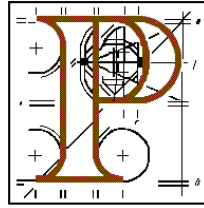


# An Bord Pleanála



## Inspector's Report

PL15.246142

### DEVELOPMENT:

Permission for Retention of internal configuration of existing accommodation at Levels 2 and 3 as follows:

- Level 2: Change of use and reconfiguration of Unit 28 (265sq.m) (previously retail) to provide a new cinema to accommodate a café kiosk (42sq.m), seating area (23sq.m), new cinema concession counter and relocated stairs access to the existing cinema at Level 3.
- Level 3: Reconfiguration of cinema foyer area (231sq.m) to accommodate a new concession counter, toilet facilities and relocated stairs access.

Permission is also sought for retention of all associated site and development works, at The Arc Cinema, Drogheda Town Centre, West Street, Stockwell Lane and Dyer Street, Drogheda, County Louth.

### PLANNING APPLICATION

Planning Authority:

Louth County Council

Planning Authority Reg. No.:

15/773

Applicant:

Melcorpo Commercial Properties Ltd

Application Type:

Permission for Retention

Planning Authority Decision:

**GRANT PERMISSION** for  
**RETENTION**  
subject to 2 Conditions

### APPEAL

Appellant:

Melcorpo Commercial Properties Ltd

Type of Appeal:

**FIRST PARTY**

in regard to Condition No. 2 only relating to a Financial Contribution under Section 48 of the Planning and Development Act 2000 as amended.

INSPECTOR:

Dermot Kelly

## **1. SITE LOCATION**

The subject site is located at the Arc Cinema in Drogheda Town Centre, West Street, Stockwell Lane and Dyer Street, Drogheda, County Louth, as indicated on **APPENDIX A - LOCATION MAP**.

## **2. SITE DESCRIPTION**

**2.1** The subject site lands at The Arc Cinema in Drogheda Town Centre are approximately 0.76 hectares in area and the gross floor space of the existing building is 6047.6 square metres as submitted, and the area the subject of the planning application is 495 square metres.

**2.2** The Planning Report for the Planning Authority included stating: 'Drogheda Town Centre is located on West Street and is a shopping centre with multiple units accessed off a central internal mall. The Centre runs from West Street back as far as Dyer Street where it has its rear entrance. The centre also has units facing onto Stockwell Lane (though these are not publicly linked internally with the centre). The area of the site extends to 0.75513 hectares. The cinema has been recently opened and all development works completed. The lobby area and café kiosk, seating area, cinema concession counter and stairs are all in place.'

## **3. PROPOSED DEVELOPMENT**

The proposed development comprises as specified in the Public Notices: The Planning Report for the Planning Authority described the Proposed Development at The Arc Cinema, Drogheda as follows:

'Level 2: Change of use of unit and reconfiguration of Unit 28 (265sq.m) (previously retail) to provide a new cinema lobby to accommodate a café kiosk (42sq.m), seating area (23sq.m), new cinema concession counter and relocated stairs access to the existing cinema at Level 3; Level 3: Reconfiguration of cinema foyer area (231sq.m) to accommodate a new concession counter, toilet facilities and relocated stairs access. Permission is also sought for retention of all associated site and development works.'

#### **4. NOTIFICATION OF DECISION OF PLANNING AUTHORITY - Submissions and Relevant Reports**

##### **4.1 Third Party Submissions on Planning Application**

No Submissions were received.

##### **4.2 Planning Report for Planning Authority**

The Planning Report, dated 8<sup>th</sup> January, 2015 included documenting the Relevant Planning History and noted that no Third Party Submissions were received and that the proposed development was 'simply an extension/reconfiguration of the already permitted use', and 'The levies applicable for the development are set out in the development contribution scheme for Drogheda 2010-2014 as amended. There is no exemption permitted for retention works for change of use; accordingly the 75% reduction that applied to change of use is not applicable. Accordingly contributions shall be payable on the full extent of the area for which retention and reconfiguration is sought which shall be used for the cinema. The reconfiguration of part of the floor area is part of an area of the cinema which is subject to the parent permission; the floor area of 230 square metres is for reconfiguration of the foyer area to accommodate a new concession counter, toilet facilities and relocated stairs and all associated site development works.', and also

'As per the 11510030 (11/30) application, levies were applied to a floor area of 1050.2 square metres which includes the change of use and the mezzanine level. The area of the projection mezzanine is 112 square metres. This area was considered new floor area. The remainder of the floor area was effectively change of use.

Under planning reference 12510084 (12/84) a further 250 square metres floor area was added.

In this regard the levies for change of use from retail to cinema for the development for which retention is being sought extends to 495 square metres and it must all be assessed as retention to the previously permitted scheme as the development is now in place.'

Permission was recommended subject to the Conditions (2) as stated in the notification of decision of the Planning Authority.

### 4.3 Notification of Decision of Planning Authority

The Planning Authority, Louth County Council, issued a notification of decision to **GRANT PERMISSION for RETENTION** for the proposed development subject to 2 Conditions including as follows:

2. In accordance with the Council's Development Contribution Scheme 2004 made under the provisions of section 48 of the Planning and Development Act 2000 the developer shall pay a contribution to the Planning Authority, in the amounts specified below (or such increased amount as may be appropriate at the time of payment) towards the costs already incurred or to be incurred by the Planning Authority on the provision of each of the public facilities listed below, which will benefit development in the area of the Planning Authority. Unless otherwise agreed in writing with the Planning Authority before development is commenced the said contribution shall be paid in full before such commencement.

- |                                     |                                |
|-------------------------------------|--------------------------------|
| 1. Roads:                           | €29.36 x 495 sq m = €14,533.20 |
| 2. Recreational and Community Levy: | €29.39 x 495 sq m = €14,548.05 |
| 3. Surface Water:                   | €14.46 x 495 sq m = €7,157.70  |
- Total levies due €36,238.95 (Thirty six thousand, two hundred and thirty eight euro and ninety five cent).

Reason: The provision of these facilities in the area will facilitate the proposed development and it is considered reasonable that the developer should contribute towards their cost.

## 5. APPEAL GROUNDS

### First Party Appeal

The First Party Appeal Grounds included stating as follows:

- 'The grounds of appeal relate only to Condition No. 2 attached to the notification of decision to grant permission, which details the development contributions levied in relation to the development. The appeal is lodged pursuant to Section 48(10(b) of the Planning and Development Act 2000 (as amended).....'  
The Appeal Grounds detailed the Proposed Development and the relevant Planning Permissions (2) on the subject site.
- 'Both of the above applications were implemented in Drogheda Town Centre in 2014/2015 and the Arc Cinema is now fully operational. The works the subject of the current application were also undertaken at this time and comprise improvements to the

internal layout and organisation of the permitted cinema. The purpose of the current application is to regularise these works.'

- Condition No. 2 was noted and also that the Planning Report for the Planning Authority under 'Levies' included stating as follows: 'In this regard the levies for change of use from retail to cinema for the development for which retention is being sought extends to 495sq.m and it must all be assessed as retention to the previously permitted scheme as the development is now in place.' (Page 4) (Underline emphasis added)

It is submitted that the above basis for calculating the development contributions for this development is incorrect. The actual floor area to which the change of use applies is Level 2 only (265sq.m). Level 3 has previously been permitted for cinema use (Reg. Refs. 11/30 and 12/84) and no change of use is sought at that level. In addition development contributions have been paid in full in relation to the development permitted under Reg. Refs. 11/30 and 12/84.'

- The First Party Appeal Grounds submitted as follows:  
'Appropriate Development Contributions/Outcome Sought:  
The development at Level 3 is described as 'reconfiguration of cinema foyer area (231sq.m) to accommodate a new concession counter, toilet facilities and related stairs access'. Permission is not sought for change of use at Level 3.  
Our client has paid the relevant development contributions for cinema development permitted under Reg. Ref. 11/30 (Condition 10 - €35,396.20) and Reg. Ref. 12/84 (Condition 3 - €25,841.42). Applying a development contribution to Level 3 under the current application is effectively double charging. The *Development Contributions Guidelines for Planning Authorities 2013* are strongly opposed to the practice of double charging.  
'Double charging  
The practice of 'double charging' is inconsistent with both the primary objective of levying development contributions and with the spirit of capturing 'planning gain' in an equitable manner. Authorities are reminded that 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.' (Page 11) (Underline emphasis added)

- ‘It is our submission that the act of double charging is contrary to the terms of the *Drogheda Borough County Development Contribution Scheme 2010-2014* and specifically Section 2 – *Rationale for Development Contributions* which states as follows:  
‘2. *Rationale for Development Contributions*  
*When new development occurs it impacts on the capacity of existing infrastructure networks. Such development places a greater demand on the services provided by Drogheda Borough Council. It is considered equitable that developers contribute to the financial burden associated with the provision of enhanced infrastructure networks facilitating new development. However, the Development Contribution Scheme ensures that the cost of infrastructural improvements does not fall disproportionately on new development and takes account of benefit to existing development.’ (Page 3) (Underline emphasis added)  
Applying a development contribution to the Level 3 development under the current application means that the cost of infrastructural improvements will fall disproportionately on the cinema development in Drogheda Town Centre as this development is effectively contributing twice to the cost of the infrastructure network. This is contrary to the terms of the *Drogheda Borough Council Development Contribution Scheme 2010-2014*.’, and*
- ‘On the basis of the above, we submit that the development contribution to be applied to the proposed development should relate to the change of use in Level 2 only giving a development contribution of €19,400.65 (265sq.m x €73.21). We request that An Bord Pleanála amend Condition 2 accordingly.’

## 6. APPEAL RESPONSES

### Planning Authority Appeal Response

This Appeal Response received 7<sup>th</sup> March, 2016 included as follows:

1. The Section 48 Development Contribution Scheme for Drogheda 2010-2014 as amended was applied to the development. As per Table 3, page 9 of the scheme, point 12 – ‘*reduction will not apply to retention applications*’.
2. I accept that it would seem unreasonable that a development contribution should also be paid in respect of the Level 3 works within the permitted cinema (Reg. Ref. 11/30), however the Planning Authority consider that the works at Level 3 comprise

reconfiguration of permitted cinema floor space required permission and as such fall under works considered to be retention. It is accepted that contributions have previously been paid in respect of this area under Condition 3 of Reg. Ref. 11/30. However on strict interpretation of the development contribution scheme in place, the Planning Authority consider that retention levies apply.

The Planning Authority would welcome the Board's interpretation of the development contribution scheme in place whereby retention of the internal reconfiguration relates.'

## **7. PLANNING HISTORY**

The Planning Report for the Planning Authority documented the relevant Planning History of the subject site as follows:

*Ref. 11/510030* – Change of use from Shopping Centre to 5 screen CINEMA at Level 3. Alterations to Stockwell Lane elevation. Partial increase in height of existing Roof to accommodate cinema use. Replacement of existing Stairway between Level 2 and Level 3 Malls with new Stairs. Provision of new Shopping Centre Toilets at Level 3. Reconfiguration of roof-top Plant Areas, associated Signage and site works.

*Ref. 12/510084* – Permission will comprise revisions/modifications to previously permitted cinema development (Ref. 11/30) Board Ref. PL54.239708, comprising an extension to Level 3 to accommodate an additional screen (i.e. sixth screen with 301 seats) and associated changes to the internal layout previously permitted level. Permission is also sought for revisions to plant areas and fire escapes and all associated signage, site and development works. The revisions proposed would result in an increase in gross floor area of 253.5m<sup>2</sup>.

## **8. DEVELOPMENT PLAN**

The provisions of the 2011-2017 Drogheda Development Plan have been considered and in particular the following provisions:

The 'TC' land use zoning objective for the appeal site:

"To protect and enhance the special physical and social character of the existing town centre and to provide for new and improved town centre facilities and uses".

## 9. PLANNING ASSESSMENT – Issues and Evaluation

It is noted that the First Party Appeal relates to *Condition No. 2 only* of the notification of decision of the Planning Authority to grant 'Permission for Retention of internal configuration of existing accommodation at Levels 2 and 3 as follows: \**Level 2: Change of use and reconfiguration of Unit 28 (265sq.m) (previously retail)* to provide a new cinema to accommodate a café kiosk (42sq.m), seating area (23sq.m), new cinema concession counter and relocated stairs access to the existing cinema at *Level 3. \*Level 3: Reconfiguration of cinema foyer area (231sq.m)* to accommodate a new concession counter, toilet facilities and relocated stairs access. Permission is also sought for retention of all associated site and development works at The Arc Cinema, Drogheda Town Centre, West Street, Stockwell Lane and Dyer Street, Drogheda, County Louth' as specified in the public notices, and that *Condition No. 2* relates to a *Financial Contribution under Section 48 of the Planning and Development Act 2000 as amended.*

Section 48(1) of the Planning and Development Act 2000 as amended provides that 'in accordance with Section 48(10) of the Planning and Development Act 2000, no appeal shall lie to An Bord Pleanála in relation to the contribution required under this condition except where it is considered by the applicant that the terms of the Scheme have not been properly applied by the Planning Authority' – which is the contention regarding Condition No. 2 in the submitted First Party Appeal.

The Appeal relates solely to this Condition No. 2 requiring a Financial Contribution under Section 48 of the Planning and Development Act 2000 as amended, and the Appeal is considered valid in that the applicant has contended that the terms of the Scheme have not been properly applied and has submitted grounds in relation to same, and accordingly has complied with section 48(10)(b) of the Planning and Development Act 2000, as amended.

- I note the Planning Report for the Planning Authority where stated under 'Levies' as follows:

*'The levies applicable for the development are set out in the development contribution scheme for Drogheda 2010-2014 as amended. There is no exemption permitted for retention works for change of use; accordingly the 75% reduction that applied to change of use is not applicable. Accordingly contributions shall be payable on the full extent of the area for which retention and reconfiguration is sought which shall be used for the cinema.'*, and



'In this regard the levies for change of use from retail to cinema for the development for which retention is being sought *extends to 495 square metres and it must all be assessed as retention to the previously permitted scheme as the development is now in place.*

1. Roads:	€29.36 x 495 sq m = €14,533.20
2. Recreational and Community Levy:	€29.39 x 495 sq m = €14,548.05
3. Surface Water:	€14.46 x 495 sq m = €7,157.70
Total levies due €36,238.95'	<i>(Italics added)</i>

- I note that *Condition No. 2* of the subsequent notification of decision of the Planning Authority stated as follows:

2. In accordance with the Council's Development Contribution Scheme 2004 made under the provisions of section 48 of the Planning and Development Act 2000 the developer shall pay a contribution to the Planning Authority, in the amounts specified below (or such increased amount as may be appropriate at the time of payment) towards the costs already incurred or to be incurred by the Planning Authority on the provision of each of the public facilities listed below, which will benefit development in the area of the Planning Authority. Unless otherwise agreed in writing with the Planning Authority before development is commenced the said contribution shall be paid in full before such commencement.

1. Roads:	€29.36 x 495 sq m = €14,533.20
2. Recreational & Community Levy:	€29.39 x 495 sq m = €14,548.05
3. Surface Water:	€14.46 x 495 sq m = €7,157.70
Total levies due €36,238.95	(Thirty six thousand, two hundred and thirty eight euro and ninety five cent).

Reason: The provision of these facilities in the area will facilitate the proposed development and it is considered reasonable that the developer should contribute towards their cost.

- I note further the First Party Appeal Grounds where stated – in regard to the request that Condition No. 2 be AMENDED:

*'It is submitted that the above basis for calculating the development contributions for this development is incorrect. The actual floor area to which the change of use applies is Level 2 only (265sq.m). Level 3 has previously been permitted for cinema use (Reg. Refs. 11/30 and 12/84) and no change of use is sought at that level. In addition development contributions have been paid in full in relation to the development permitted under Reg. Refs. 11/30 and 12/84.'*

'Applying a development contribution to Level 3 under the current application is effectively double charging. The *Development*

*Contributions Guidelines for Planning Authorities 2013* are strongly opposed to the practice of double charging.'

- I concur with the First Party Appeal Grounds submissions above that the proposed development would constitute '*double charging*', and in this regard I note the definition of '*double charging*' as included in the *Development Contributions – Guidelines for Planning Authorities 2013*, and also the provisions of *Section 2 – Rationale for Development Contributions* in the Drogheda Borough Council Development Contribution Scheme 2010-2014 as amended.
- I also note the First Party Appeal Grounds where submitted: 'Applying a development contribution to the Level 3 development under the current application means that the cost of infrastructural improvements will fall disproportionately on the cinema development in Drogheda Town Centre as this development is effectively contributing twice to the cost of the infrastructure network. This is contrary to the terms of the *Drogheda Borough Council Development Contribution Scheme 2010-2014*,' and 'On the basis of the above, we submit that the development contribution to be applied to the proposed development should relate to the change of use in Level 2 only giving a development contribution of €19,400.65 (265sq.m x €73.21). We request that An Bord Pleanála amend Condition 2 accordingly.'
- I refer to the '*Development Contributions – Guidelines for Planning Authorities*' published by the Department of the Environment, Community and Local Government in January 2013 which state under *Section 2- 'Supporting Economic Development'*:-  
'*Double charging*  
*The practice of 'double charging' is inconsistent with both the primary objective of levying development contributions and with the spirit of capturing 'planning gain' in an equitable manner. Authorities are reminded that 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.*' (Page 11)
- In this regard I note the provisions of the *Drogheda Development Contribution Scheme 2010-2014* including where stated as per Table 3, page 9 of the scheme, point 12 – '*Reductions will not apply to Retention Applications*' as referred to in the Appeal

Grounds. I note also the Planning Authority Appeal Response where stated:

'...it would seem unreasonable that a development contribution should also be paid in respect of the Level 3 works within the permitted cinema (Reg. Ref. 11/30), however the Planning Authority consider that the works at Level 3 comprise reconfiguration of permitted cinema floor space required permission and as such fall under works considered to be retention. It is accepted that contributions have previously been paid in respect of this area under Condition 3 of Reg. Ref. 11/30. However on strict interpretation of the development contribution scheme in place, the Planning Authority consider that retention levies apply.'

- In my opinion the payment of a '*development contribution*' in regard to the *Level 3 works* the subject of the present planning application – which *Level 3 works* comprise '*reconfiguration of permitted cinema floorspace*' and where '*it is accepted that contributions have previously been paid in respect of this area under Condition 3 of Reg. Ref. 11/30*' – would in effect constitute '*double charging*' in contravention of the relevant '*Development Contributions – Guidelines for Planning Authorities 2013*'.
- Accordingly I recommend that Condition No. 2 be AMENDED as requested in the First Party Appeal Grounds such that the *development contribution payable* is only in regard to the *Level 2 Change of Use (265 square metres)* and not to *Level 3 – Reconfiguration of cinema foyer area (231 square metres)*.

## 10. CONCLUSIONS AND RECOMMENDATION

In the Development Management Guidelines for Planning Authorities published in June, 2007 by the Department of the Environment, Heritage and Local Government, Section 8.11 '*Appeals against conditions*' states that '*in appeals relating to section 48/section 49 financial contributions conditions only, the Board is restricted to consideration of the matters under appeal only*'. As such this appeal is limited to the consideration of Condition No. 2 only in the notification of decision of the Planning Authority.

## DECISION

The Board, in accordance with section 48 of the Planning and Development Act, 2000, as amended by section 30 of the Planning and Development Act, 2010, considered, based on the reasons and considerations set out below, that the terms of the Development Contribution Scheme for the area had not been properly applied in respect of condition number 2 and directs the said Council under subsection (10)(b) of section 48 of the 2000 Act, to AMEND condition number 2 and the reason therefor.

## REASONS AND CONSIDERATIONS

The payment of a 'development contribution' in respect of the Level 3 works at the Arc Cinema, Drogheda which comprise *'reconfiguration of permitted cinema floorspace'* where *contributions have previously been paid in respect of this area under Condition 3 of Reg. Ref. 11/30*, would in effect constitute *'double charging'* in contravention of the relevant *'Development Contributions – Guidelines for Planning Authorities'* published by the Department of Environment, Community and Local Government in January, 2013.

The *Drogheda Development Contribution Scheme 2010-2014* provides under Table 3 – 'Reduced Contributions' that '1. Reductions will not apply to Retention Applications.' However it is considered that as the proposed development at Level 3 relates only to reconfiguration of the cinema foyer area (231 square metres) and does not include a change of use at Level 3 as proposed at Level 2 (area 265 square metres), and as in this case a development contribution has already been paid in relation to the said area at Level 3 as permitted under planning register reference number 11/510030, that as such a development contribution is not payable in respect of the Level 3 works. Having regard to the stated provisions in the *Development Contributions – Guidelines for Planning Authorities 2013* including relating to *'double charging'*, the Board, therefore, considered that the terms of the Development Contribution Scheme have not been properly applied, and that condition number 2 should be AMENDED as set out hereunder.

## **Condition No. 2**

The developer shall pay to the planning authority a financial contribution of €19,400.65 (nineteen thousand four hundred euro and sixty five cent) in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000. The contribution shall be paid prior to the commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. The application of any indexation required by this condition shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to the Board to determine.

**Reason:** It is a requirement of the Planning and Development Act 2000 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.

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**DERMOT KELLY**  
**SENIOR PLANNING INSPECTOR**

**16<sup>th</sup> May, 2016.**

**sg**

- APPENDICES - DEVELOPMENT CONTRIBUTIONS – GUIDELINES FOR PLANNING AUTHORITIES – JANUARY 2013 – *Extract*
- DROGHEDA DEVELOPMENT CONTRIBUTION SCHEME 2010-2014