An Bord Pleanála

Inspector's Report

Appeal Reference No: **PL 27.RP2127**

Development: Point of detail regarding financial contribution condition No. 18 of permission PL27.224289, Reg. Ref. 07/112, for a revised neighbourhood centre at Merrymeeting Road, Broomhill, Rathnew, Co. Wicklow

Planning Application

Planning Authority:	Wicklow County Council
Planning Authority Reg. Ref.:	07/112
Applicant:	Broomhall Estates Ltd.

Planning Appeal

Referrer:	Broomhall Estates Ltd., Broom Estates Ltd. & Hall Estates Ltd.
Type of Referral:	First party against S48 condition (point of detail)
Observers:	None

Inspector: Mary Kennelly

1.0 SITE LOCATION AND DESCRIPTION

The site is located in Rathnew, in a relatively recent development to the south of the old village of Rathnew, which in turn is located approx. 3km to the Northwest of Wicklow Town. The site forms part of a mixed use development consisting of a 3-storey neighbourhood centre, (with apartments on the top floor), a 3-storey apartment block (Wilton Hall) and individual housing units (Wilton Manor) in a triangular-shaped site bounded by Merrymeeting Road to the north and Saunders Lane to the south.

2.0 PLANNING HISTORY

06/5286 Planning permission was granted subject to (48 no.) conditions for a 2/3 storey neighbourhood centre, a 3-storey apartment block and 42 no. 2 and 3 storey residential units. The neighbourhood centre building, which was located at the north-western corner of the site, had a stated floor area of 2132.31m² and included 7 no. 2 bed apartments of 66m² and 1 no. 1-bed apartment of 48.8m². The permitted neighbourhood centre also included a crèche, a doctor's surgery, a dentist's surgery and 4 no. retail units. A more detailed description is set out in the Referring party's letter of 6th November 2015, attached to the Referral letter of 23rd March 2016. A total financial contribution payable under Section 48 of the 2000 Act was calculated at €1,213,160 (condition 2 of that permission).

224289 Permission was granted by the Board following a first party appeal against refusal (07/112) for a revised 3-storey neighbourhood centre, which was larger than the previously permitted centre by 370m² retail space and 241m² storage space, with an additional 32 no. parking spaces. The revised proposal altered the internal arrangements of the residential accommodation, but not the number or size of apartments, (i.e. 8 no. apartments of less than 100m²). The number, size and users of the proposed retail and community uses were also altered. However, the application was revised in compliance with Condition No. 1 of the Board's decision, whereby the proposed hair and beauty salon was replaced by a single apartment (134m²). The file is attached for the Board's attention. A further financial contribution was required under Condition 18.

3.0 PLANNING DECISION

The Board granted planning permission (224289) on 17th April 2008 subject to 19 no. conditions for a revised neighbourhood centre. Condition 18 required the payment of a financial contribution under the General Development Contribution scheme. The condition reads as follows:

18. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000. The contribution shall be paid prior to the commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to the Board to determine the proper application of the terms of the Scheme.

Reason: It is a requirement of the Planning and Development Act 2000 that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

4.0 POINT OF DETAIL

This is a first party referral under section 34(5) of the Planning and Development Act 2000, as amended, which provides for points of detail to be agreed between the planning authority and the developer, and where agreement cannot be achieved, the matter may be referred to the Board for determination. The point of detail relates to Condition No. 18 of the permission granted by the Board in 2008 under PL27.224289, (Reg. Ref. 07/112), as set out above. The dispute relates to the amount of contribution to be paid in respect of the development of the neighbourhood centre, but only in respect of the 8 no. unsold apartments (less than 100m^2).

5.0 REFERRAL GROUNDS

It should be noted in the first instance that whilst the applicant's agent has raised issues with the P.A. (in its letter of 6th November 2015), relating to the amount of contribution to be paid in respect of both planning decisions referred to at 2.0 above, (06/5286 and 07/112), it is my view that the matter before the Board relates only to the planning permission granted by the Board for the revised neighbourhood centre (PL27.224289). It should also be noted that the planning authority responded to the request for the reduction in charge proposed on 6th November 2015 by the applicant in a letter dated 21st January, 2016. Both letters are attached to the applicant's request to the Board, and are referred to below.

The request from the applicant is set out in the agent's letter to the Board dated 23rd March 2016, the main points of which may be summarised as follows:-

1. Reference is made to the planning permission granted by the Board and specifically to the content of Condition No. 18.
2. The Planning Authority identified on 25th May 2015 the contributions that it was seeking in respect of the Neighbourhood Centre (under Reg. Ref 07/112) as comprising €14,700 for each of the apartment Nos. 1-8 inclusive, (€117,600) and €16,800 for Apartment No. 9 within this building.
3. On 6th November 2015, the Applicant sought a reduction in the amount of contribution payable (from the planning authority) in respect of several elements of the overall mixed use development, including the residential element of the Neighbourhood Centre. This request was made on the basis of the new provisions contained in Section 29 of the Urban Regeneration and Housing Act 2015 and having regard to the Development Contribution Guidelines for Planning Authorities, 2013. It is stated that, in the opinion of the applicant, the goals of the legislature are a material consideration for planning purposes, and that the applicant should be afforded the benefit of reduced contribution rates which have been adopted since the grant of consent in the first instance.
4. It is further claimed that it would be open to the Board to apply the charges which are currently authorised by the Development Contribution Scheme adopted in 2015. The Board is thus invited to determine that the amount to be paid in respect of dwelling unit nos. 1-8 within the Neighbourhood Centre, as permitted under PL27.224289, should be €7,425 each.
5. The Planning Authority had responded to the applicant's request for a reduction in the charge, and this response (dated 21st January 2016) is attached to the request of referral. The applicant in the request to the Board, has included a point by point response to this communication from the P.A., and is summarised below. For ease of reference, under each point, I have first summarised the P.A's position followed by the Applicant's response:-

   - *<u>P.A. - Urban Regeneration and Housing Act 2015</u> – it is the view of the P.A. that the purpose of this legislation was to encourage developers to complete housing developments and thus increase housing supply. The P.A. does not readily see why this legislation should be applied to houses that have been completed and occupied. Full details of the houses which have been included in the calculation (the subject of the reduction request) were therefore requested and any further details regarding the justification for the request.*

     <u>Applicant's response</u> - The planning authority's request for FI is unfounded. All of the information required to enable the P.A. to respond to the applicant's request has been provided in respect of the identification of unsold units, confirmation of floor space within in unit and all other details. It is claimed that it is not lawfully open to the P.A. to refuse to apply the entitlement to a reduction in the amount of contribution with respect to the unsold housing units, and that the fact

that the units are occupied and/or rented rather than sold is Immaterial.

- *P.A. - Water charges – the comparison calculations provided by the applicant are based on total contributions for each particular house, rather than on the class of infrastructure provision. The calculations are also based on comparisons between the Scheme that was in place in 2006 and the newly adopted Scheme of 2015. It is pointed out that the 2015 Scheme does not include any contributions for Water and Sewerage services and is not therefore directly relevant to the Scheme that was in place when the permission was granted in 2006. The comparison, based on totals, means that no payment would be made for water or sewerage infrastructure to which the development was connected. Thus the Class 2 contributions for water should be deducted from the comparison calculation to arrive at the reduction that may be due.*

  Applicant's response - The applicant claims that the P.A. is not entitled to refuse the request for a reduction in the charge on this basis as it is out of step with the provisions of the Urban Regeneration and Housing Act 2015 and is fundamentally at variance with the aim of this legislation.

- *Calculation errors – the P.A. considers that individual calculations contain errors, which should be addressed in due course.*

  Applicant's response - The calculation errors referred to in the P.A. response are not identified and cannot therefore be responded to in any detail.

- *Clarification regarding legal ownership – is required in respect of the names of the developers/owners, i.e. Broom Estates Ltd., Hall Estates Ltd. and Broomhall Estates Ltd.*

  Applicant's response - In respect of legal entities and ownership of the lands, it is confirmed that the developers are Broom Estates Ltd. And Hall Estates Ltd. And that they trade as Broomhall Estates Ltd.

6. In conclusion, the applicant rejects the amount of contribution required by the planning authority of €14,700 for each of the apartments numbered 1-8 as sought by the P.A. on 25th May 2015 and instead submits a counter offer of €7,425 for each of the retained dwellings, i.e. €59,400 in aggregate.

5.2 Planning authority response to grounds of referral

The planning authority responded to the referral on 13th April 2016. The P.A. requests in the first instance that the Board examines its role in the matter for the following reasons:-

1. Section 29 of the Urban Regeneration and Housing Act 2015, which amended Section 48 of the Planning and Development Act 2000 (as amended), allows for a reduction in certain circumstances (as set out in S29(3A) and (3B)) of the development contributions payable on a permission granted under S34 of the 2000 act, where the basis for determination of the contribution has changed. It is noted that one such change might include the adoption of a new Development Contribution Scheme. However, the planning authority has pointed out that the said Section 29 of the 2015 Act does not refer to the Board.

2. Section 48(10) (a) provides that there shall be no appeal to the Board in relation to a condition requiring a contribution to be paid in accordance with a scheme made under this section. It is further pointed out that S48(10(b) does provide for an appeal of such conditions but only where an applicant considers that the terms of the scheme have not been properly applied in respect of any condition laid down by the planning authority.

3. It is the planning authority's view that the applicant seems to be relying on either the provisions of S48(10)(b) or on the content of Condition 18 of the Board's decision under PL27.224289.

4. In terms of S48(10)(b) of the 2000 Act, the P.A. considers that the request by the applicant is not an appeal in the first instance and does not relate to the application of the terms of the Scheme that was relevant at the time of the grant of permission under S34, as the request relates to the application of Section 29 of the Urban Regeneration and Housing Act 2015.

5. In terms of Condition 18 of 224289, the P.A. considers that this allows for a referral to the Board of the proper application of the Development Contribution Scheme where the planning authority and the applicant cannot agree the application of the terms of the Scheme. However, the P.A. points out that the request from the applicant for a reduction in the charge relates to Section 29 of the Urban Regeneration and Housing Act 2015 and does not relate to the application of the terms of the Scheme that was in place at the time that the planning permission was granted.

6. In conclusion, the planning authority considers that the subject matter of the referral request is a matter between the planning authority and the applicant and as such, that the request should be considered to be invalid.

5.3 Applicant's response to Planning Authority submission of 13th April 2016

The applicant's agent responded to the P.A. submission in a letter received by the Board on 1st June 2016. The main points may be summarised as follows:-

1. Basis of request – It is refuted that the request stems from the referral provision of the Board's condition, although it is acknowledged that it did form the backdrop to the request. It is stated that the request had rejected the P.A.'s demand for €14,700 per apartment (for Apartments 1-8). Thus it was concluded that there is a clear lack of consensus on the appropriate amount to be paid, and that this was the basis for the request. It is noted that at no stage does the P.A. dispute the fact that condition 18 contains a referral entitlement or that the disagreement precondition has not been satisfied.
2. Role of Board - It is agreed that the Urban Regeneration and Housing Act 2015 does not confer a particular function on the Board but disagrees that its request should be invalidated. It is reiterated that it is lawfully open to the Board to consider legislative changes when deciding the sum of money to be imposed and restates the applicant's interpretation of the aims and objectives of the UR & H Act. Reference is also made to the Development Contribution for P.A.s Guidelines 2013, which it is stated, together with the provisions of the UR & H Act 2015, seek to "rectify years of overcharging". It is stated, that the Board should not, therefore, apply "discontinued rates".
3. Counter-offer - It is refuted that the request relates to S29 of the UR & H Act 2015. Instead, it is claimed that the request contains a counter offer/alternative suggestion of €7,425 per unit, as opposed to €14,700 demanded by the P.A. It is claimed that this demonstrates that the parties have failed to reach an agreement. It is noted that the P.A. does not comment on the amount to be paid as proposed by the applicant.

6.0 CONTRIBUTION SCHEME

6.1 Development Contribution Scheme 2005

A copy of the Development Contribution Scheme that was in force at the time that the contribution was paid is on the file. This is the Wicklow County Development Contribution Scheme 2005. It was adopted by the Council on 9th May 2005. It sets out the classes of infrastructure and facilities in respect of which contributions are sought at Section 3.0 and the basis for the determination of contributions at Section 4.0. The level of contributions to be sought are set out at Section 5.0 and Table 5.1, which are to be calculated on the basis of floor space for the development type (residential or industrial). A rate is provided for each class of infrastructure, Class 1, Roads & Transport; Class 2, Water & Drainage; Class 3, Community & Recreational Amenity.

The combined rate for residential is €120 per m². However, this is further refined in Table 5.2 in that the €120 rate is to be modified into four bandwidths

representing different sizes of residential units (gross floor space). Thus for example, the contribution for Band 1 - Units of less than 93.99m² - is specified as €11,160 and that for Band 2 - Units of between 94m² and 130.99m² - is €13,440. Band 1 is a minimum figure and Band 4 is a maximum figure. Band 2 is the average of 94m² x €120 and 130m² x €120.

It is further noted (5.5) that the contributions are to be index linked in that the above contribution rates will have increased on 1st Jan. 2006 and each year thereafter in line with the Wholesale Price Indices. Clause 5.6 states that contributions are payable before development commences. However, it is further stated:-

> *"The planning authority may, in certain circumstances, and on a case-by-case basis, agree to facilitate the phased payment of contributions due, in accordance with the terms of the Scheme, if requested to do so in writing. Any such agreement by the planning authority may be subject to conditions as the planning authority may set and may require the giving of security to the planning authority to ensure the payment of contributions."*

Where the contribution is not paid in accordance with the terms of the appropriate condition, the Scheme states that interest will be applied to the outstanding amounts (5.7, 5.8).

6.2 Development Contribution Scheme 2015

The Scheme that is currently in operation was adopted on 5th October 2015. A copy of this Scheme is on the file. The Classes of Infrastructure have been amended to reflect the establishment of Irish Water and as such, Class 2 is now entitled Storm water Drainage. The types of development have also been altered and expanded. Residential is now spilt into Rural and Non Rural. In addition, the rate is calculated differently. There are now two categories of unit size, 0-100m² and >100m². The rate for <100m² is €7425 and that for >100m² is €7425 + €57 per sq. m over 100m².

7.0 ASSESSMENT

7.1 Scope of the Referral/Role of Board

It is noted that the point of detail request relates to Condition 18 of PL27.224289. This permission was granted by the Board in 2008 following a first party appeal against a refusal of planning permission. Thus condition 18 was attached pursuant to S48 (11) which states:

> *Where an appeal is brought to the Board in respect of a refusal to grant permission under this Part, and where the Board decides to grant permission, it shall, where appropriate, apply as a condition to the permission the*

provisions of the contribution scheme for the time being in force in an area of the proposed development.

It is considered, therefore, that the point of detail request cannot be considered to be an appeal against a condition of a planning permission, as the permission was granted by the Board. Thus it is considered that the matter is not one which arises under Section 48(10)(b), which provides for an appeal against a S48 condition imposed by a planning authority, where it is considered that "the terms of the scheme have not been properly applied in respect of any condition laid down by the planning authority."

However, Condition 18 includes a provision whereby a similar opportunity is afforded to the developer, where there is a lack of agreement between the parties. Specifically the conditions states

"Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to the Board to determine the proper application of the terms of the Scheme."

It is considered that it is this provision that is applicable in this case. Crucially, however, it is considered that it is the terms of the Scheme that was in place at the time that the Board made its decision is the relevant Scheme to which the Board must have regard in its determination on the matter. I draw this conclusion based on the wording of the both the condition itself and on the wording of S48(11) as referred to above. Thus it is my opinion that the matter that is before the Board can be stated as follows:-

Have the details of the application of the terms of the Scheme been agreed between the planning authority and the developer?

If it is concluded that there is no agreement on the application of the terms of the Scheme, it is considered that the Board has a role which I believe is confined to the determination of the proper application of the terms of the Scheme that was in place at the time of the Board's decision to grant permission.

Thus I do not accept that the provisions provided for in the Urban Regeneration and Housing Act 2015, which in this case relates to the change in circumstance brought about by the adoption of a new Development Contribution Scheme with new reduced charges, is relevant to the case currently before the Board. I would also concur with both parties that S29 of the UR & H Act 2015 does not appear to confer any function on the Board in respect of the application of reduced charges for housing units that remain unsold.

7.2 Have the details of the Application of the Terms of the Wicklow County Development Contribution Scheme 2005 been agreed?

There has clearly been a period of protracted negotiations between the parties on the matter of development contributions over the past 8 years. However, having reviewed the correspondence on file, I am of the opinion that, notwithstanding the current impasse, there appears to have been no disagreement from the outset on the amount of contribution to be paid in respect of the 8 no. apartments in the Neighbourhood Centre. The main issues that appear to have been in dispute relate to the phasing or timing of payments and related matters in respect of the overall development. It is noted that both the Board's condition and the terms of the Contribution Scheme make reference to the requirement that the contribution should be paid either before commencement of the development or in such phased payments as the planning authority may facilitate and shall be subject to any indexation provision of the Scheme at time of payment.

Although there were some inconsistencies in the positions taken by the parties from time to time on the matter of phased payments, there seems to have been general agreement that phased payments would be facilitated. At first, it would appear that the P.A. had agreed (22/05/09) to the payment of contributions for each block of 10 houses/residential units which would be payable for the block at the completion of the first signing of the sale of the unit. However, as the effects of the recession became apparent, the applicant had approached the P.A. indicating that insufficient sales were achievable to continue with this phasing agreement. It was, therefore, sought that the contribution would be paid as each unit was sold. This arrangement, however, led to further disputes between the parties on the timing of payments. It is considered, however, that the P.A. has facilitated such an agreement and that the details of any such agreement on phased payments is not a matter for the Board.

The other matters that were the subject of disagreement related to whether the applicant should be permitted to offset payments already made against the amounts owed and whether the applicant should be allowed to use the security bond on deposit to pay the outstanding amounts owed in respect of development contributions. These matters are not ones which concern the Board in terms of the current case before it.

7.3 Have the terms of the Wicklow County Development Contribution Scheme 2005 been properly applied?

As stated above, it is clear from the correspondence that the amount of contribution payable, or the method of calculation, does not appear to have been in dispute and appears to be in accordance with the terms of the adopted Scheme (2005). The figure of €14,700 per apartment (Nos. 1-8) first appeared in the Invoice issued by the P.A. on 9th March 2015. This charge, (which was index linked but subject to any further adjustment for indexation), seems to have been

agreed as evidenced by subsequent correspondence between the parties, (dated 15/05/15 and 26/05/15 from Cooney Parle on behalf of applicant, 25/05/15 from P.A.). In fact, Cooney Parle, on behalf of the applicant, provided the entire amount of contribution outstanding at that time for the overall development in the form of 24 no. post-dated cheques, (letter of 20th October 2015). However, the P.A. rejected the method of payment and insisted on the immediate payment the outstanding amount.

The first indication of a dispute regarding the amount/rate of contribution for the 8 no. unsold apartments was raised in the letter from Vincent Farry dated 6th November 2015. The applicant is now seeking a reduced contribution rate in line with that provided for in the current Development Contribution Scheme (2015) of €7,425 per apartment instead of €14,700 per unit, or €59,400 in aggregate. The reduced rate is being sought on the basis that the applicant believes that the Urban Regeneration & Housing Act 2015 obliges the P.A. to apply the reduced charge rate to unsold housing units. However, as already stated, it is considered that the matter before the Board is whether the terms of the Development Contribution Scheme that was in operation at the time that the planning decision was made (17/04/08) have been properly applied. I consider that the terms of the Scheme have been properly applied and that the rate of contribution is €14,700 per apartment. It is considered that all other matters are for the parties to resolve between themselves. Thus the amount of contribution to be paid in respect of the 8 no. apartments is €117,600.

8.0 Recommendation

It is recommended that the Board indicate to the referring party and to the planning authority that the amount of contribution payable under the terms of Condition no. 18 of Board Ref. PL27.224289 is €117,600.00 in respect of the 8 no. apartments within the Neighbourhood Centre.

REASONS AND CONSIDERATIONS

Having regard to:-

(1) The specific wording of Condition 18 of the permission granted by the Board under PL27.224289 which required the payment of a financial contribution under the terms of the Development Contribution Scheme prior to the commencement of development or in such phased payments as the planning authority would facilitate, and in default of agreement that the matter be referred to the Board;
(2) The date that the planning permission was granted, 17 April 2008; and
(3) The Terms of the Development Contribution Scheme (2005) that was operative at the time of the grant of permission,

The Board considers that the terms of the Wicklow County Development Contribution Scheme adopted in 2005 have been properly applied in this

instance, and that the appropriate amount of contribution remaining to be paid is €117,600.00 (one hundred and seventeen thousand, six hundred euro).

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Mary Kennelly
Senior Planning Inspector
12th August 2016