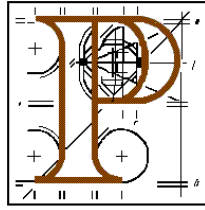


# An Bord Pleanála



## Inspector's Report

**Development:** Retention of existing educational/warehousing/light industrial development at Liber House, Cloonanorig, Monavalley Industrial Park, Tralee, Co. Kerry.

### Planning Application

Planning Authority : Kerry County Council  
Planning Authority Register Ref. : 15/240  
Applicant : Liam Davis  
Type of Application : Permission  
Planning Authority Decision : Grant permission

### Planning Appeal

Appellant(s) : Liam Davis  
Type of Appeal : 1<sup>st</sup> Party v. Condition  
Observer(s) : None

**Date of site inspection** : None undertaken

Inspector: **Michael Dillon**

## 1.0 Site Location and Description

The site, with a stated area of 0.53ha, is located on the west side of the R556 Ballybunion Road within the inner suburbs of Tralee in Co. Kerry. Public lighting and public footpaths are in place in this area. There is a two- and three-storey commercial building on the site – clad in blue and grey metal panels. The site is landscaped. The vehicular entrance to the site is from the Monavalley Industrial Estate on the northeastern boundary. There is no access to the site from either the Ballybunion Road or from Gallowfield on the southwestern boundary. The boundaries of the existing commercial unit comprise plinth stone walls surmounted by railings. There is a single-storey detached sub-station building on the southwestern boundary of the site, with access from Gallowfield. There are approximately 23 no. ground-level parking spaces to the northwest of the building. The ramp to the basement parking is located on the northwest side. Drawings submitted indicate 60 no. parking spaces at basement level. There is a strip of unused land to the northwest of the existing site – between it and the adjoining industrial unit. Additional surface parking spaces are proposed where the site will extend into part of this unused land. There is vehicular access to this strip of land from Gallowfield (a pair of farm gates). There is a two-storey house to the south of the site at the junction of Ballybunion Road and Gallowfield. The building is connected to the public watermains and public sewers. Part of the ground floor of the building would appear to be occupied by Brookfield College.

## 2.0 The Proposed Development

- 2.1 Permission sought on 27<sup>th</sup> March 2015, for development as follows-
- Retention of revised site boundaries.
  - Permission for change of use of 303.5sq.m at ground floor, 1,044.5sq.m at first floor and 588.4sq.m at second floor level from permitted warehousing/light industrial use to Class 3 office use as per Schedule 2, Part 4 of the Planning & Development Regulations 2001.
  - Extend parking area to the west of the site for provision of 33 no. additional spaces.
- 2.1.1 The application is accompanied by a letter of consent to the making of the planning application from the landowner of lands where additional parking spaces are to be located.
- 2.2 Following a request for additional information, revised proposals were received on 29<sup>th</sup> May 2015, as follows-
- Applicant agrees to allow the neighbouring factory occupant access to the car-park for purposes of maintenance to the factory building.

- Revised sewerage layout.
- Indicating that it is not possible to submit details of future occupants of the building.
- The applicant is aware of flood risk to site.

2.3 Following a request for clarification of additional information, revised information was received on 3<sup>rd</sup> July 2015, as follows-

- New public notices.
- Revised site layout showing retaining wall on western boundary.
- Letter of consent from landowner allowing for removal of rear access gate.

2.4 Unsolicited additional information was received from the applicant on 17<sup>th</sup> July 2015, justifying the development and parking arrangements; submitted by way of observation to the Material Contravention procedures notified by the Council.

### 3.0 Development Plan

The relevant document is the Tralee Town Development Plan 2009-2015. The site is zoned 'General Industry'. Office use is not normally permitted under this zoning. Objective OPO3 is to 'Prohibit office development that is outside the town centre that is of a type and scale appropriate to the town centre'.

### 4.0 Planning History

**Ref. 06/7261:** Permission granted to CMS Developments Ltd. on 29<sup>th</sup> January 2007, to demolish existing building and construct a three-storey-over-basement building of 5,590m<sup>2</sup> comprising warehousing/light industrial with ancillary office use, basement car-park for 41 cars, surface parking for 26 cars, new entrance and associated site works.

**Ref. 07/7446:** Permission granted for ESB sub-station on this site and to provide 3 no. additional parking spaces at basement level in lieu of at ground level.

**Ref. 07/7552:** Permission granted for alterations to fenestration and external doors of already permitted building.

**Ref. 14/308163:** Permission granted by way of Material Contravention procedures for change of use of 1,026m<sup>2</sup> at ground floor level from permitted warehouse/light industrial use to educational use. It was a condition of permission that 12 no. parking spaces be reserved for this use. This change of use has been effected.

## 5.0 The Planning Authority's Decision

By Order dated 7<sup>th</sup> of September 2015, Kerry County Council issued a Notification of decision to grant planning permission (following material contravention procedures of the Development Plan to permit office use on this site) subject to 8 no. conditions – the principal ones of which may be summarised as follows-

1. The development shall be carried out in accordance with plans and particulars received by the planning authority on 27<sup>th</sup> March, 29<sup>th</sup> May, 3<sup>rd</sup> July and 17<sup>th</sup> July 2015.
2. Requires payment of development contribution of €18,318.34 in respect of amenity and arts/heritage.
3. Requires payment of Supplementary Development Contribution of €28,377.94 towards Tralee Ring Roads Project.
6. Office uses on the three floors shall be restricted to services which are not provided principally to visiting members of the public. The following services shall not be permitted-
  - (a) Financial services.
  - (b) Professional services.
  - (c) Health & Medical services.
  - (d) Any other services (including use as a betting office) where the services are provided principally to visiting members of the public.Not more than one office unit shall be permitted on each of the three floors of the building. Prior to occupation of any of the permitted office space, details of the proposed office use shall be submitted for the written agreement of the planning authority.

## 6.0 Grounds of Appeal

The appeal from McCutcheon Halley Walsh, agents on behalf of the applicant, Liam Davis, received by the Board on 5<sup>th</sup> October 2015, can be summarised in bullet point format as follows-

- The appeal is against conditions 2 & 3 only – in accordance with the provisions of sections 48(10)(b) and 49(3)(a).
- Condition 2 requires payment of a general development contribution of €18,318.34 and condition 3 required payment of a supplementary development contribution of €28,377.94. The applicant has already paid in excess of €225,000 in development contributions on foot of the permission under which the building was constructed – ref. 06/7261. The building was never occupied, and there was, therefore, no burden placed upon existing infrastructure. The applicant met with the Council, and an

undertaken was given that no development contributions would be imposed. The planning authority has reneged on this commitment.

- The Board should note that the application does not place any additional burden on infrastructure.
- The Development Contribution Scheme has been incorrectly applied.
- Application of development contributions is “double charging”. Condition 10 of permission ref. 06/7261 required payment of a special development contribution of €30,000 to fund construction of a junction as part of the Bracker O’Regan road scheme. This contribution was paid in full but the road works were neither commenced nor completed. The building was completed but never occupied.
- Conditions 4 & 5 of permission ref. 14/308163 levied general and supplementary contributions to the permitted change of use. During the course of subsequent negotiations, the Council agreed to waive the €15,036.03 required under condition no. 5, and the applicant is still in negotiation with the Council to waive the amount required under condition no. 4.
- The retention element of this current application/appeal relates to change in boundaries only. The building, as constructed, is in compliance with permissions.
- The Government published new Developer Contribution Guidelines for Local Authorities in January 2013. Section 2 refers to “double charging”. Any development contribution already levied and paid in respect of a given development should be deducted from the subsequent charge so as to reflect that this development has already made a contribution.
- Tralee Town Council adopted a Development Contribution Scheme on 8<sup>th</sup> May 2007. Commercial/Industrial are identified as a single category to be charged at the rate of €64.95 per m<sup>2</sup>.
- On March 22<sup>nd</sup> 2010, Kerry County Council adopted the Tralee Ring Road Project Supplementary Development Contribution Scheme. The Scheme identifies only two types of development – ‘Residential’ and ‘Retail and other non-residential development’.
- The Council justifies the attachment of development contribution conditions on the grounds of change from low population demand for services to high population demand for services. The rationale fails to note that the floor space (with the exception of the ground floor space) was permitted for office use. Whilst this was to be ancillary to ground floor warehouse/light industrial use, it was in any case permitted as office space.
- The distinction drawn by the planning authority between the permitted and proposed office uses is not supported in the Development Contribution Scheme, which classifies commercial and industrial uses as a single category. The Development

Contribution Scheme was incorrectly applied, as the amount levied does not take account of contributions already paid.

- The Bracker O'Regan road scheme is now covered by the Tralee Ring Road Project Supplementary Development Contribution Scheme.
- The Board should remove conditions 2 & 3 of the permission.

## 7.0 Observations

None received.

## 8.0 Response Submissions

8.1 There was no response from Kerry County Council to the grounds of appeal submitted.

8.2 The Board wrote to the planning authority, specifically asking it to respond to the grounds of appeal – with a response requested by 7<sup>th</sup> December 2015.

8.3 The response of Kerry County Council, received by the Board on 4<sup>th</sup> December 2015, may be summarised in bullet point format as follows-

- The site is within the development boundary of the now abolished Tralee Town Council. However, the terms of the Tralee Town Council Development Contribution Scheme 2007, still apply.
- Since the setting up of Irish Water, development contributions for water and sewerage are no longer imposed by Kerry County Council.
- The Tralee Ring Roads Supplementary Development Contribution Scheme was adopted in 2010. Since that time, developments within the town boundary are subject to the terms of the Scheme in lieu of the Roads Contribution specified in the Tralee Town Council Development Contribution Scheme 2007.
- The Tralee Town Council Development Contribution Scheme requires payment of a contribution for development involving change of use which is likely to substantially increase the demand for water and the amount of effluent or adversely change the nature of the effluent. The change of use permitted would substantially increase both the demand for water and the amount of effluent. The rate of the development contributions specified is 50% of the rate of new development (office) in respect of Amenity, Arts/Heritage and Roads. The contributions are calculated as follows for a total change of use floor area of 1,936.4m<sup>2</sup>.
  - Amenity and Arts/Heritage – 1,936.4m<sup>2</sup> x €18.92 per m<sup>2</sup>, @ 50% = €18,318.34.
  - Roads – 1,936.4m<sup>2</sup> x €29.31 per m<sup>2</sup>, @ 50% = €28,377.94.

- 8.3.1 The response of Kerry County Council is accompanied by copies of the relevant extracts from the Development Contribution Scheme and from the Supplementary Development Contribution Scheme.
- 8.4 The response of Kerry County Council was referred by the Board to the appellant for comment, on or before 16<sup>th</sup> January 2016.
- 8.4.1 The response of McCutcheon Halley Walsh, agent on behalf of the applicant, Liam Davis, received by the Board on 15<sup>th</sup> January 2016, can be summarised in bullet point format as follows-
- The development description afforded to the case by the Board does not accurately describe the development, and this could have implications for the assessment of the case.
  - The retention element is minor, and ancillary in that it relates only to boundaries.
  - Kerry County Council has failed to respond to the substantive argument put forward by the appellant.
  - Commercial and industrial uses are classified as a single category in the Development Contribution Scheme – presumably as they place an equal burden on infrastructure.
  - There is no justification or evidence to support the argument that the change of use proposed will place an additional burden on the demand for water or sewerage. It is noted that this is now a matter for Irish Water to decide.
  - The planning authority is double charging for this development. Government guidance on this issue has been ignored. Contributions paid in the past are significantly in excess of what is now charged.

## **9.0 Assessment**

### **9.1 General Comment**

- 9.1.1 This appeal relates to financial contribution conditions only – no.s 2 & 3 of the permission. In relation to the development contribution scheme of a planning authority, section 48(10)(b) of the Planning and Development Act 2000, allows that “An appeal may be brought to the Board where an applicant for permission under *section 34* considers that the terms of the scheme have not been properly applied in respect of any condition laid down by the planning authority”. In relation to supplementary development contribution schemes, section 49(3)(a) allows that “*Subsections (3), (4), (5), (6), (7), (8), (9), (10), (11) and (15) of section 48* shall apply to a scheme subject to- (a) the modification that references in those subsections to a scheme shall be construed as references to a supplementary development contribution scheme,”. This latter provision,

in particular subsection (10), allows for an appeal against condition 3 on the grounds that the terms of the supplementary development contribution scheme were not properly applied.

9.1.2 Section 48(10)(c) provides that- “Notwithstanding *section 34(11)*, where an appeal is brought in accordance with *paragraph (b)*, and no other appeal of the decision of the planning authority is brought by any other person under *section 37*, the authority shall make the grant of permission as soon as may be after the expiration of the period for the taking of an appeal, provided that the person who takes the appeal in accordance with *paragraph (b)* furnishes to the planning authority security for payment of the full amount of the contribution as specified in the condition”. This subsection does not specify a time within which such security for payment can be furnished. It would appear that furnishing of the security could be done at any time during the consideration of the appeal by the Board – should the applicant be desirous of proceeding with the development whilst the Board deliberating. In the light of this provision of the Act, it is clear that the Board is restricted to considering whether the terms of the relevant schemes were properly applied, and cannot examine the appeal *de novo*.

## **9.2 Condition No. 2**

9.2.1 This condition required payment of a development contribution of €18,318.34 in respect of infrastructure comprising Amenity and Arts/Heritage only. Water supply and sewerage infrastructure have been removed from the Development Contribution Scheme, and are now under the control of Irish Water. Roads infrastructure for the town of Tralee and its’ environs has been removed from the Development Contribution Scheme, and is instead charged within the terms of a Supplementary Development Contribution Scheme (as per condition no. 3). So, the only elements of infrastructure charged for are Amenity & Arts/Heritage, at the total rate of €18.92 per m<sup>2</sup>. There is no dispute by the applicant in relation to the relevant floor area – 1,936.4m<sup>2</sup>. The amount of the levy would be €36,636.68. The Development Contribution Scheme provides for a 50% reduction for applications for change of use which is likely to substantially increase the demand for water and the amount of effluent generated. Whilst this element of infrastructure is now controlled by Irish Water, I would be satisfied that it has been used as an easy way of measuring whether a development would result in an increased demand for all elements of infrastructure provided.

9.2.2 Tralee Town Council has recently been dissolved and its functions taken over by Kerry County Council. The Development Contribution Scheme in force is the Tralee Town Council Development Contribution Scheme 2007, adopted on 8<sup>th</sup> May 2007. Page 5 of the Scheme indicates the rates



payable. For commercial/industrial development, the rate indicated is €16.62 per m<sup>2</sup> for Amenity, and €2.30 per m<sup>2</sup> for Arts/Heritage; equal to €18.92 per m<sup>2</sup> in total. Further down the same table, reference is made to the 50% reduction for change of use – a rate applied by the Council in this instance. The wording of this section in relation to 50% being charged would seem to envisage instances where the change of use would not result in any increased demand for water or increase in discharge of effluent – and presumably where no development contribution would be levied. Whilst I would acknowledge the contention of the appellant that the original rate imposed does not differentiate between commercial and industrial use – indicating that the Council clearly considered that both commercial and industrial uses would result in a similar demand for infrastructure, the Scheme does not provide for any exemptions in relation to applications such as the one currently before the Board. The need to extend the car-parking to serve proposed uses on this site would clearly indicate an intensification of use which would lead to a greater demand for water and discharge of effluent. I would be satisfied that the terms of the Scheme have been properly applied. Condition 2 should be restated.

### **9.3 Condition No. 3**

The original Tralee Town Council Development Contribution Scheme 2007 originally had a roads infrastructure element. This was subsequently replaced by way of Supplementary Development Contribution Scheme for the Tralee Ring Roads Project – such that roads infrastructure is not now charged as part of the general Development Contribution Scheme. The rate for retail and other non-residential development is €29.31 per m<sup>2</sup>. This figure when multiplied by 1,936.4m<sup>2</sup> equals €56,755.88. Charged at the rate of 50% (the rate for change of use), the amount is €28,377.94. The wording of the section relating to 50% reduction being charged would seem to envisage instances where the change of use would not result in any increased demand for water or increase in discharge of effluent – and presumably where no development contribution would be levied. Whilst I would acknowledge the contention of the appellant that the original rate imposed does not differentiate between commercial and industrial use – indicating that the Council clearly considered that both commercial and industrial uses would result in a similar demand for infrastructure, the Scheme does not, however, provide for any exemptions in relation to applications such as the one currently before the Board. The need to extend the car-parking to serve proposed uses on this site would clearly indicate an intensification of use which would lead to a greater demand for water and discharge of effluent, and on other infrastructure by . I would be satisfied that the terms of the Scheme have been properly applied. Condition 3 should be restated.

## **9.4 Other Issues**

### **9.4.1 Development Description**

The shorthand notation of the development description which the Board has applied to this development is not of any significance in this appeal. This Inspector is fully aware of the nature and extent of the development the subject of the appeal, and assessment has been undertaken based on this understanding of what is proposed for retention and what constitutes proposed development.

### **9.4.2 Previous Payments**

Reference by the applicant to Development Contribution Scheme payments made by the developer are not strictly of relevance, and neither are references to past or current negotiations under way between the developer and the Council in relation to levies conditioned in relation to previous grant(s) of permission.

## **10.0 Recommendation**

I recommend that conditions 2 & 3 of the planning permission granted by Kerry County Council be restated, for the Reasons and Considerations set out below.

## **REASONS AND CONSIDERATIONS**

It is considered that the terms of Development Contribution Scheme and the Supplementary Development Contribution Scheme have been properly applied in this instance. The change of use proposed would be likely to substantially increase the demand for water and increase the amount of effluent which this development would generate. The application of the 50% reduction rate provided for within the Development Contribution Scheme is appropriate in this instance.

---

**Michael Dillon,  
Inspectorate.**

**19<sup>th</sup> January 2016.**