended) following the grant of permission by An Bord Pleanála on 21st November 2016 for residential development (as amended) comprising 4 No. apartments, change of use of aparthotel from commercial to residential, 59 No. apartments, construct 7 No. houses subject to 19 no (PL 91.246960 (Reg Ref 15/645) refers).

8.1.2. Condition No 16 states as follows:

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.*

8.1.3. The Board will also be aware that Section 96(8) of the Planning and Development Act 2000 (as amended) states that where an agreement is not entered into before the expiration of 8 weeks from the date of the grant of permission because of a dispute, the applicant, the planning authority or any other person with an interest in the land may refer the dispute to the Board. In this case the matters have been referred to the Board for determination by Limerick City and County Council under Section 96(5) of the Planning and Development Acts 2000 (as amended).

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

- Limerick City & County Council Part V Obligations
- Does Part V apply in this case?
- Is Ardhu House and the Aparthotel “one building” for the purposes of Part V?
- Is 50% of the external fabric of Ardhu House and the Aparthotel being retained?
- Is Part V applicable in this case?

8.2. Limerick City & County Council Part V Obligations

- 8.2.1. The Board will be aware that each planning authority shall include in any development plan it makes a strategy for the provision of housing of the existing and future population of the area in the manner set out in the strategy. In conjunction with the inclusion of the housing strategy in its development plan, a planning authority shall also include objectives in the development plan in order to secure the implementation of the housing strategy, including objectives requiring that a specified percentage of land zoned solely for residential use, or for a mixture of residential and other uses, be made available for the provision of social and affordable housing referred to in section 94(4)(a) of the Planning and Development Act (as amended). Further Section 96 of the Act states that a planning authority, or the Board on appeal, shall 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, providing, for either the transfer of lands, sites or houses for social and affordable housing purposes.
- 8.2.2. In this case the overall site is zoned ZO.2 (A) Residential where the objective is to provide for residential development and associated uses and where residential development is acceptable in principle. Chapter 6 of the Limerick City Development Plan 2010 – 2016 (as extended) states that one of the overall objectives is to require 20% of land zoned for residential use or a mixture of residential and other uses, subject to certain exemptions, shall be reserved for the purpose of the provision of social and affordable housing.

8.3. Does Part V apply in this case?

8.3.1. The first item to be addressed is whether Part V applies in this case. The Board will be aware that if an applicant applies for planning permission for a development of 9 or fewer houses or a development of houses on land of less than 0.1 hectare they can be exempted from Part V.

8.3.2. In this case however the scheme as permitted by An Bord Pleanála (PL91.246960 (Reg Ref 15/645)) on 21st November 2016 is for a residential development comprising 4 No. apartments, change of use of aparthotel from commercial to residential, 59 No. apartments, construct 7 No. houses. The overall site area in this case is stated as 1.7 ha. Accordingly, Part V is applicable in this case.

8.3.3. Having regard to the foregoing, there are exemptions set out in Section 96(13) of the Planning and Development Act (as amended) that may be applicable. These provision relate to as follows:

- provision of houses by an approved body for social housing and/or affordable housing;
- conversion of an existing building or the reconstruction of a building to create one or more dwellings provided that at least 50% of the external fabric is retained;
- carrying out works to an existing house;
- development of houses under a Part V agreement.

8.3.4. There is no evidence that the permitted units are to be provided by an approved housing body. Further the permitted scheme does not involve works to an existing house and there is no evidence of a Part V agreement already being in place. Having regard to the previous appeal on site it is noted that the application was made in August 2015, prior to the Urban Regeneration and Housing Act 2015 coming into effect in September 2015 and therefore the more detailed agreement with the Housing Authority required under this Act was not required at the time of application. In line with the comments provided by the developer there is, however a query as to whether the conversion of the existing structures on site comprising Ardhu House and the former hotel / aparthotel block are classed as one building and whether or not at least 50% or more of the external fabric of the building is retained.

8.4. Is Ardhu House and the Aparthotel “one building” for the purposes of Part V?

8.4.1. The pertinent question to be addressed in determining if the exemption under Section 96(13) is applicable in this case is whether or not Ardhu House, a protected structure, and the former hotel / aparthotel block are classed as one building for the purposes of planning Part V.

8.4.2. As referred to above Section 96(13)(b) of the Act states that Section 96 shall not apply to applications for permission for:

*(b) the conversion of an **existing building** or the reconstruction of a building to create one or more dwellings, provided that 50 per cent or more of the existing external fabric of the building is retained,*

8.4.3. The developer submits that when the Clarion Suites was operating as a hotel, that a continuous internal connection between Ardhu House and the “aparthotel” block was installed in the form of a single storey link corridor. The link was constructed pursuant to Reg Ref 15/40. It is stated that the link corridor was subject to the provision of a “Failte Ireland Hotel Classification Scheme” which specified that at any one premises, buildings providing accommodation for visitors must be physically linked via “well lit, covered or insulated walkways”. This therefore had the effect of making the facility a single unit complex, for operational and servicing purposes and may therefore be regarded as “one building” for the purposes of Section 96(13) of the Act. The internal link corridor still remains at the time of writing but is to be removed as part of the permitted scheme (site photos and drawing details refer).

8.4.4. While I agree that both buildings are “physically linked”, I do not consider for the purposes of Section 96(13) that this intervention makes both Ardhu House and the former Clarion Hotel one building. Ardhu House and the former Clarion Hotel are two standalone buildings, built at different times for different primary uses, operating as two distinct planning units that were connected only in recent years with the most minimal of interventions, clearly reflecting the requirement to preserve the character of the Ardhu House, a protected structure. In my view Ardhu House and the former Clarion Hotel are two separate planning units for the purposes of Part V.

8.4.5. While Section 96(13) clearly refers to *the conversion of an **existing building*** in the singular I do not consider that the conversion of more than one distinct planning unit or buildings within the same scheme can be excluded for the purpose of the act. In

my view Section 96(13)(b) is applicable to each existing building within the scheme. Based on this interpretation of the Act it is my view that it is reasonable to assess both Ardhu House and the former Clarion Hotel as separate buildings for the purposes of exemption under Section 96(13). Each element of the scheme will be assessed accordingly and in turn the sum of the parts considered as to whether or not part V is applicable in this development.

8.5. Is 50% or more of the external fabric Ardhu House and the Aparthotel being retained?

- 8.5.1. The second question to be addressed in determining if Section 96(13) is applicable in this case is whether or not **50 per cent or more of the existing external fabric of the building is retained** on both Ardhu House and the former hotel / aparthotel block. In this regard the referrer, Limerick City and County Council have specifically asked what is the definition of “external fabric” in regard to Section 96(13)(b) of the Act. I have considered the Planning and Development Act 2000 (as amended), the Planning Regulations 2001 (as amended), the relevant Section 28 Ministerial Guidelines and Circulars and note that “external fabric” has not been defined in these documents.
- 8.5.2. Broadly speaking external fabric could refer to a multiple of elements. However, in my view a reasonable and balanced interpretation of “external fabric” for the purposes of Part V would refer to the exterior appearance of walls, roofs or openings to include external fixtures and fittings. Essentially it is everything visible on the outside of the building.
- 8.5.3. An assessment of the areas of material alteration to existing external fabric under the terms of the planning permission has been undertaken by the applicant in order to determine the extent of alteration of fabric, relative to the extent of overall external fabric. While the figures presented provide no reference value the assessment concluded that cumulatively less than 50% of the overall extent of external fabric of both buildings is to be altered by reason of the permitted development.
- 8.5.4. In this regard I refer the Board to the black and white drawings submitted with the referral that set out the extent of alteration of external fabric relative to the extent of overall fabric. As these are black and white drawings they are of limited assistance

distinguishing between alterations, areas to be demolished etc in assessing the extent of existing external fabric to be retained. Accordingly I refer the Board to the previous appeal on this site and associated details and drawings attached therein (PL 91.246960 (Reg Ref 15/645) refers).

8.5.5. With regard to the former hotel / aparthotel block and having considered the information available including the history file together with my site inspection I am satisfied that 50 per cent or more of the existing external fabric of the building is to be retained and therefore this existing building **is exempt** for the provisions of Part V.

8.5.6. With regard to Ardhu House and having considered the extensive demolition works permitted together with the information available including the history file together with my site inspection and with particular reference to the assessment presented by the applicants in the drawing submitted with the referral it is evident that less than 50 per cent of the existing external fabric of the building is to be retained. Therefore in my view Ardhu House is **not exempt** for the provisions of Part V.

8.6. **Is Part V applicable in this case?**

8.6.1. In my view the developer provides a logical argument that if Ardhu House and the former Clarion Hotel were classed as “one building”, for the purposes of Section 96(13) that the remaining permitted housing element (7 units) would also be exempt from Part V as the social housing obligations contained in Section 96 are not applicable in respect of developments consisting of 9 or fewer houses pursuant to Section 97(3)(a) of the Planning and Development Act (as amended).

8.6.2. However it has been demonstrated above that Ardhu House is not exempt from the requirements of Part V. It is therefore the case that the 4 no residential units proposed within Ardhu House together with the permitted 7 no detached houses also proposed within the site provides for a total of 11 residential units. Accordingly Part V is applicable in respect of these 11 units pursuant to Section 97(3)(a) of the Planning and Development Act (as amended).

9.0 Recommendation

9.1. Having regard to the foregoing I recommended that the Board make a determination within the terms set out below:

WHEREAS a dispute has arisen between the planning authority, Limerick City & County Council and the developer, Eoin Ryan, Budelli Construction Ltd, in relation to the agreement required by Condition Number 16 of the grant of permission made by An Bord Pleanála on the 21st Day of November 2016, under planning register reference number PL91.246960 in respect of a development at Ennis Road, Roses Avenue & North Circular Road, Limerick City

AND WHEREAS the said dispute was referred to An Bord Pleanála by Limerick City & County Council on 25th day of May 2017:

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

- (a) Section 96 & 97 of the Planning and Development Act (as amended),
- (b) Ministerial Guidelines Part V of the Planning and Development Act 2000 (January 2017).
- (c) the provisions of the Limerick City Development Plan 2010 – 2016 (as extended)
- (d) the planning history of the site:

AND WHEREAS An Bord Pleanála has concluded that the former hotel / aparthotel block is exempt for the provisions of Part V and whereas Ardhu House is not exempt for the provisions of Part V

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 96(5) of the Planning and Development Act 2000-2010, hereby determines that, having regard to the submissions made, the said agreement between the planning authority and the developer shall provide that the developer 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, in relation to the 4 no residential units proposed within Ardhu House together with the permitted 7 no detached houses also proposed within the site that provides for a total of 11 residential units only.

Mary Crowley

Senior Planning Inspector

21st December 2017