



Comhshaol, Pobal agus Rialtas Áitiúil
Environment, Community and Local Government



Circular Letter PL 11/2013

20 June 2013

Re: Provision of Security provided under section 34(g) of the Planning and Development Act 2000 - 2010 for the satisfactory completion of residential housing developments

To all County and City Managers, Directors of Services for Planning, Town Clerks.

Introduction

I am directed by Minister of State for Housing and Planning Ms Jan O'Sullivan T.D. to set out key requirements for planning authorities in relation to planning securities, including bonds.

Under the provisions of Section 34(4) of the Planning and Development Act, planning authorities may impose conditions on the grant of a planning permission regarding the manner in which a development is to be completed, including how it will be maintained until completed and handed over to the local authority or management company and the provision of financial securities to provide safeguards in the event of a default by the developer, or of the failure or refusal of the developer to complete the development in accordance with the planning permission (or any extension thereof).

There are a number of current issues and difficulties with the operation of securities, mainly of the bond type security including:

- Difficulties in securing new bonds to comply with planning conditions imposed because of wider difficulties in the financial markets, which difficulties may recede over time;
- Limited or no market interest in providing open ended bonds;
- The length of time and complexity involved in getting a development taken in charge, which is adversely affecting the availability of bonds because of their now perceived riskiness; and
- Lack of clarity in the terms and conditions of securities in relation to how and when they may be activated or released.

As a rule, planning permission must **not** be granted or a development allowed commence without provision for an adequate and effective security mechanism. At the same time, the provision of a satisfactory planning security can represent a significant financial, legal and procedural hurdle in advancing from planning permission to commencement stage and planning authorities have a key role to play in supporting good development and minimising such hurdles by operating a clear, fair and timely regime with respect to planning securities.

In relation to residential developments, a clear and effective planning security regime can offer re-assurance to the purchaser of the home that there will be a smooth transition of the relevant housing scheme from the development phase (or phases) to either taking in charge or, in the case of multi-unit developments with common areas, long term maintenance by a management company.

Taking account of the above, this Circular advises on updated practice in relation to bonds and securities for housing and other relevant developments. It complements previous circular PD 1/08 on Taking in Charge of Residential Developments/Management Arrangements.

1. Purpose of Securities

As set out in the *Development Management Guidelines for Planning Authorities, June 2007*(section 7.13 in relation to conditions requiring security for completion):

“It is essential that permissions for residential development are subject to a condition under which an acceptable security is provided by way of bond, cash deposit or otherwise so as to secure its satisfactory completion. The amount of the security, and the terms on which it is required to be given, should enable the planning authority, without cost to themselves, to complete the necessary services (including roads, footpaths, water mains, sewers, lighting and open space) to a satisfactory standard in the event of default by the developer”.

Planning securities are therefore provided to ensure the satisfactory completion ***of essential infrastructure of a shared or public nature***, especially as regards infrastructure that may be taken in charge by the local authority and maintained into the future by that authority.

The type of essential infrastructure which will normally be covered under a planning security includes roads, footpaths and car parking areas, water services infrastructure, including any surface water drainage facilities, public lighting, open space and amenities.

The issue of planning securities is closely related to the transition of a development to its long term maintenance context whether through taking in charge or maintenance by a management company.

In relation to taking in charge, section 180 of the Planning and Development Act provides for and regulates this process (and, where applicable, the obligation) by planning authorities in respect of housing developments.

2. Types of Securities

Practical experience indicates that planning securities can take a number of forms including:

- A **cash deposit** lodged in a bank account of the local authority, which can be accessed by the local authority in certain circumstances;
- An **insurance bond** lodged with a local authority that can be “called in” or encashed, again in certain predefined circumstances; or in certain exceptional cases where obtaining either of the above is not practicable
- Such other **liquid asset** as may be agreed between a developer and the relevant local authority, including a legal charge over property or some element of the development site, as long as this is acceptable to the planning authority.

It is a matter for the relevant local authority to decide what type of security to require as part of the terms of the planning permission from the list above.

Bonds

The bond type of security is the most common type of security. Where the option of a bond is preferred by the local authority, the bond will normally be provided by a bank that may or may not be the funder of the development, or alternatively, an insurance company. In either case, the bond can be called upon in the event of a failure on behalf of the developer to fully discharge their obligations under an agreement between the developer and the planning authority.

Bonds are usually provided for a specified period of time, much as in the manner of the validity of an insurance policy. It is best practice that local authorities make sure that in accepting such bonds that they include a condition requiring that the bond provider contact the local authority giving sufficient notice (not less 1 year) that the bond is about to expire and a final 28 day notice period on expiration of the bond.

With the above condition in place, there is an onus on the bond provider/insurer to notify the council that the bond is about to expire and on the developer to ensure that a security in compliance with the relevant planning condition is in place at all time. Local authorities should also be proactive though in ensuring that bonds are ‘live’. It is essential therefore that the planning authority has a record of the period of relevant planning securities on file and has an ICT based system to alert its own internal procedures that a specific security validity period is expiring. This will enable the planning authority to contact the developer requiring renewal of the bond and/or appraise the condition of the development ensuring that the developer complies with planning conditions or failing that, to call in the bond.

It is important to note that notwithstanding the expiration of a particular bond, the obligation under planning legislation on the developer to provide security under the relevant planning permission condition will remain. On expiration of a bond, it will be necessary for developers to provide adequate replacement.

As well as bonds for a specified risk period, there are also open ended bonds, i.e. bonds that are in place until a development is taken in charge. However, these types of bonds are not common in today's market.

Bonds can also be differentiated according to how they are accessed.

On demand bonds are a highly effective mechanism and state a single unqualified obligation. The bond provider must honour the agreement according to its terms, on demand if so stipulated, without proof or conditions. The only exception is where the bond provider is aware of a clear fraud.

In a planning context, such bonds should stipulate that in the event of the insolvency of the developer, the bond provider shall pay a specified sum so therefore once the insolvency is established the money becomes due immediately without having to fulfil any other conditions.

Conditional bonds are those where payment arises provided certain conditions are met. It is important to note that such bonds will normally require the party relying on the bond (i.e. the local authority) to state what are the breaches of conditions. Planning authorities need to be especially vigilant in examining all conditions attaching to conditional bonds, for example avoiding clauses requiring the furnishing of court orders proving breach of conditions, as such overly elaborate conditions can make payment under the bond very difficult and time consuming negating the effectiveness of the security in the first place. Instead, the agreement between the developer and the local authority in relation to the security should be very clear in relation to (a) what specific public infrastructure provision is being secured and (b) what breach or default situations will trigger the calling in of the security.

3. Requirements for Securities

Regardless of which of the above options is selected, it is very important that the security in both its format and the way it operates is:

- **proportionate** to the risk of the relevant infrastructure being substandard;
- **specific** in relation to the particular infrastructure covered by the security and the events which will trigger the security (including, for example, insolvency of a developer, or/and the development being placed in receivership);
- **adequate** in financial terms to cover the costs of making good such infrastructure;
- **durable** in that the security remains in place until such time as the development is either taken over by the relevant local authority or a management company, including

mechanisms that clearly flag to the local authority where a particular security needs to be renewed;

- ***accessible*** in that there are clearly defined contexts or defaults which enable the local authority to use the security to resolve the infrastructural difficulties that may arise; and
- ***fair*** in that where a development has been completed to the satisfaction of the local authority in line with its taking in charge policy or such other standards as it may specify, that the security will be released and in a timely manner.

4. Default events and definition

As set out above, local authorities should clearly specify default events that will trigger calling in the security. It is very important that the activation of the relevant security can be triggered by the local authority, if the completion of essential infrastructure has not occurred, in situations where the developer is insolvent and/or a receiver has been appointed, in order to protect the interests of the residents and the priority of the local authority against other creditors.

For the avoidance of doubt 'default' should be defined non exhaustively as, for example, a failure to comply with the conditions of planning permission granted pursuant to Section 34 (permission ref) where Section 34(4) conditions, especially relating to (f) or (j) are not adhered to and/or public amenities and services have not been provided for in accordance with the planning permission or "default" (during the life of the planning permission) by reference to the insolvency, bankruptcy, liquidation or entering into an arrangement with its creditors, by the developer. (See also Appendix 1).

5. Securities and Phased Development

In the case of large housing schemes of say larger than 50 houses, it is normally appropriate to break the development down into distinct phases of the development so that areas of the development are not in an unfinished state for extended periods while the full development is being completed.

Condition in such cases should be worked out in consultation with the developer as part of the determination of the application and should state requirements relating to the completion of specific roads, public lighting, open spaces or other public infrastructure before development on a subsequent phase or phases may commence. Such practice is normal and appropriate.

Similarly, the amount of security lodged with a local authority can follow the phased approach to development providing, sequentially, for:

- (a) the lodgement of a security, followed by
- (b) commencement of development of a specific phase, followed by

(c) completion of that phase to a standard agreeable to the local authority and then followed by
(d) release of the security for that phase and either lodgement of a new security for a further phase or a roll-over of the security for the previous phase to a further phase of development.

It is very important in the situations described above that as part of the relevant planning permission, there is clarity between the planning authority and the developer as to the mechanism, including information required, e.g. CCTV surveys, deflection/core sample tests for road surfaces etc and timescales, for the signing off of specific phases in order for securities to be released or rolled over. This signing off procedure should be in line with the taking in charge policy of the relevant local authority.

The amount of money provided by a given security for subsequent phases of development may reduce in comparison for the amount of money provided for the initial phase or phases of a development given the typical front loading of infrastructural provision within housing developments and the fact that as a development proceeds satisfactorily, the risk of infrastructural deficiencies and the cost of making these good may recede.

6. Assessment of Security Mechanisms

Taking account of current trends in relation to planning securities, an increasing number of funders of housing developments into the future are likely to be making specific provision for provision of security as an integral component of the wider funding of the development.

In other words in the future, securities, including bonds, are likely to be supplied by the primary funding agency for the development.

To promote a more standardised approach, a ***template for a conditional bond type security*** is outlined at Appendix 2 and should be adopted by planning authorities in their dealings with developers, their agents and funders in relation to housing developments or other relevant application types. Maps should also be attached to all bonds, clearly outlining and identifying the units or/and phases that the bond covers.

7. Computation of bonds for residential developments

Experience in dealing with unfinished housing developments, specifically developments in need of restorative works at a cost in excess of the lodged security indicates that there is a need for a degree of consistency by recommending a base calculation of the level of bond/security to be provided in respect of a typical dwelling.

The Irish Home Builders Association prepared a report in May 2012 on the costs of building a standard 3 Bedroomed Semi-detached house.

This report costs shared public infrastructure costs at around €15,500 per dwelling. Allowing for an appropriate risk factor, a minimum provision of **€7,000 per dwelling** is therefore considered reasonable but local authorities may decide to increase this provision where the risk or exposure is greater, as in the case of developments that require more expensive or front loaded infrastructural support. See also appendix 3.

8. Release of Bonds

Planning authorities must deal with requests for release of bonds expeditiously on completion of the development to the specified standard. This will ensure that any defects that may exist are identified in a timely manner and will also act as an incentive for the developer to complete the development in the confidence that the release of the bond will not be delayed if all works are completed in accordance with requirements.

Conclusion

The advice in this circular may be updated from time to time reflecting practical experience and any queries may be directed to the undersigned.



Philip Nugent
Principal
Planning Section

Appendix 1: Conditions that may be Attached to Grants of Planning Permission under Section 34(4) of the Act.

(d) Conditions for requiring provision of open spaces;

(e) Conditions for requiring the planting, maintenance and replacement of trees, shrubs or other plants or the landscaping of structures or other land;

(f) Conditions for requiring the satisfactory completion within a specified period, not being less than 2 years from the commencement of any works, of the proposed development (including any roads, open spaces, car parks, sewers, watermains or drains or other public facilities), where the development includes the construction of 2 or more houses;

(g) Conditions for requiring the giving of adequate security for satisfactory completion of the proposed development;

(h) Conditions for determining the sequence and timing in which and the time at which works shall be carried out;

(i) Conditions for the maintenance or management of the proposed development (including the establishment of a company or the appointment of a person or body of persons to carry out such maintenance or management);

(j) Conditions for the maintenance, until taken in charge by the local authority concerned, of roads, open spaces, car parks, sewers, watermains or drains and other public facilities or, where there is an agreement with the local authority in relation to such maintenance, conditions for maintenance in accordance with the agreement;

Appendix 2: Proposed Standard Text for Bonds

The following is a suggested standardised wording for a bond type security.

Know all men by these presents that we, (...) having its registered office at (...) (hereinafter referred to as 'the Developer') and (...) having its registered offices at (...) (hereinafter referred to as 'the Surety') are hereby jointly and severally bound unto (...) (hereinafter referred to as 'the Local Authority') in the sum of €.... (..... Euro only) to be paid to the Local Authority its successors and assigns jointly and severally by these presents.

Sealed with our Seals this day of, 2012.

*WHEREAS the Developer has received Planning Permission (Planning Register Reference No. refers) a certified copy of which is annexed hereto for the construction of (...)(**example:** six no. 2 two storey houses at the development to be known as (...)) as more particularly outlined in red on the plan attached hereto) and the Planning Permission has required security to be lodged with the Planning Authority for the carrying out and completion of the essential infrastructure of the development in accordance with the said permission.*

NOW the condition of the said Bond is that if the Developer shall carry out and complete the said development in accordance with the said permission or if on default by the Developer the Surety shall pay to the Local Authority the sum of €... (.... Euro only) then this Bond shall be null and void but otherwise it shall remain in full force and virtue and without prejudice to its own rights under the said Permission the Local Authority shall insofar as may be lawful permit the surety to perform the conditions and provisions of the said permission which the Developer shall have failed to perform or observe.

No liability shall attach to the Surety under this Bond in consequence of any delay or damage directly or indirectly due to or arising out of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), Civil War, Rebellion, revolution, insurrection or military or usurped power.

The Surety shall immediately notify the Local Authority should it become aware of (1) The insolvency of the Developer (2) Any reason why this Bond shall expire, at least one year before such expiry date.

*It is hereby agreed that if the Developer shall become insolvent before it carries out and completes the said development in accordance with the said permission, either before or after the said permission expires, the Surety shall pay to the Local Authority the sum of €... (..... Euro only) **or such sum as calculated by agreement between the Surety and the Local Authority.***

THIS Bond provides that all monies which become due and payable by the Surety under the Bond shall be payable and paid in the Republic of Ireland.

IN WITNESS WHEREOF the Developer has hereunto affixed its Common Seal and the Surety has caused this instrument of writing to be signed by its Secretary or Acting Secretary and its Common Seal to be hereunto affixed the day and year first above written.

Present when the Common Seal

OfDevelopments ...

Was affixed hereto:

Present when the Common Seal

Of (Surety name)

Was affixed hereto:

Appendix 3: Examples of Approaches to Computation of Bonds

Some examples of local authority approaches are set out below.

Local Authority 1

Up to 15 Housing Units: Minimum of €50,000 Bond or Cash Deposit of €38,000 in lieu

Greater than 15 Housing Units: €4,000 Bond per unit or Cash Deposit of €2,500 per Unit

Local Authority 2

Up to 2 Housing Units: Minimum €31,000 Bond or Cash Deposit of €19,000

Developments of between 2 and 10 Units: €10,500 Bond per Unit or Cash Deposit €6,300 per Unit

Developments of between 11 and 20 Units: €6,300 Bond per Unit or Cash Deposit €3,800 per Unit

Developments of Greater than 20 Units: €3,100 Bond per Unit or Cash Deposit of €1,900 per Unit

Local Authority 3

€7,620 per Housing Unit (recently increased from €3,810 per unit)

Local Authority 4

Calculated on a length of road basis – circa €700 Cash Deposit per linear metre of roadway to cover all services.