



An
Bord
Pleanála

Inspector's Report

ABP-305440-19

Development	Concrete hard standing and roller doors to side of building, installation of palisade fence, relocate truck wheel wash to complete surfacing works to yard space.
Location	Cloghabrody, Thomastown , Co. Kilkenny.
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	19366
Applicant(s)	McGuire Haulage Ltd.
Type of Application	Retention and Permission.
Planning Authority Decision	Grant with Conditions.
Type of Appeal	First Party V Development Contribution only.
Appellant(s)	McGuire Haulage Ltd.
Observer(s)	None.
Date of Site Inspection	Not applicable.
Inspector	Susan McHugh

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1.0 Site Location and Description

- 1.1. The appeal site is located in the townland of Cloghabrody in Thomastown, Co. Kilkenny.
- 1.2. Existing structures on site comprise a large industrial style unit which is orientated onto the Dublin Road, and also an internal road which serves the adjoining units and Thomastown United.
- 1.3. The stated site area is 2.4ha.

2.0 Proposed Development

- 2.1. Retention permission is sought for constructed concrete hard standing and newly installed roller doors to the side of building.
- 2.2. Permission is also sought for the installation of palisade fencing to site perimeters, to relocate truck wheel wash, to complete surfacing works to yard space, and to reinstate excavated earth outside of yard space.
- 2.3. A request for further information was sought by the planning authority dated 15/07/2019.
- 2.4. A response to the request for further information was submitted 25/07/2019.

3.0 Planning Authority Decision

3.1. Decision

The decision of the planning authority was to **grant** planning permission subject to 12 conditions.

Of relevance to this appeal are the following conditions;

Condition no. 1

The development shall be carried out, completed and retained strictly in accordance with:

- (i) The conditions of this permission.

- (ii) The documents lodged with this application on 28/05/2019 and further information on 25/07/2019, except as otherwise required by the conditions of this permission.

Reason: To ensure that the development strictly accords with the permission and to ensure that effective control is maintained.

Condition no. 2

The developer shall pay to the Planning Authority a financial contribution in respect of public infrastructure and facilities benefiting development in Kilkenny County Council's administrative area that is provided or intended to be provided by or on behalf of the Local Authority in accordance with the terms of the Development Contribution Scheme made under Section 48 of the Planning and Development Acts 2000-2018.

The amount of the financial contribution shall be paid upon grant of permission, with the amount of the contribution being the rate of contribution in existence on the date of such grant. In accordance with the current scheme the amount of the contribution is calculated at €116,205.00 (One hundred and sixteen thousand two hundred and five Euro). Any applicable amount is subject to revision with reference to the Wholesale Price Index and to penalty interest in accordance with the terms of Kilkenny County Council's Development Contribution Scheme.

Reason: It is a requirement of the Planning and Development Acts 200-2018 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.

Condition no. 8

A maximum of 10 No. trucks shall be parked overnight, trailers shall only be parked on a concrete hardstand.

Reason: In the interest of orderly development.

3.2. Planning Authority Reports (dated 12/07/2019 and 20/08/2019)

3.2.1. Planning Reports

The 1st planning report is the basis for the Planning Authority decision.

Includes;

- Applicant has amended the proposal from the previous application under Ref.P18/615, including;
 - The relocation of the truck wash outside of the boundaries of the Thomastown Relief Road.
 - The removal of hardcore and reinstatement of grassed area within the Thomastown Relief Road corridor.
- No objection to the retention of the roller shutters on the side elevation.
- Applicant has carried out extensive excavation works and works which include a hardstanding area which has a floor area of 1,740sqm.
- Thomastown Local Area Plan 2009-2020 - the site is unzoned and located directly outside the development boundary and refers to section 2.12 Transport and Policy 27:Transport.
- Previous Reason for Refusal No.1 - Both amendments address the key concerns in relation to the previous application, notes the report of the Roads Department, and reason for refusal has been addressed and no longer applies.
- Previous Reason for Refusal No. 2 – Applicant has not addressed reason for refusal, notes report of the Environment Section in relation to the newly installed hardcore surface is contaminated C and D Waste which has not been addressed. Recommends further information.

The 2nd planning report includes;

- Issues raised in request for further information have been addressed, to the satisfaction of the Environment Section, and recommends a grant of permission.

3.2.2. Other Technical Reports

Roads Department: No objection.

Water Services: Verbal report no objection.

Environment Section: No objection following further information subject to requirements.

4.0 Planning History

P.A.Reg.Ref. 18/615: Permission **refused** 20/03/2019 for retention of concrete hard yard station and wheelwash, newly installed roller doors to side of building and excavation works to yard space. Full planning permission for completion of works to yard space and installation of palisade fencing to site perimeters. Reasons for refusal include;

1. The development for which retention is sought, lies within the corridor of the proposed Thomastown bypass which has been identified in the Thomastown Local Area Plan 2009-2020 and in the Draft Thomastown Local Area Plan 2019-2025. The proposed retention development is at variance with section 2.2 of the current Thomastown Local Area Plan 2009-2020 and in particular conflicts with Policy 27(b) which states:

‘To preserve free from development the proposed relief road alignment to the east of the town and to actively seek the construction of the road during the lifetime of this plan to allow for a reduction in town centre traffic and a more efficient local road network.’

The proposed retention development is also at variance with the Draft Thomastown Local Area Plan 2019-2025, objective MTO1.2 which states:

‘To preserve free from development the proposed R700 relief road alignment to the north and east of the town and actively seek the construction of the road during the lifetime of the plan.’

It is therefore considered that the proposed retention is at variance with the Thomastown Local Area Plan 2009-2020 and the Draft Thomastown Local Area Plan 2019-2025 and is therefore contrary to the proper planning and sustainable development of the area.

2. Taking account of the evidence of the potential contamination of the hardcore placed on site with particular regard to micro plastic and hydrocarbon contamination the Planning Authority is not satisfied that the material used across the site is not at risk to public health or the environment. It is considered that the proposed retention will exacerbate the threat to groundwater quality which, in turn, will represent an unacceptable risk to public health and the environment and would therefore be contrary to the proper planning and sustainable development of the area.

Parent Permission

P.A.Reg.Ref.1/1/8819: Permission granted to erect a warehouse and sheet metal workshop.

Enf 18/047: Alleged unauthorised excavation of lands and increase in hardcore serving commercial premises.

5.0 Policy Context

- Development Contributions Guidelines for Planning Authorities - Department of the Environment, Community and Local Government January 2013

5.1. Development Plan

The operative plan is the Kilkenny County Development Plan 2014-2020.

5.2. Kilkenny County Council Development Contribution Scheme 2016-2017

- 5.2.1. The scheme refers to the basis for determination of contributions, categories of development and rates of charge, change of use applications, exemptions and reductions, and demolition and rebuild/extension of use.
- 5.2.2. The development contribution scheme outlines that the following contributions are payable with regard to storage areas.

Section	Description of Development	Unit	Rate of Charge
12	The provision on, in, over or under land of plant and machinery or of tanks or other structures (either than buildings) for storage purposes.	M ²	€15.00

The scheme also states, that '*Exemptions/Reductions will NOT apply to Retention Applications.*'

6.0 The Appeal

6.1. Grounds of Appeal

6.1.1. The appeal relates to condition no. 2 of the Planning Authority's decision to grant planning permission which includes the payment of a sum of €116,205.00 in accordance with the Development Contribution Scheme. The appeal was lodged by Peter Thomson Planning Solutions on behalf of the appellant and was accompanied by the following;

- Notification of Decision to Grant Permission 19366.
- Kilkenny County Council Development Contribution Scheme 2016-2017
- Calculation sheet
- Site layout plans of planning applications referenced in the grounds of appeal with associated Development Contribution Scheme Calculation Sheets.

The grounds of the appeal can be summarised as;

- The terms of the Kilkenny County Council Development Contribution Scheme have not been correctly applied.
 - In the response to further information it was agreed by the applicant to remove C and D waste that had been deposited over an area of ground to the south of the existing concrete hardstanding to the rear (south) of the existing building.

- The area over which the C and D waste had been deposited comprised 2 areas.
- Contributions should only have been applied for the proposed wheel wash facility, which has a stated floor area of 369sqm.
- Accordingly, it is considered the correct contribution due in respect of the Scheme should have been only €5,535.00 and not €116,205.00 as charged.

1. Retention of concrete yard – 5,638sqm

- This area is made up of crushed C and D waste between the concrete yard at the rear of the building and the area of ground reserved for the future Thomastown by pass. The applicant is required to remove this C and D waste and, in doing so, the ground will revert to unused open ground. It will be covered with certified hardcore rather than being re top soiled and re seeded to reduce maintenance. This accords with the revised side plan submitted with the further information. This ground will not have a concrete surface as noted in the contribution description 'retention of concrete yard – 5,638m²'.
- Condition 8 of the permission limits the parking of trucks and trailers to the existing concrete yard immediately to the rear of the building. The hardcore area will not be used and there are no plans for it to be used.
- Assert that as this area is not to be further developed and is not permitted to be used in conjunction with the business, no contributions should have been applied.
- No plant, machinery, tank or other structure for storage purposes, as per Class 12 of the Scheme, are proposed or permitted on this ground.
- Contend that the Development Contribution Scheme was incorrectly applied in respect of this part of the landholding.

2. Retention of the concrete hardstanding – 1740sqm

- This area is a service yard to enable the trucks and trailers to be maintained and serviced to access the rear of the building. At most there will be 10 trucks parked at any one time in the rear yard area. These will be trucks waiting to be

serviced and those that have been serviced and are due to be collected. All truck and trailer maintenance and servicing will be undertaken inside the building. Some of these vehicles may be parked overnight. Condition 8 allows these trucks and trailers to be parked in the yard including overnight.

- No plant or machinery is proposed in this yard or tanks or other structures for storage purposes, as per Class 12 of the Scheme.
- Contend that the Development Contribution Scheme was incorrectly applied.
- A number of examples are referenced of similar situations which demonstrate the planning authority has not sought development contributions for service yards and parking in service yards.
- Assert that Class 12 is clearly not intended to cover service yards and this is confirmed in the wording. Service yards and parking are clearly considered as ancillary areas to buildings and do not attract development contributions under the Scheme.

3. Retention of the partially constructed wheelwash – 369sqm

- This is an installation incorporating equipment and the applicant has no issue with development contributions being applied for this aspect of the development as it constitutes 'plant' as provided for under Class 12 of the Scheme.

6.2. Planning Authority Response

The Planning Authority in a response dated 29/10/2019 refers to;

- Development Contributions were calculated under Category 12 of the Kilkenny County Council Contribution Scheme 2016-2017.
- Retention Permission was granted for, and development contributions calculated as per drawing submitted as part of the response for further information, received on 25/07/2019:
 - Concrete hardstand – 1,740m² (outlined in orange)
 - Concrete yard – 5,638 m² (outlined in green)
 - Wheel wash – 369 m² (outlined in red)

- Copy of drawing attached and coloured in for ease of reference.
- Copy of calculation sheet attached.
- Reject the appellant's claim that no contributions should have been charged in respect of the hardstand (orange) and the yard (green). This is clearly development, and as the application reflects is for a change of use.
- Historic map of the area attached which shows the Coolwagon site was surrounded by grassland.

1. Retention of concrete yard – 5,638sqm

- Consider that the core area to be retained is designed and will be used as part of the operation of the premises.
- It is clearly marked on the drawing submitted on the 25th July 2019 that estimated ten no. trucks associated with the operation of the business would be located within the area of hardcore to be retained which is contrary to the appeal grounds where it states, 'the ground will revert to unused open ground'.
- The area of hardcore is clearly within the red line boundary of the site and by examination of the documents submitted both at the application stage and at further information stage is clearly to be used as part of the operation of the business.
- If the applicant is now claiming that contributions are not required to be paid on the area then it is the view of the planning authority that this is widening the scope of the appeal outside the confines of Section 139 of the Act as the appellant is asking the Board to interpret that the hardcore area is or is not part of the permission.

2. Retention of the concrete hardstanding – 1740sqm

- The development to be retained was for an area of hardstanding on an existing industrial building which was previously used as a logistics hub. In constructing the concrete slab and hardcore areas and then seeking retention of these areas the Planning Authority has adjudicated on an application before it. The appellant is making a case that these areas are not required for

the operation of the business. The application documents and further information documents clearly show the contrary.

- The current scheme was adopted by the Council on the 20th June 2016. All examples of other developments put forward by the appellant pre-date the scheme and are not relevant.
- Notes example 16/622 is in relation to a development on an existing Agri-Business Park. The parking areas and storage yards were granted under P.05/1766 granted on 12/05/2006, which also precedes the current Development Contribution Scheme.
- The terms of the Development Contribution Scheme 2016-2017 have been applied correctly.

6.3. Applicant Response

6.3.1. A further response was lodged by Peter Thomson Planning Solutions on behalf of the appellant dated 12/11/2019 indicates;

- The area coloured orange on the plan marked up by the Planning Authority is primarily for the purpose of servicing the building. Vehicles entering and existing the internal workshops will do so from this service yard.
- In relation to the site layout plan submitted with the further information response, it had been proposed that, to facilitate the relocation of trucks, up to 10 would be parked overnight on the area of ground (green) to be hard-cored. However, condition 8 of the planning permission required these trucks to be parked on the concrete yard, not on the hard-core area. The condition also requires trailers to be parked on the concrete yard, the concrete yard therefore, has an ancillary parking function.
- The planning authority does not apply development contributions for ancillary servicing and parking and has provided no examples of when it has in the past.
- The service yard is not a storage yard and no storage structures are proposed on the yard. Therefore, contributions should not have been applied.

Retention of the concrete yard

- This is the area where the C and D waste was deposited and the Planning Authority requires its removal. In the further information response, it was stated it was proposed to replace the C and D waste with hardcore and to park up to 10 trucks overnight. Condition 8 requires these trucks to park on the concrete service yard and for all trailers to also be parked on the service yard. Class 12 does not relate to service areas, parking areas or hard-standings and never has under the various Development Contribution Schemes. Class 12 is solely in respect of plant, machinery, tanks or other storage structures.

Retention of concrete hard-stand

- A case has not been made in the application that the concrete service yard and hard-core area for which retention was sought were not required for the operation of the business. The concrete yard was for access to the building, wheel wash and the parking on the hardcore area. The Council has prohibited the parking on the hardcore area under condition 8 thereby removing the use intended.
- Dispute the assertion that that the examples given in the appeal of other similar service and parking areas are irrelevant as they predate the current Development Contribution Scheme adopted by Kilkenny County Council in June 2016.
- In support of this the agenda and minutes of the Council meeting and associated report relating to the review of the 2015-2017 Development Contribution Scheme which resulted in the current 2016-2017 Development Contribution Scheme are attached.
- Notes that the scheme was only amended to incorporate all types of renewable energy and that Class 12 of the 2015-2016 Scheme did not change (copy attached).
- Notes that the contributions calculated under files 15/647 and 15/27 involving similar service and hardcore areas were not calculated under Class 12.
- What is now Class 12 under the current Scheme was Class 15 under the Development Contribution Scheme in 2007 when application 06/2097 was determined. This was precisely the same type of development as proposed in this case and no contributions were taken under Class 15 (copy of contribution sheet attached).

- In relation to the example under 16/622 the planning authority referred to an earlier application (P05/1766) for the development of that area with agri-units with service yards/parking etc. Class 15 of the Development Contribution Scheme in force at that time was the same as the current Class 12. Contributions were not applied under Class 15. Contributions were not paid for the units permitted under the earlier scheme and not built, therefore the first time contributions were sought on the site of 16/662 was when that application was being determined. That application was determined under the current Development Contribution Scheme and development contributions were calculated on the floor area of the units and not the storage yards or parking. Therefore, the current scheme is being applied inconsistently and, in the current case, incorrectly.
- Another example under 19/391 is referenced in support of the appeal.
- Notes that the planning authority has not offered in its response any examples of other cases where it has applied Class 12 to service yards or hardcore areas as it has on this occasion.

7.0 **Assessment**

- 7.1. This is an appeal in relation to the application of a development contribution only. The Board will not determine the application as if it was made to it in the first instance and will only determine the matters under appeal.
- 7.2. An appeal may be brought to the Board where an applicant for permission under section 34 considers the terms of the Development Contribution Scheme have not been properly applied in respect of any condition laid down by the planning authority. In this appeal, the issue to be considered is whether the terms of the Scheme have been properly applied.
- 7.3. The current proposal is for retention permission for constructed concrete hard standing and newly installed roller doors to the side of an existing building.
- 7.4. Permission is also sought for the installation of palisade fencing to the site perimeters, to relocate a truck wheel wash, to complete surfacing works to yard space, and to reinstate excavated earth outside of the yard space.

- 7.5. The elements of the proposal relevant to the current appeal include the following;
1. Retention of concrete yard – 5,638sqm
 2. Retention of the concrete hardstanding – 1,740sqm
 3. Retention of the partially constructed wheelwash – 369sqm
- 7.6. The combined area is 7,747sqm.
- 7.7. The calculation sheet submitted by the planning authority indicates that the levy was calculated having regard to Class 12 of the Kilkenny County Council Development Contribution Scheme which refers to the provision on, in, over or under land of plant and machinery or of tanks or other structures (either than buildings) for storage purposes which applies a charge of €15.00 per sq.m.
- 7.8. The calculation of the levy of €116,205.00 was based on the area of the yard, hardstanding and wheelwash which combined gives a total area of 7,747sqm. (7,747sqm x €15.00 = €116,205.00).
- 7.9. The Development Contribution Scheme permits exemptions but these do not apply as the application is for retention.
- 7.10. The applicant submits that the Development Contribution Scheme has been incorrectly applied in respect to the yard and hardstanding areas, and should only have been applied for the proposed wheel wash facility.
- 7.11. Accordingly, it is considered the correct contribution due in respect of the Scheme should have been only €5,535.00 (369sqm x €15.00 = €5,535.00) and not €116,205.00 as charged.
- 7.12. In support of the appeal the applicant states that no plant, machinery, tank or other structure for storage purposes, as per Class 12 of the Scheme, are proposed or permitted on the yard and hardstanding areas. It is asserted in the appeal that Class 12 does not relate to service areas, parking areas or hard-standings and never has under the various Development Contribution Schemes.
- 7.13. In relation to the retention of the concrete yard it is also asserted that the revised site plan submitted with the further information indicates that this ground will not have a concrete surface as noted in the contribution description 'retention of concrete yard – 5,638m²'.

- 7.14. In addition, the applicant notes that Condition 8 of the permission limits the parking of trucks and trailers to the existing concrete yard immediately to the rear of the building, and that the hardcore area will not be used and there are no plans for it to be used.
- 7.15. In support of the appeal the applicant has provided details of similar developments where the planning authority has not sought development contributions for service yards and parking in service yards.
- 7.16. In response to the appeal the planning authority contend that the yard and hardstanding areas constitute development and that the application is for a change of use. The planning authority refer to a historic map of the area indicating that the site was previously surrounded by grassland in support of this assertion.
- 7.17. I have examined the drawings submitted with the application and by way of further information and considered the implication of condition no. 8 in terms of the use of the yard and hardstanding area to be retained in the context of the wording of section 12 of the Development Contribution Scheme. I have also examined the examples of similar developments submitted with the appeal.
- 7.18. I have considered the case put forward by the applicant and the response to the appeal by the planning authority.
- 7.19. I note the Proposed Site Layout Plan Drawing No. 04 submitted by way of further information and date stamped 25th July 2019 indicates the location of 10 parking bays within the hardcore yard area.
- 7.20. I also note the coloured version of the Proposed Site Layout Plan Drawing No. 04 submitted by way of further information and date stamped 25th July 2019 submitted by the planning authority in response to the appeal, which identifies the three areas subject of the appeal.
- 7.21. I note the wording of condition no. 8 which states that 'A maximum of 10 No. trucks shall be parked overnight, trailers shall only be parked on a concrete hardstand.' The implication of this condition by necessity therefore is that the area indicated as hardcore yard area will not be used for parking of trucks.
- 7.22. On balance, I am reasonably satisfied that the use of the yard and hardstanding areas are ancillary to the main use of the building and is not for storage.

- 7.23. I am satisfied therefore, that the case put forward by the applicant is reasonable, and in the context of the current application that category 12 of the Development Contribution Scheme which does not relate to service areas, parking areas or hard-standings, as evidenced in the examples cited in the grounds of appeal.
- 7.24. I am satisfied that the Development Contribution Scheme has **not** been correctly applied in relation to the yard areas.

8.0 Recommendation

- 8.1. I recommend that Kilkenny County Council be directed to **amend** Condition No. 2 on the grounds that the terms of the Development Contribution Scheme 2016-2017 have not been properly applied.

9.0 Reasons and Considerations

Having regard to:

- (a) The provisions of the Kilkenny County Development Contribution Scheme 2016-2017,
- (b) The submissions made in this appeal;

The Board considers that the terms of the Kilkenny County Development Contribution Scheme 2016-2017 have not been properly applied, and the amendment of Condition number 2 is, therefore, appropriate.

Condition no. 2

The developer shall pay to the Planning Authority a financial contribution in respect of public infrastructure and facilities benefiting development in Kilkenny County Council's administrative area that is provided or intended to be provided by or on behalf of the Local Authority in accordance with the terms of the Development Contribution Scheme made under Section 48 of the Planning and Development Acts 2000-2018.

The amount of the financial contribution shall be paid upon grant of permission, with the amount of the contribution being the rate of contribution in existence on the date of such grant. In accordance with the current scheme the amount of the contribution is calculated at €5,535.00 (Five thousand five hundred and thirty five Euro). Any applicable amount is subject to revision with reference to the Wholesale Price Index and to penalty interest in accordance with the terms of Kilkenny County Council's Development Contribution Scheme.

Reason: It is a requirement of the Planning and Development Acts 200-2018 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.

Susan McHugh
Senior Planning Inspector

20th March 2020