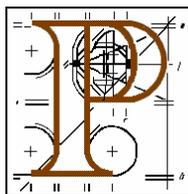

An Bord Pleanála



Inspector's Report

Ref.: PL09. 237361

Development: Retention of reinstatement of lands using inert construction and demolition waste and all associated site works.

Russelltown, Kilmeague, Co. Kildare.

PLANNING APPLICATION

Planning Authority: Kildare County Council

Planning Authority Ref.: 10/123

Applicant: Sean Taaffe and Declan McKenna

Type of Application: Permission for Retention

Planning Authority Decision: Grant subject to conditions

APPEAL

Type of Appeal: First Party v. Condition

Observers: None.

INSPECTOR: Robert Speer

Date of Site Inspection: None required.

1.0 INTRODUCTION

This report relates to a first party appeal made under S.48 of the Planning and Development Act, 2000 in respect of Condition No. 5 as attached to the decision of the Planning Authority to grant permission for the proposed development.

2.0 SITE LOCATION AND DESCRIPTION

The proposed development site is located in the rural townland of Russellstown approximately 2.8km southeast of Kilmeague and 5.4km west of Caragh, Co. Kildare. It is accessed from a local county road extending between Naas and Rathangan, has a stated site area of 4.3 hectares and has been subjected to infilling works.

3.0 DESCRIPTION OF PROPOSED DEVELOPMENT

The proposed development consists of the retention of the importation of c. 20,700m³ of inert construction and demolition waste (in accordance with Classes 2, 4 & 20 of the Fourth Schedule of the Waste Management Act) as part of the reinstatement of the subject lands for agricultural use.

4.0 RELEVANT PLANNING HISTORY

On Site:

PA Ref. No. 071783 / ABP Ref. No. PL09. 225886. Was refused on appeal on 28 May, 2008 refusing Sean Taaffe and Declan McKenna permission for the retention of the reinstatement of lands using inert construction and demolition waste in accordance with classes 2, 4 and 20 of the fourth schedule of the Waste Management Act, 1996 in accordance with the waste permit granted by Kildare County Council reference number 18/2000 for the following reasons:

- The development proposed for retention is located in a rural area of County Kildare where it is the policy of the planning authority as set out in the Kildare County Development Plan, 2005-2011 to preserve the rural character of these areas and to prevent the degradation of the rural landscape resource. It is considered that the development contributes to the erosion of the rural character and seriously injures the visual amenities of the area. Retention of the development would conflict with the said Development Plan policy on the preservation and protection of the visual amenities of the area, would represent an undesirable precedent for further such development in the vicinity and would, therefore, be contrary to the proper planning and sustainable development of the area.
- The development proposed for retention contravenes materially the development objectives set out in the Kildare County Development Plan, 2005-2011 for the primary use of this area for agricultural purposes or development related to local needs. Retention of the development would, therefore, be contrary to the proper planning and sustainable development of the area.

On Adjacent Sites:

PA Ref. No. 053037. Was refused on 24 February, 2006 refusing Patrick Byrne permission for the retention of inert material (subsoil) deposited as part of site reclamation / raising as granted under Waste Permit No. 18/2000.

PA Ref. No. 061518. Was refused on 12 September, 2006 refusing Patrick Byrne permission for the retention of inert material (subsoil) deposited as part of site reclamation / raising as granted under Waste Permit No. 18/2000.

Other Relevant Files:

Both the appellant and the Planning Authority have referred to a number of previous Board decisions to support their respective positions, and in the interest of conciseness, I would refer the Board to the copies of same attached to the file.

5.0 PLANNING AUTHORITY CONSIDERATIONS AND DECISION

Decision:

Following the receipt of a response to a request for further information, on 20 July, 2010 the Planning Authority issued a notification of a decision to grant permission for the retention of the proposed development subject to 5 No. conditions. These conditions are generally of a standardised format and Condition No. 5, the subject of this appeal, states the following:

'Before development commences the applicant / developer shall pay to Kildare County Council the sum of €215,000 being the appropriate special levy or special financial contribution toward recreation, amenity and community to be applied to this development in accordance with the Development Contributions Scheme adopted by Kildare County Council on 23rd February 2004 in accordance with Section 48 of the Planning and Development Act, 2000. The amount payable under this condition shall be fully index-linked from the date of grant of permission.

***Reason:** It is considered reasonable that the developer should make a contribution in respect of public infrastructure and facilities benefiting development in the area of the Planning Authority'.*

6.0 GROUNDS OF APPEAL

The grounds of appeal are summarised as follows:

- It is noted from the Planner's Report that a charge of €5.00/m² of land within the site was applied i.e. 43,000m² x €5.00/m² = €215,000. It is considered that this figure was applied incorrectly.
- Paragraph 2 of Section 9 of the Kildare County Council Development Contribution Scheme, 2004 states that quarries and landfill developments are subject to a 'special levy' towards two classes of public infrastructure and facilities, however, no definition is provided for the term 'special levy'.
- Whilst Section 8 of the Scheme also refers to 'special contributions' as provided for under Section 48(2)(c) of the Act, no basis for the calculation of

the amounts payable in respect of development of the nature proposed is provided for within the scheme as adopted.

- It is submitted that the only reference to €5.00/m² is contained under the heading ‘Agriculture’ in Paragraph 2 of Section 9. Subsection (2) of this section states that *‘the exemption / contribution will apply to all buildings / structures including barns, stores, haysheds, slatted units etc.’*, however, the subject proposal is not for any of these items and simply consists of the reinstatement of a green field.
- It would appear that the ‘special levy’ referred to in Section 9 is to be allocated towards the costs of the two named classes of infrastructure and facilities but that the amount payable is at the discretion of the Planning Authority. Whilst there is an indication of an intention in the reference to ‘special contributions’ in Section 8 of the Scheme to require the payment of a special contribution as provided for under Section 48(2) of the Act, no basis for the calculation of the amount payable in respect of development of the nature proposed is provided within the scheme.

It appears that the determination of the amount payable is entirely at the discretion of the Planning Authority and in this respect the Board’s attention is drawn to Section 48(2)(b) of the Act which states:

‘A scheme may make provision for payment of different contributions in respect of different classes or descriptions of development’.

In addition, the Board is referred to Section 48(3) of the Act which states the following:

‘A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme’.

Having regard to the foregoing, Circular Letter PD3/2003 states that the purpose of introducing the Development Contribution Scheme was to provide for transparency and to ensure that:

‘. . . where a prospective developer examines a scheme, he or she will be able to clearly see the level of contribution they are expected to pay, as well as the basis for levying the contribution. Therefore a development contribution scheme must state clearly the level of contributions to be payable under the scheme including any different levels of contributions in respect of different classes or descriptions of developments’.

It is considered that the references to ‘special levy’ in the Kildare County Development Contribution Scheme do not fulfil the aforementioned requirements and therefore do not enable the Planning Authority to attach a condition requiring the payment of a contribution towards these two classes of infrastructure.

- The Board is referred to its determinations in respect of ABP Ref. No. PL09. 215757 and PL09. 214765 wherein, although the Planning Authority included

a condition requiring a 'special levy', the inspector concluded that these conditions should be removed.

7.0 RESPONSE TO GROUNDS OF APPEAL

Response of Planning Authority:

- In accordance with Section 48(2)(c), contributions were applied to the subject proposal by applying the 'Recreation & Amenity' and 'Community' elements of the commercial rate at €4.00 and €1.00 per square metre respectively. Chapter 9, Page 30, of the Kildare County Council Development Contribution Scheme specific to Quarries / Landfill and similar development refers.
- Condition No. 5 was calculated as follows:

Site area: 43,000m² @ €5.00/m² = €215,000

- In determining a similar situation, PA Ref. No. 07977 / ABP Ref. No. PL09. 226718, a contribution applied in the same manner to a sand and gravel pit was deemed to be correct in its application.

8.0 RESPONSE TO PLANNING AUTHORITY SUBMISSION

Response of Applicant:

- With regard to the Planning Authority's reference to ABP Ref. No. PL09. 226718 it should be noted that this relates to an application to extend the life of an existing sand and gravel pit and to extend the pit area whereas the subject application seeks to retain an agricultural green field.
- It is considered that the Planning Authority's reference to ABP Ref. No. PL09. 226718 is neither appropriate nor relevant to the subject application. In assessing ABP Ref. No. PL9. 226718 the reporting inspector noted that in attaching Condition No. 39 the Council had applied an aggregate commercial rate of €5.00/m² to the extended sand and gravel pit and that this was in breach of Section 5(d) of the Development Contribution Scheme. The inspector also stated that the application of the Scheme appeared to be arbitrary and inconsistent to such an extent that it was impossible to determine whether the terms of the scheme had been properly applied and therefore he recommended the deletion of the condition. The Board concurred with the inspector and stated:

'In relation to Condition No. 39, the Board considered that, in respect of developments of description proposed, the Kildare County Development Contribution Scheme, as adopted, does not provide a basis for calculation of an amount payable towards public infrastructure and facilities benefiting development in the area of the planning authority covered by the scheme (that is recreation, amenity and community). Accordingly, the Board concluded in terms of the said scheme have not been properly applied'.

Whilst the Board did agree that a special development contribution for the quarry extension was acceptable in principle, the subject application concerns the retention of an agricultural green field and does not relate to a quarry or any other commercial activity.

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- Section 5(d) of the Kildare County Council Development Contribution Scheme, 2004 states that contributions should not be set at a level that would adversely affect the ongoing physical, economic, social and cultural activity in the county. It is submitted that the contribution of €215,000 as imposed, which equates to a levy of €20,240 per acre, clearly conflicts with Section 5(d) of the Scheme as agricultural lands in Co. Kildare currently range from €10,000-€20,000 per acre depending on location and the quality of the land etc.
 - The Board is again referred to its previous decisions in respect of ABP Ref. Nos. PL09. 215757 and PL09. 214765. In both of these cases the Planning Authority had included a condition requiring the payment of a special levy, however, the Board subsequently concluded that both these conditions had been incorrectly applied and ordered their removal.

9.0 DEVELOPMENT CONTRIBUTION SCHEME

The Kildare County Council Development Contribution Scheme, 2004 was adopted on 23 February, 2004 and remains in effect. The relevant provisions of the Scheme can be summarised as follows:

Chapter 7: General Arrangements Regarding Payment of Development Contributions:

- Until such time as the first review of this scheme special consideration will be given to cases where the implementation of the scheme has unintended consequences (Item No. 7).

Chapter 8: Implementation of Scheme:

- The Planning Authority may, in addition to the terms of this Scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by this Scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development (Item No. 5).
- Quarries, waste disposal facilities and other developments not specifically covered by the scheme will be subject to Special Development Contributions (Item No. 6).
- Where payment of a special contribution is required in accordance with 5 above, the following provisions shall apply (Item No. 7):
 - a) the condition shall specify the particular works carried out, or proposed to be carried out by the local authority to which the contribution relates,
 - b) where the works in question –
 - i) are not commenced within 5 years of the date of payment to the authority of the contribution,
 - ii) have commenced , but have not been completed within years of the date of payment to the authority of the contribution, or
 - iii) where the local authority decides not to proceed with the proposed works or part thereof, the contribution shall, subject to paragraph (c), be refunded to the applicant together with any interest that may have accrued over the period while held by the local authority.

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- c) where under subparagraph (ii) or (iii) of paragraph (b), any local authority has incurred expenditure within the require period in respect of a proportion of the works proposed to be carried out, any refund shall be in proportion to those proposed works which have not been carried out.

Chapter 9: *Adoption of Scheme:*

Quarries / Landfill and similar development:

- Such development will be subject to a special levy for Recreation, Amenity and Community purposes.

10.0 ASSESSMENT

10.1 This is an appeal made under the provisions of Section 48 of the Act and therefore the Board is restricted to considering this condition alone and cannot consider the proposed development *de novo*. I have therefore confined my assessment to the condition that has been appealed.

10.2 The financial contribution of €215,000 as imposed by the Planning Authority under Condition No. 5 is described as the appropriate '*special levy or special financial contribution*' required towards recreation, amenity and community services in accordance with the provisions of the Kildare County Council Development Contribution Scheme. Although the Planner's Report itself does not specify the inclusion of any such condition, a handwritten note appended to same sets out the calculation of the contribution imposed as $43,000\text{m}^2 \times €5/\text{m}^2 = €215,000$ whilst a further unsigned note simply states '*Rds [Roads] Water Levies Cond [Condition] for quarries, €215,000*'. No further elaboration on the basis for the inclusion of this condition is detailed in the decision to grant permission.

10.3 In their grounds of appeal, the appellants have queried the calculation of the development contribution of €215,000 and appear to suggest that the aforementioned charge of €5/m², which has been applied by the Planning Authority to the entire site area, may have been derived from the application of those rates which pertain to 'Agriculture' as set out in Paragraph 2 of Chapter 9 of the Scheme. On this basis, the amount payable, based on a reckonable area of 43,000m² at €5/m², would equate to the required €215,000. In this respect I would refer the Board to Paragraph 2 (1) – (4) of Chapter 9 of the Development Contribution Scheme in which it is stated that exemptions and reductions apply to buildings and structures such as barns, stores, hay sheds, slatted units etc. located on farms. From a review of same it is my interpretation of the scheme that the application of the 'agricultural' rate as set out in the scheme cannot be applied to works such as those proposed which specifically entail the importation of material for the purposes of land reclamations / improvement and do not provide for the construction of any buildings or structures. Therefore, the application of a rate of €5/m² derived from the agricultural rate would be inappropriate in this instance and, in my opinion, would have unintended consequences, as per Paragraph 7 of Chapter 7 of the Scheme, by reason of the large amount of the contribution payable relative to the scale of the works. In any event, in its response to the grounds of appeal the Planning Authority has confirmed that the contribution was calculated on the basis of the 'Recreation & Amenity' and 'Community' elements of the commercial rate (€4/m² and €1/m² respectively) as outlined in Chapter 9 of the Scheme.

10.4 The contribution required by Condition No. 5 has been described as both a ‘special levy’ and a ‘special contribution’ and therefore it is necessary to consider whether the attachment of either of these charges is appropriate in this instance. With regard to the former, Chapter 9 of the Development Contribution Scheme states that ‘*quarries, landfill and similar development*’ will be subject to a ‘special levy’ towards Recreation, Amenity and Community, however, the Scheme does not provide any definition of the term ‘special levy’.

10.5 It would appear that the “special levy” referred to in Chapter 9 is to be allocated towards the costs of the two named classes of infrastructure and facilities but that the amount payable is at the discretion of the Planning Authority. In this respect it should be noted that no basis for the calculation of the amounts payable in respect of development of the nature proposed is provided for within the scheme as adopted.

10.6 The calculation as detailed in the response received from the planning authority states that the contribution was based on the application of the normal charge of €4/m² for ‘recreational and amenity’ and €1m² for ‘community’ facilities as derived from the standard commercial rate set out in the Scheme. I would suggest that this could be construed as being indicative that rather than being a special levy, or, more properly, a special contribution, the €215,000 sought, is in fact a normal contribution.

10.7 On the basis of the foregoing, I would advise the Board that there are direct parallels to be drawn between the circumstances pertinent in the subject appeal and several similar appeals already determined by the Board.

10.8 Section 48 (2) (b) of the Planning and Development Act, 2000 states the following:

‘A scheme may make provision for payment of different contribution in respect of different classes or descriptions of development’

whilst Section 48(3)(a) states:

‘A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme’.

10.9 I would also draw the Board’s attention to the provisions of Circular Letter PD 4/2003 with particular reference those items under the heading “Level of Contributions” in which it is stated:

‘The purpose of introducing the development contribution scheme is to introduce transparency into the way in which development contributions are levied and applied. Planning authorities must ensure that, when a prospective developer examines a scheme, he or she will be able to clearly see the level of contribution they are expected to pay, as well as the basis for levying the contribution. Therefore a development contribution scheme must state clearly the level of contributions to be payable under the scheme, including any

different levels of contributions in respect of different classes or descriptions of developments’.

10.10 There is a significant planning history of similar appeals having been determined by the Board with regard to the attachment of development contributions in respect of land reclamation / infilling operations in Co. Kildare and, on consideration of same, I am of the opinion that the reference to the “special levy” within the adopted scheme does not meet the aforementioned requirements and therefore does not enable the planning authority to attach a condition requiring the payment of a contribution towards the two named classes of infrastructure. At present, the scheme does not provide a clear justification for the condition, whilst the details of the basis upon which the calculation of the amounts payable in respect of developments such as that proposed are not available to developers in advance of submitting an application.

10.11 With regard to the description of the charge imposed by Condition No. 5 as a ‘special development contribution’ I would also refer the Board to the provisions of Paragraph 6 of Chapter 8 of the Scheme which states that quarries, waste disposal facilities and other developments not specifically covered by the Scheme will be subject to Special Development Contributions.

10.12 Notably, the Planning Authority’s response to the grounds of appeal refers to the application of the contribution as being in accordance with the provisions of Section 48(2)(c). This is of relevance as Section 48(2)(c) of the Planning and Development Act, 2000 refers to the payment of a special contribution in respect of a particular development where specified exceptional costs not covered by the general contribution scheme are incurred by the Local Authority in respect of public infrastructure and facilities which benefit the proposed development. The submission also refers to Chapter 9, Page 30, of the Scheme which would appear to be in reference to the provisions of Paragraph 2 of Chapter 9 which states that ‘quarries / landfill and similar development’ will be subject to a “special levy” towards two classes of public infrastructure and facilities i.e. ‘Recreation & Amenity’ and ‘Community’. In this respect, it could be assumed that the intention of the “special levy” is to require payment of a special contribution as provided for under Section 48(2)(c) of the Planning and Development Act, 2000.

10.13 On the basis that the charge required by Condition No. 5 is a special development contribution imposed pursuant to Section 48(2)(c) of the Act I would refer the Board to the specifics of the Act in that Section 48(12)(a) requires any condition seeking the payment of such a special contribution to specify the particular works carried out, or proposed to be carried out, by any local authority to which the contribution relates whilst Subsection (12)(b) allows for the recovery of a refund in the event of the specified works not being carried out. In the case of Condition No. 5 the Planning Authority has failed to specify the particular works carried out, or proposed to be carried out, in order for the contribution to constitute a special contribution and, accordingly, it would be impossible for the appellant to calculate, in the future, if a refund was payable. Accordingly, in my opinion, the attachment of Condition No. 5 as a special development contribution fails to meet the requirements of Section 48 of the Act.

10.14 Having regard to the foregoing, I am not satisfied that the Kildare County Council Development Contribution Scheme has been properly applied and therefore I recommend the deletion of Condition No. 5.

11.0 RECOMMENDATION

On the basis of the foregoing I consider that the Planning Authority has incorrectly applied the terms of the Development Contribution Scheme and, therefore, it is my recommendation that the Planning Authority should be directed accordingly to remove Condition No. 5 for the reasons and considerations set out hereunder:

Reasons and Considerations:

1. The Board considered, in the absence of any specific provision for a requirement to pay a financial contribution in respect of development comprising the raising and restoration of lands for agricultural purposes, that the planning authority, by attaching a condition with a requirement to pay a financial contribution, based on the reckonable floor area of structures, improperly applied the terms of the Kildare County Council Development Contribution Scheme, as adopted on the 23rd day of February, 2004. Furthermore, on the basis of the submissions made in connection with the application and the appeal, it was considered that condition number 5 would not be in accordance with the provisions of Section 48(2)(c) of the Planning and Development Act, 2000 with reference to the payment of a “special contribution” and that the said condition had not been justified in this case.

Signed: _____

Robert Speer
Inspectorate

Date: _____