



An
Bord
Pleanála

Inspector's Report RP91.RP2138.

Referral	Point of detail regarding condition number 18 of Planning Authority Register Reference: 15/221.
Location	Ballybrown, Clarina, Co Limerick.
Planning Authority	Limerick City and County Council.
Planning Authority Reg. Ref.	15/221.
Referrer	ATG Properties Ltd.
Type of Application	Point of Detail.
Type of Appeal	First Party.
Observer(s)	None.
Date of Site Inspection	23 January 2017.
Inspector	Stephen Rhys Thomas.

1.0 Introduction

- 1.1. This is a referral under Section 34(5) of the Planning and Development Act, 2000 (as amended) requesting a determination on the appropriate implementation of points of detail relating to condition 18 attached to permission register reference 15/221.

2.0 Site Location and Description

- 2.1. The site is located at Clarina, a small village on the N69, about 10 kilometres west of Limerick City. The subject site comprises an unfinished housing estate of retirement homes and adjoins a partially completed housing estate which is an adjunct to the village.

3.0 Planning Permission

- 3.1. The development permitted under planning register reference 15/221 relates to planning permission for the construction and completion of 48 retirement homes currently in various states of construction. This is however, a standalone permission for the completion of the retirement homes only.
- 3.2. The description of development however, includes the information that the 48 units were originally granted planning permission under 99/2676 (which was extended under 12/7106 until 2017) and construction had commenced with amendments to the principal permission under 07/1252 and 07/3472.
- 3.3. **Planning authority reference number 15/221.** Planning permission for the construction and completion of 48 retirement homes. The permission was subject to 19 conditions, the relevant condition (18) is reproduced in its entirety, as follows:
- **Condition 18** – ‘(a) Prior to the commencement of any development on site, the applicant shall submit the following information for written agreement with the Planning Authority:
 - (i) The proposed surface water attenuation/storage area is not permitted and the applicant shall install sufficient surface water storage as specified under the parent permission 99/2676. The

applicant shall submit a safety review outlining additional measures to maximise safety in operation and safety of maintenance.

- (b) All defects in the surface water sewer (including those noted in the submitted sewer survey reports on the surface water system under the current application) shall be rectified and a revised surface sewer survey and report to prove that all defects have been rectified, shall be submitted to the Planning Authority for written agreement prior to the occupation of any retirement house on site.

Reason – In the interests of orderly development and in the interest of clarity.’

4.0 Planning History

- 4.1. **Planning register reference number 99/2676 and An Bord Pleanála reference PL13.129104.** Permission granted for 196 housing units, childcare centre, offices, business and technology park, supermarket, restaurant, retail units, hotel, communal and community halls, temporary wastewater treatment plant and foul sewerage pumping station. October 2002. **Planning register reference number 12/7106.** Permission extended until the 20th November 2017. October 2012
- 4.2. **Planning register reference number 071252.** Permission granted for changes to elevations. June 2007.
- 4.3. **Planning register reference number 07/3472.** Permission granted for changes to internal layouts. January 2008

5.0 The Referral

- 5.1. The submission by the owner/occupier is accompanied by supporting detail and documentation including copies of a Barrister’s legal opinion, copy of a reply from a Solicitor acting on behalf of the Local Authority, copy of notification to grant permission and a grant of permission (reference number 15/221), drawings of the proposed attenuation area and an Irish Water pre-connection agreement. The grounds of referral regarding this point of detail are summarised as follows:

- That the proposed means of attenuation as delineated on the enclosed drawings satisfies condition 18 and the applicant should not be required to submit a further planning application.
- The proposed means of attenuation has been approved by Local Authority Engineers as acceptable.

The conclusion of the legal opinion on the wording of the condition can be summarised as follows:

- That the applicant is required to submit information for written agreement with of the planning authority.
- The surface water attenuation proposal in the application (15/221) is not permitted.
- The applicant is required to install sufficient water storage as specified in the parent permission, the details of which to be agreed with planning authority prior to the commencement of development.

6.0 Planning Authority Submission

6.1. The Planning Authority response to the grounds of referral is summarised as follows

- The condition is clear insofar as it states that the surface water attenuation proposal submitted on the 2nd February 2016 is unacceptable and not permitted; the applicant shall install sufficient surface water storage in accordance with the permission granted under 99/2676.
- The applicant has now proposed an acceptable form of surface water disposal, however, given the revised location of the proposed system and the nature of the proposal, the planning authority have advised the applicant that this would require a revision to the permission.
- The applicant has lodged a planning application 16/998, to revise surface issues associated with 15/221 and therefore accepts the need to apply for a revised planning permission.

7.0 Further Response from the Referrer

7.1. The further response of the referrer can be summarised as follows:

- Cannot accept that condition 18 is clear, if it were, there would be no disagreement.
- It is misleading to imply that the applicant 'appears to accept' the planning authority's view in relation to the need for a further planning application in relation condition 18. The applicant has utilised the planning application process as it was advised that this might be a speedier route to resolve matters.
- The correspondence of Leahy and Partners Solicitors on behalf of Limerick City and County Council (dated 20th October 2016) does not support or show a basis for its conclusions for the need for a further planning application.
- The issue of a connection agreement with Irish Water is not in any way connected with the issue of surface water attenuation.

8.0 Planning Policy

8.1. Limerick County Development Plan 2010-2016 is the statutory development plan for the area.

9.0 Relevant Legislation and Guidelines

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

9.1.1. Under Section 34 (1) where (a) an application is made to a planning Authority in accordance with permission regulations for permission for the development of land, and (b) all requirements of the regulations are complied with, the authority may decide to grant the permission subject to or without conditions, or to refuse it.

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

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

9.2.1. These Guidelines provide guidance for Planning Authorities and seek to promote best practice in the development management process. Chapter 7 provides guidance on drafting planning conditions. Under paragraph 7.9 Conditions requiring matters to be agreed, the following advice is provided:

- 'In some cases, it may be considered unreasonable when granting a permission to require the applicant to go through the statutory application procedure again in relation to some detail of the proposed development and, to obviate this, a practice has developed of using a form of condition which requires that the matter shall be agreed with the planning authority. However, such conditions should be avoided in cases where the matters involved are of a fundamental nature or such that third parties could be affected.'

10.0 Assessment

10.1. Preliminary

10.1.1. It is my interpretation of the referral that the issue revolves solely around condition 18 of the planning authority register reference 15/221 and which states:

- '(a) Prior to the commencement of any development on site, the applicant shall submit the following information for written agreement with the Planning Authority:
 - (i) The proposed surface water attenuation/storage area is not permitted and the applicant shall install sufficient surface water storage as specified under the parent permission 99/2676. The applicant shall submit a safety review outlining additional measures to maximise safety in operation and safety of maintenance.
 - (b) All defects in the surface water sewer (including those noted in the submitted sewer survey reports on the surface water system under the current application) shall be rectified and a revised surface sewer survey and report to prove that all defects have been rectified, shall be submitted to the Planning

Authority for written agreement prior to the occupation of any retirement house on site.

Reason – In the interests of orderly development and in the interest of clarity.’

- 10.1.2. The need for this condition is relevant to the planning application because the applicant initially proposed surface water attenuation loosely in accordance with that permitted by register reference 99/2676, the parent planning permission. Specifically, the use of an existing storm sewer which would be cut to form a lagoon(s) with outflow located adjacent to the Barnakyle River to the south west of the subject site. These lagoons were to be a central feature of a business and technology park adjacent to the river and south of the N69, granted permission under 99/2676 (PL13.129104), and extended until the 20th November 2017. The current planning application was then subjected to a lengthy and detailed assessment process by the submission of numerous revised details, calculations, surveys and drawings in relation to a variety of things, including surface water.
- 10.1.3. On the 20th May 2015, the applicant was requested by way of a further information to include details of the surface water lagoon, submit the appropriate third party consents and take account of most recent CFRAM flood mapping. The applicant pointed out that either lagoons or the existing system of increased sewer size provides for inline surface water storage sufficient for the six-hour tidal cycle. On the 30th July 2015, the applicant was requested by way of clarification of further information to submit a surface water solution on account that permitted lagoons would be located on lands liable to flooding and would not be acceptable. On the 14th December 2015, the applicant was requested by way of further clarification of further information to explain why the submitted design was significantly different to the lagoon(s) permitted under 99/2676. The planning authority needed to have sight of design details of the proposed stormwater disposal to backdrains off the tidal Barnakyle River and clarity regarding the lack of a planning permission for a pipe discharging straight to the river. Consequently, the planning authority decided to grant permission and expressly omit the surface water solution proposed by the applicant in favour of a revised solution subject to written agreement.
- 10.1.4. Ultimately, the applicant submitted information to the planning authority in relation to surface water storage. The proposal is for an attenuation area of 880 sqm, located to

the south west corner of the applicant's landholding and comprising Wavin Aquacell Units. This proposal is acceptable to the planning authority.

10.1.5. The applicant's willingness to lodge a planning application for the surface water storage facility should not be considered as a tacit agreement with the planning authority that permission is required. It would appear that the applicant's motivation to lodge a planning application was predicated on the need to receive a speedy decision from the planning authority.

10.2. **Substantive Issue in Dispute**

10.2.1. The applicant has reached an impasse with the planning authority insofar as the information they have submitted in order to comply with condition 18 is in dispute. The planning authority consider that the surface water storage solution designed by the applicant is acceptable. However, the planning authority insist that the revised location and design would require a revision to the planning permission. The applicant does not accept the planning authority's position and requests the Board to adjudicate on the matter.

10.3. **The Condition**

10.3.1. **Part (a)** - It is my reading of condition 18, that in the first instance and with reference to part (a), details are to be agreed with the planning authority prior to the commencement of any development on site. This means that no development can commence, or in the case of the subject site, re-commence, until such details are agreed in writing with the planning authority.

10.3.2. **Part (a) (i)** - In relation to part (a) (i) of condition 18, this element of the condition is broken into three requirements. Firstly, the condition clarifies what is permitted in the overall development and clearly states that the proposed surface water attenuation/storage area is not permitted. This is as a consequence of the lengthy application process which failed to yield an acceptable surface water solution for the development.

10.3.3. Secondly, the applicant is instructed to submit the details of sufficient surface water storage which was specified under the parent permission 99/2676. The key word in this phrase is the use and meaning of 'sufficient'. The applicant is being asked to provide a surface water storage solution which is similar in scope to that permitted by 99/2676. This phrasing of the condition would enable the applicant and planning

authority to reach agreement as to the detail of a surface water storage solution for the site. In this respect I have concluded that the use of 'sufficient' equates to either 'adequate' or 'enough'. Thus, this portion of the condition should be taken as meaning the applicant is to provide the details of adequate surface water storage so as to be comparable to that permitted under 99/2676.

- 10.3.4. The condition does not specifically detail what the form of surface water storage should be nor does it specify a location. In my view this is a deliberate strategy to allow the planning authority and applicant to reach agreement without resorting to a further planning application. This is an acceptable approach to the framing of a condition if the matter is not of a fundamental nature and third parties would not be affected. In this context, I note that the proposed development to complete the 48 retirement homes was to be served by an existing storm water sewer to an existing outfall. This was deemed unacceptable to the planning authority which pursued a storm water storage solution for the entire development (i.e. that permitted under 99/2676) not just the completion of the 48 retirement homes which the applicant applied for. I consider that the provision of surface water storage is fundamental to the parent planning permission (99/2676), but is not fundamental to the subject application which was to be served by existing infrastructure.
- 10.3.5. The applicant and planning authority should be satisfied that the implementation of either parent permission or current permission can be achieved in accordance with conditions, given the location and design of surface water attenuation area. This is however, a matter between the applicant/developer and the planning authority with respect to compliance with conditions of either grant of permission. This is relevant because Condition 2 of the current permission refers to the terms of the parent permission (99/2676) and advises the applicant that this permission shall expire on the 20th November 2017.
- 10.3.6. If the applicant were to submit details of a surface water storage solution on lands within their control, I would anticipate that such a proposal would not impact third parties. During the course of the current application, I note that the applicant advertised attenuation on the storm water layout by way of public notices concerning the submission of significant further information. Therefore, I consider that if the applicant were to follow the two principles of proposing a surface water solution on their own lands and which is not fundamental to the proposed completion of 48

retirement homes, then I can see no reason why an agreement cannot be reached. In fact, this the applicant has done, as shown on drawings submitted to the Board on the 24th October 2016. I think it would be unreasonable to require the applicant to go through the statutory application procedure again on a point of detail.

- 10.3.7. In addition, condition 18 does not use the phrase: *shall be the subject of a separate application for permission to the planning authority*. Therefore, I conclude that the matter in hand, a point of detail concerning surface water attenuation, was not considered by the planning authority to be of a genuine planning concern which required a further permission. Instead the planning authority favoured the approach of agreement between parties.
- 10.3.8. Thirdly, in relation to the submission of a safety review outlining additional measures to maximise safety in operation and safety of maintenance, I consider this to be clear and self-explanatory. If clarity were needed, I would suggest that such a report should relate to a proposed surface water storage facility and its component parts if relevant. I have not had sight of such a report and can find no mention of its acceptability or otherwise to the planning authority. It appears not to be an issue for dispute between either party.
- 10.3.9. **Part (b)** - In relation to part (b) which seeks to have all defects in the surface water sewer system rectified and the submission of a report which proves all defects have been rectified, is self-explanatory. The applicant should note that any works, if necessary, should be carried out and completed prior to the occupation of any retirement house. The works, however, can only proceed after all other conditions of the grant of permission have been complied with as appropriate.

10.4. **Conclusion**

- 10.4.1. I am of the opinion that condition 18 is clear and precise in its intention to find agreement on the matter of adequate surface water storage for the proposed completion of 48 retirement homes. I think that the planning authority have been extremely cautious in requiring a design solution that is comparable to the entire development proposal as permitted in the parent permission. However, I note that the applicant has conceded to this and submitted a surface water proposal which is acceptable to the planning authority. I find that the planning authority are incorrect to require the applicant to go through the entire statutory planning process on a point of

detail I consider to be neither fundamental to the proposed development nor would it impact upon third parties.

10.4.2. I note that the applicant has not supplied information with regards to a safety review outlining additional measures to maximise safety in operation and safety of maintenance of the surface water storage area. This report should be sought by the planning authority.

10.4.3. Finally, agreement with part (b) of condition 18 cannot be concluded until all other relevant conditions are complied with and construction works commence and are completed.

11.0 Recommendation

I recommend an order as follows:

WHEREAS by order dated the 29th day of February, 2016 made by Limerick City and County Council, under register reference number 15/221, granted subject to conditions a permission to ATG Properties Ltd care of Gleeson McSweeney, 99 O'Connell Street, Limerick for development comprising the completion of the construction of 48 no. retirement houses currently in various states of construction along with associated site works. The 48 no. units were originally granted planning permission under 99/2676 (which was extended under 12/7106 until 2017) and construction commenced with amendments to the principal permission under 07/1252 and 07/3472 all at Ballybrown, Clarina, Co Limerick :

AND WHEREAS condition 18 attached to the said permission required the developer to (a) Prior to the commencement of any development on site, submit the following information for written agreement with the Planning Authority:

(i) The proposed surface water attenuation/storage area is not permitted and the applicant shall install sufficient surface water storage as specified under the parent permission 99/2676. The applicant shall submit a safety review outlining additional measures to maximise safety in operation and safety of maintenance.

(b) All defects in the surface water sewer (including those noted in the submitted sewer survey reports on the surface water system under the current application)

shall be rectified and a revised surface sewer survey and report to prove that all defects have been rectified, shall be submitted to the Planning Authority for written agreement prior to the occupation of any retirement house on site:

AND WHEREAS the developer and the Planning Authority failed to agree on the above details in compliance with the terms of the said condition and the matter was referred by the developer to An Bord Pleanála on the 24th day of October, 2016 for determination:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 34(5) of the Planning and Development Act, 2000, as amended, hereby determines that the Board agrees that the proposed attenuation area of 880 sqm Wavin Aquacell Units Top Level = 3.765 m and Invert Level 2.165 are within the terms and conditions of the permission and are agreed under condition 18 (a) (i).

NOTE

The Board however, notes the absence of any information concerning condition 18 (a) (i) with regard to a safety review outlining additional measures to maximise safety in operation and safety of maintenance of the surface water storage area.

Stephen Rhys Thomas
Planning Inspector

30 January 2017