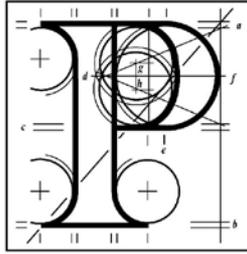


# An Bord Pleanála



## Inspector's Report

**Development:** Minor amendments to a mixed used development permitted under application reg. no. 4071/09 and previously amended under permitted application reg. no. 2270/15 on a 0.4223 hectare site at 1 – 4 Windmill Lane, 1 – 3 Hanover Street East and 19 & 20 Creighton Street, Dublin 2.

### Application

Planning authority: Dublin City Council

Planning application reg. no. 4186/15

Applicants: Hibernia REIT Holding Co. Ltd. & Trinity General Two Ltd.

Type of application: Permission

Planning authority's decision: Grant, subject to 13 conditions

### Appeal

Appellants: Hibernia REIT Holding Co. Ltd. & Trinity General Two Ltd.

Type of appeal: Section 49

Observers: None

Site inspection: 2<sup>nd</sup> June 2016

Inspector: Hugh D. Morrison

## Proposal

Hibernia REIT Holding Company Limited and Trinity General Two Limited, intend to apply for planning permission for minor amendments to Reg. Ref: 4071/09 (as previously amended under Reg. Ref: 2270/15) for a mixed use development at a 0.4223 hectare site at 1-4 Windmill Lane, 1-3 Hanover Street East and Nos 19-20 Creighton Street, Dublin 2.

The proposed amendments to the permitted development comprise of the following:

- Amendments to entrance canopy and glazed facade to foyer at Windmill Lane and Creighton Street;
- Provision of 1 no. non-illuminated sign on the entrance canopy to Windmill Lane; Provision of service access doors to foyer at Windmill Lane;
- Provision of service access/fire escape doors to foyer at Creighton Street;
- Amendment to facade materials to the office element of the permitted development, including omission of louvred panels and revisions to solid to void ratio;
- Retain original door to No. 19 Creighton Street (previously permitted to be removed under Reg. Ref: 4071/09);
- Provision of a fire escape door and internal fire escape corridor to the south of No. 19 Creighton Street;
- Amendments to retail elevations to Creighton Street and Hanover Street East incorporating glazed brickwork, timber framed shopfront glazing with timber infill panels and re-positioned doors;
- Modifications to apartments adjacent to No. 19 Creighton Street at 2nd to 4th floor level comprising of reduction in area to align with 1st floor below;
- Minor reconfiguration of residential staircores and internal apartment layouts; Amendments to the type, location, and number of windows to the residential element to Creighton Street, Hanover Street East and internal courtyard elevations;
- Minor amendments to central core layout in office element;
- Provision of brick to courtyard elevations of apartments in lieu of zinc cladding from 1st and 3rd floor;
- Repositioning of doors to 4th floor level terrace of office element;
- Provision of louvred aluminium screen to rooftop plant enclosure in lieu of stainless steel mesh;

- Extension of glazing at 4th and 5th floors to north east and south east corners of office element;
- Addition of rooflight to No.19 Creighton Street;
- Amendment to configuration of rooflight to foyer adjacent to No. 19 Creighton Street.

The proposed amendments result in a minor decrease in the gross office floorspace of the development of 71sq.m from 14,127sq.m of office space to 14,056sq.m of office space.

### **Planning authority's decision**

The planning authority granted permission subject to 13 conditions, the third of which requires the developer to pay the sum of €534,128 as a contribution under the Luas C1 Line Scheme, i.e. 14,056 sq m x €38 per sq m of commercial floorspace.

The reason for this condition is as follows: It is considered reasonable that the payment of a development contribution in respect of the public infrastructure and facilities benefiting development in the Luas C1 Line Area as provided for under the Supplementary Development Contribution Scheme (SDCS) be made for the area of the proposed development under Section 49 of the Planning and Development Act, 2000 – 2015.

### **Grounds of appeal**

The planning authority in attaching condition 3 did not properly apply the SDCS for the Luas C1 Line (cf. Section 49(3) of the Planning and Development Act, 2000 – 2015, hereafter referred to as the Act). In this respect the following points are of relevance:

- The proposal would not benefit from the Luas C1 Line (cf. Section 49(3A) of the Act).
- The proposal would entail a small reduction rather than any increase in floorspace.
- Condition 3 would in effect retrospectively impose a Supplementary Development Contribution (SDC) on a parent permission granted on 20<sup>th</sup> April 2011, which predates the subject SDCS that was adopted on 2<sup>nd</sup> September 2013. This Scheme does not apply retrospectively and so for the planning authority to do so now is inequitable and unreasonable.
- The parent permission has begun to be implemented and indeed it could be implemented in its entirety without recourse to the current proposal. Under such a scenario, the required SDC would not impinge.

- That said the current proposal is typical of minor amending proposals that arise when large projects become the subject of more detailed design exercises. To encumber such proposals with wholly new SDCs is clearly unreasonable.
- The basis for the subject SDCS's SDCs is the land within the catchment area that has potential for either development or redevelopment. Such land necessarily must exclude existing operational development or sites, such as the appeal one, with extant permissions. To do otherwise would risk a shortfall in contributions, as not all extant permissions would be the subject of amending applications.
- Precedent for the applicant's case is afforded by the Board's decision on PL16.241088, wherein a condition requiring payment of a Section 48 development contribution was removed, as it was deemed to be unreasonable to attach the same to a permission that did not pertain to any increase in floorspace but only to an increase in the number of children that could use an existing crèche.

### **Response**

No response has been received from the planning authority to date. A Section 132 notice was forwarded to the planning authority with a response deadline of 9<sup>th</sup> May 2016.

### **Planning history**

- Application 4071/09 and appeal PL29S.237295

Demolition of existing warehouse buildings, retention of No. 19 Creighton Street and the construction of a mixed use development consisting of 4 – 6 storey office building, including setback penthouse levels with roof terraces at third floor level, ground floor café and associated roof top plant, a 4 – 5 storey residential building with a retail space at ground floor level and residential development at upper floors around a raised first floor landscaped court yard providing 15 residential units, and an ESB sub-station and all associated works.

Permission was granted subject to 24 conditions on 20<sup>th</sup> April 2011. The twenty-fourth required an unspecified financial contribution to be made towards Metro North only under Section 49 of the Planning and Development Act, 2000 – 2015.

- Application 2270/15 to amend the aforementioned parent permission was granted permission subject to 12 conditions on 20<sup>th</sup> April 2015. The third required payment of €5586 to be made towards the Luas C1 Line Scheme under Section 49 of the aforementioned Act. This figure arose from the proposed addition of 149 sq m, which was the subject of a SDC that was levied at the rate of €38 per sq m.
- Application 3055/15 and appeal PL29S.245667 to amend the aforementioned parent permission was granted permission subject to 4 conditions on 8<sup>th</sup> February 2016. No increase in floorspace was proposed.
- Application 2686/16 to amend the aforementioned parent permission: decision is awaited.

### **Supplementary Development Contribution Scheme**

The subject Supplementary Development Contribution Scheme (SDCS) is entitled the “Luas Red Line Docklands Extension (Luas C1)”. This SDCS was made under Section 49 of the Planning and Development Act, 2000 – 2015, on 2<sup>nd</sup> September 2013 and it cites Policies SI1, SI3 & SI4 of the Dublin City Development Plan 2011 – 2017 (CDP) by way of justification for the same.

### **Assessment**

1. Under Sections 48(10)(b) and 49(3) of the Act, an applicant can appeal to the Board a SDC condition that has been attached to a permission on the basis that in attaching such a condition a planning authority did not properly apply the relevant SDCS. Under Section 48(13) of the Act, such a condition can be reviewed in isolation from the planning authority’s decision as a whole.
2. The applicant in this case contends that the planning authority did not properly apply the subject SDCS as the proposal in question simply amends the parent permission for the site in a manner that would not lead to the provision of any additional floorspace but rather a slight reduction in the same. Furthermore, as the parent permission was granted before the SDCS was adopted, it was not the subject of a SDC condition attached under this Scheme and the Scheme itself is not one that can now be applied retrospectively. In this respect, it states explicitly, under Section 16 entitled the “Administration of Levy”, that “The scheme will apply from the date it is made until the 25<sup>th</sup> anniversary of that date.”
3. The applicant seeks to support their case by citing the Board’s decision on PL16.241088, wherein a development contribution scheme was removed from the draft permission for an application that simply proposed an increase in the intensity of use of an existing crèche without the addition of extra floorspace.
4. The planning authority has not responded to the applicant’s case.

5. I note from the above summarised planning history of the appeal site that the planning authority has previously determined one other amending application and the Board has determined another one. The former application reg. no. 2270/15 entailed a slight increase in floorspace and so this floorspace alone was the subject of a SDC condition under the subject SDCS. The latter application reg. no. 3055/15 and appeal ref. no. PL29S.245667 did not entail any increase in floorspace and so it was not the subject of a SDC condition under this SDCS.
6. I note, too, that the planning authority's approach in determining the current application departs from that which it and the Board has previously adopted. In the absence of any commentary from the authority, any explanation for this apparent inconsistency is not available for evaluation.
7. I have reviewed the subject SDCS and I concur with the applicant that it was adopted after the parent permission was granted. Section 12 of this SDCS is entitled "Reductions" and Item (a) states the following:

*Where development contributions under a Section 49 Scheme or the Dublin Docklands Development Authority Luas Levy were paid in respect of the former development, the contribution payable on the new proposal will be net of the quantum of development previously paid for...*

Section 17 of the SDCS is entitled "Areas of overlap with other Section 49 SDCSs" and it states the following:

*Where the area of this Scheme overlaps with another Section 49 SDCS in respect of a Luas or Metro railway, any development within such area of overlap shall only be charged a levy under the provisions of the this Scheme.*

8. The parent permission in question was granted subject to a Metro North SDC condition. The applicant has not indicated whether or not this condition has been complied with, although I am aware that SDCs for Metro North have not been gathered under such conditions for some time now.
9. The interpretation of Item (a) of Section 12 hinges on how the terms "former development" and "new proposal" are understood. I take the view that two separate developments are in view, i.e. a redevelopment scenario, wherein an earlier development that was the subject of a SDC is proposed to be replaced by a new one. In these circumstances, any further SDC is to be calculated net of that which has already been paid.
10. If my interpretation is accepted, then Item (a) of Section 12 is not applicable to the current proposal as there is no evidence of previous payment before me and the current proposal is only to amend an existing proposal that is presently under construction.

11. I have reviewed the remainder of the subject SDCS and I cannot identify within it any other provisions that would empower the planning authority to act in the retrospective manner that it has done in attaching condition 3.
12. Under Section 49(3A) of the Act, an applicant can also appeal to the Board a SDC condition that has been attached to a draft permission on the basis that the proposal would not benefit from the service or project that is the subject of the subject SDSC.
13. The applicant contends that the proposal would not benefit from the Luas C Line. No argument or evidence is advanced to support this contention.
14. Given that the current proposal seeks to amend the parent permission, I consider that it should be viewed as being subsumed within the existing proposal for the purpose of addressing Section 49(3A) of the Act. The site of the proposal is within the 800m band that stretches southwards from the Luas C Line across the River Liffey. Links between this site and the nearest Luas stop at George's Dock are facilitated by both the Samuel Beckett Bridge to the east and the Sean O'Casey Bridge to the west across. Given this high level of connectivity, I do not accept the applicant's contention that the proposal would not benefit from the Luas C Line.

### **Conclusion**

In the light of my assessment, I conclude that the planning authority has not properly applied the subject SDCS, in attaching condition 3 to the draft permission granted to application reg. no. 4186/15. I also conclude that the proposal would benefit from the Luas C Line.

### **Recommendation**

I recommend that the planning authority be directed to remove condition 3 from the permission granted to application reg. no. 4186/15.

### **Reasons and considerations**

It is considered that, under the Supplementary Development Contribution Scheme for the Luas Red Line Docklands Extension (Luas C1), there are no provisions that empower the planning authority to levy a supplementary development contribution retrospectively on a proposal for minor amendments, which would not entail the provision of any additional floorspace, to an existing proposal that was granted permission before the said Scheme was adopted. Accordingly, condition 3 attached to the permission granted to application reg. no. 4186/15, which would require the payment of such a supplementary development contribution, should be removed.

Hugh D. Morrison

Inspector

2<sup>nd</sup> June 2016