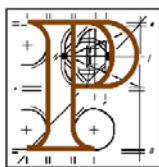


An Bord Pleanála



Inspector's Report

Appeal Reference No: PL 09.246355

Development: Demolition of existing store building and construction of new stores building.
Great Connell, Newbridge, Co. Kildare.

Planning Application

Planning Authority: Kildare County Council

Planning Authority Reg. Ref.: 16/20

Applicant: Ballyfarm Limited

Planning Authority Decision: Grant Permission

Planning Appeal

Appellant(s): Ballyfarm Limited

Type of Appeal: First Party v Financial Contribution Condition

Observers: None on File

Date of Site Inspection: 6th July 2016

Inspector: Sarah Moran

1.0 SITE LOCATION AND DESCRIPTION

1.1 The site is located on the north eastern side of Newbridge, Co. Kildare, in an area with a mix of land uses including industrial, residential and open agricultural lands. It is accessed via local road off the R445. There is a Lidl distribution centre and a Pfizer plant nearby to the north east and residential areas to the northwest. The site is within an existing premises occupied by Murphy International Ltd., building contractors. The overall premises has a total stated area of 2.73 ha. There is a large, 2 storey office building and associated car park facing the road frontage and 3 no. sheds to the rear with a yard used to store vehicles and building machinery. There is an apparently unoccupied 2 storey house at the eastern end of the overall site, which has a separate vehicular access.

2.0 PROPOSED DEVELOPMENT

2.1 The development involves the demolition of an existing store building (stated area 484 sq.m.) and the construction of a new store building with a stated area of 436.6 sq.m. Both the existing and proposed structures are located on the eastern side of the site. The proposed new building is located 40 m to the south east of the existing building to be demolished, to the rear of another existing building. The proposed structure is to be used for the general storage of building materials and space parts, WC, welding rod store, paint store, office, tool store and PPE lock up. The development is to connect to the existing public sewer and water supply.

3.0 PLANNING HISTORY

3.1 The following information on the planning history of the subject site has been gleaned from the Kildare County Council website and from the documentation provided by the Council.

3.2 97/1450

3.2.1 Permission granted to Ballyfarm Ltd. for demolition of piling shed, erection of new piling shed & its relocation, erection of metal fabrication and plant repair workshop and offices at first floor and retention of extension to existing store. Conditions 9 and 16 imposed financial contributions for services and road improvement services.

3.3 99/1828 PL09.118610

3.3.1 Permission granted to Ballyfarm Ltd. for infrastructural development to provide entrance, roads, footpaths, sewers, public lighting, watermains and other services and all other ancillary works for a 93 acre (37.7 ha) business park. The appeal was withdrawn.

3.4 01/1064 PL09.131257

3.4.1 Relating to a parcel of land to the north west of the subject site, within the same ownership as identified in the blue boundary on drawing no. PA-001 submitted with the subject application. Permission granted to Ballyfarm Ltd. for 4 light industrial / warehouse buildings consisting of 3 no. detached buildings, units 1, 2 & 3 with gross ground floor area of 9451sq.m, 1656sq.m & 2026sq.m respectively & 1 cluster building. There was a first party appeal against conditions and a third party appeal against the decision to grant. The Board granted permission subject to conditions including revised development contributions.

3.5 02/1373 PL09.205724

3.5.1 Relating to a larger area in the same ownership as the subject site. Permission granted to Ballyfarm Limited and K & D Fay for distributor road, footpaths, cycleways, grass margins, public lighting and all associated services. The decision was subject to first and third party appeals. The Board granted permission subject to revised conditions.

3.6 03/0679 PL09.203931

3.6.1 Relating to the subject site. Permission granted to Ballyfarm Ltd. leasing the site for (a) 2 storey office extension to front of the metal fabrication and plant repair workshop granted under reg. ref. 97/1450, then currently under construction (b) new single storey ESB sub-station to rear and side of the metal fabrication premises. The applicant appealed 6 no. conditions, including 3 no. financial conditions. The Board decided to remove condition no. 12 and the reason therefor and to amend conditions nos. 4, 9(a), 13, 17, 18 and 23. Permission was granted to Ballyfarm Ltd. to renew this permission under **09/169** and again under **14/39**.

3.7 05/3002

3.7.1 Relating to the subject site. Permission granted to Murphy Ireland Ltd (leasing the site from Ballyfarm Ltd) for modifications and extension to existing fitters workshop to include (a) re-cladding to match existing offices and fabrication workshop as granted under reg. ref. 03/0679, (b) modifications to facilitate overhead internal gantry crane which involves increased ridge height to 2.416 m, (c) 121.48 sq.m. extension to fitters workshop. The structure in question is located at the eastern side of the site.

4.0 PLANNING AUTHORITY DECISION

4.1 Planning and Technical Reports

- 4.1.1 Kildare County Council Water Services 10th February 2016. Recommend conditions. Irish Water submission to Kildare County Council 15th February 2016, no objection.
- 4.1.2 Kildare County Council Environmental Health Officer 10th February 2016. No objection subject to conditions.
- 4.1.3 Kildare County Fire Service 25th February 2016, no objection subject to conditions.
- 4.1.4 Kildare County Council Transportation Department 2nd March 2016. No objection subject to conditions.
- 4.1.5 Kildare County Council Environment Section 7th March 2016. No objection, recommends conditions.
- 4.1.6 Kildare County Council Planning Report 8th March 2016. Recommends permission subject to conditions. Attached Appropriate Assessment screening report concludes that there are no significant potential effects on designated sites and AA is not required.

4.2 Planning Authority Decision

- 4.2.1 Kildare County Council decided to grant permission on 9th March 2016, subject to 19 no. conditions. Condition no. 19 required a development contribution of €23,711.75 in accordance with the section 48 Development Contribution Scheme adopted by Kildare County Council on 5th November 2015.

5.0 GROUNDS OF FIRST PARTY APPEAL

- 5.1 The first party appeal relates solely to condition no. 19, i.e. the financial contribution required by Kildare County Council. The grounds of appeal may be summarised as follows:
- The appeal is submitted pursuant to section 48(10)(b) of the Planning and Development Act 2000, as amended, on the basis that the relevant Development Contribution Scheme has not been properly applied. As no other issues are raised, the Board is requested to limit its analysis of the case to financial matters.
 - Section 12(k) of the Kildare County Council Development Contribution Scheme 2015-2022 allows an exemption for redevelopment projects. Where the development includes replacing existing development, the

relevant contribution charge will be applied to the additional floor area per sq.m.

- The schedule of development contributions on file does not take into account the fact that the development involves the demolition of an existing structure as well as the erection of a new building.
- The appeal refers to ABP case ref. PL09.222386, also involving the demolition of an existing building, where the Board took account of existing floorspace and placed great weight on the need for a nexus between new proposals and the additional demands for services when calculating an appropriate levy. The appeal also refers to previous Board decisions, ref. PL78.223484, PL16.228466, PL06S.218902, PL09.216074, PL09.216199, PL09.221374.
- The proposed development involves only replacement floorspace and therefore should be subject to the exemption provided under section 12(k) of the Development Contribution Scheme. No levy is due as there is no increase in the quantum of development.
- The appellant is aware that the Council believes that section 12(k) is subject to a stipulation that any previous payment that may have been required in respect of permitted floorspace which is now to be removed, must first have been paid. The PA response to the appeal may erroneously identify reg. ref. 01/1064 as being the original permission governing the structure to be removed and may suggest that, as the levy attached thereto was not paid, the appellant should not now benefit from section 12(k) of the Scheme. The applicant cannot identify any drawing on this application relating to the structure which is now proposed for removal and submits that this consent was never implemented.
- It is not open to the PA to read additional requirements into the Development Contribution Scheme document, which are not explicitly stated in same. The appeal refers to the High Court Case 'Cork City Council v An Bord Pleanála', which ruled that An Bord Pleanála was statutorily bound to apply the actual text of the particular contribution scheme as it had been adopted and further concluded that it was not lawfully open to the Board to indirectly vary its provisions.
- With regard to Cork City Council v An Bord Pleanála, authorities calculating a levy must apply the terms of the scheme in the precise manner set out in its text and cannot re-write the document because it is convenient to do so. Extraneous issues such as the payment of development contributions on previous permissions cannot lawfully be considered by the Board.

6.0 PLANNING AUTHORITY RESPONSE TO APPEAL

6.1 The main points made may be summarised as follows:

- The subject application 16/20 was reviewed prior to calculation of the levy to determine the history of the existing store building which is to be demolished, with specific consideration to the following:

- a) Had the existing store building to be demolished the benefit of a previous grant of permission, if so;
- b) Had levies been applied to the development under the previous permission and if so,
- c) Had the levies been paid in full.
- The PA reviewed all valid applications made at the subject site. The only application permitting warehousing / industrial buildings at the site is reg. ref. 01/1064. Levies applied to same are outstanding in full.
- A condition of the exemption applied under section 12(k) of the Scheme requires any levies applied previously to the area subject to redevelopment to be paid in full. The policy of the PA in the instance that levies applied previously remain outstanding is to apply the levy to the superseding permission.
- The PA invited the appellant to advise if the structure differed from the permission of 01/1064. It also advised the appellant that the permissions stated on the application form did not relate to the area of redevelopment and invited the appellant to provide an alternative planning reference in the case that the structure was permitted under another permission. The appellant has not provided same.
- In order to prevent any 'double charging', the levy applied to the related floor area under the previous permission would be restructured to €0.00 upon evidence of commencement of the development permitted under the superseding permission. Thus the levy on the larger development would no longer be payable. In the case that the developer does not take up the superseding permission, a site inspection would be carried out upon the expiration of said permission to confirm that development did not take place and the levy applied to same would be reduced to €0.00.
- The PA confirms that both the demolition and the proposed new development were considered in detail and formed the basis of the levy calculation. Had the structure to be demolished the benefit of a previous grant of permission with applicable levies discharged in full, the PA would not have applied a levy in this case as there is no additional floor area.
- If the levy is removed from the subject development, then a leviable development has taken place without having made a contribution.
- The appeal refers to ABP case PL09.216199. In that case, the Board determined that the contribution should only be applied to the additional floor area as the applicants have paid development contributions for the existing floor area in full. The Board's direction in that case replicates the methodology used by the PA in applying levies to the subject application.
- The PA considers it reasonable that a development without the benefit of planning permission or a permitted development whereby levies remain outstanding does not qualify for the exemption provided under 12(k) of the Development Contribution Scheme.

7.0 POLICY CONTEXT

7.1 Newbridge Local Area Plan 2013-2019

7.1.1 The site has the zoning objective 'H: Industry and Warehousing' under the current LAP, with the objective "To provide for and improve industrial and warehousing development".

8.0 ASSESSMENT

8.1 The only issue under review in this appeal is the issue of financial contributions under section 48 of the Planning and Development Act 2000 (as amended). Section 48(10) of the Act provides that an applicant can only appeal a condition requiring a development contribution in accordance with a development contribution scheme where the applicant considers that the scheme has not been properly applied. Therefore, the Board's sole remit is not to adjudicate on the merits of the scheme but to consider whether it has been properly applied. Section 48(10)(c) provides:

Notwithstanding section 34(11), where an appeal is brought in accordance with paragraph (b), and no other appeal of the decision of a 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.

I therefore intend to assess the relevant issues as follows:

- PA calculation of development contributions under the Kildare County Council Development Contribution Scheme 2011-2018;
- Relevant appeal cases;
- Relevant case law;
- Assessment of applicant's case;
- Conclusion.

8.2 Planning Authority Calculation of Development Contributions

8.2.1 Condition no. 19 of the subject permission states the following:

The applicant / developer to pay to Kildare County Council the sum of €23,711.75 being the appropriate contribution to be applied to this development in accordance with the Development Contribution Scheme adopted by Kildare County Council on 5th November 2015 in accordance with section 48 of the Planning and Development Act 2000 as amended.

Payments of contributions are strictly in accordance with Section 13 of the Development Contribution Scheme adopted by Kildare County Council on 5th November 2015.

Note: Please note water and wastewater development contribution charges now form part of the water connection agreement, if applicable, with Irish Water.

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

8.2.2 Section 8(iii) of the scheme sets out the following development contributions for 'Commercial development including warehousing / industrial and commercial extensions':

Gross Floor Area	0 – 250 sq.m.	251 - 3,000 sq.m.	> 3,000 sq.m.
Rate per sq.m. €	43.46	54.31	61.55

Section 12(k) relates to redevelopment projects and states:

Where permission is granted for the redevelopment of a project which includes replacing existing development, the relevant contribution charge will be applied to the additional floor sq.m. i.e. residential (using the extension rates), commercial, retail, etc.

8.2.3 The permitted development involves:

- Demolition of an existing store building with an area of 484.0 sq.m.;
- Construction of a new stores building with an area of 436.6 sq.m. and an overall height of 9.266 sq.m.;
- Associated site development works.

There is a memorandum attached to the Kildare County Council planning report on file, dated 9th March 2016, which sets out the basis for the calculation of development contributions. The development of 436.6 sq.m. was charged at the commercial rate of €54.31 per sq.m. for developments with a floor area between 251-3,000 sq.m., resulting in a total contribution of €23,711.75.

8.3 Relevant Appeal Cases

8.3.1 The following appeal cases have been cited by the applicant in the grounds of appeal.

8.3.2 PL16.228466 Dalton Street, Claremorris, Co. Mayo

Relating to the demolition of an existing building and the construction of a new building containing a commercial/ retail unit and 2 no. office units. The applicant appealed a special development contribution towards the upgrading

of Claremorris Sewerage Scheme and a second special development contribution for the provision of car parking. The Board decided to delete both special contributions. It considered that the special contribution for upgrading of the Claremorris Sewerage Scheme did not accord with the provisions of Section 48(2)(c) as it did not constitute a specific exceptional cost in relation to the particular development. The element of the contribution sought applied to a wide geographical area, as part of the Water Services Assessment of Needs for County Mayo and would more properly be dealt with through a revised development contribution scheme. With regard to the special development contribution in relation to car parking, the Board considered that details of the nature and scope of works and the associated costs together with the basis of calculations as to how such exceptional costs were to be apportioned to the proposed development had not been furnished and therefore the condition also did not accord with the provisions of Section 48(2)(c). This appeal is not considered to be directly analogous to the subject case.

8.3.3 PL09.222386 Gormanstown, Kilcullen, Co. Kildare

Relating to retention permission for existing house and garage, construction of extension and stable block. Permission had already been granted for a bungalow at the site, the case related to changes to the permitted development. All relevant levies had been paid on the permitted dwelling and there were limited differences between constructed development and that permitted. The Board considered that the retention element did not fall within the terms of the development contribution scheme and did not require a development contribution. However, the Board noted that the stables were a new and separate development and did fall within the terms of the scheme, therefore the relevant development contribution was charged. This case is not considered to be directly analogous to the subject case.

8.3.4 PL78.223484 Main Street, Templemore, Co. Tipperary

Relating to the demolition of store rooms to the rear of a retail unit, extension of same and change of use from residential to office at first floor level. The Board considered that the terms of the North Tipperary County Council Development Contributions Scheme had not been properly applied in that (a) the additional floor area was incorrectly calculated and (b) the residential unit was incorrectly included (one unit already existed on site). The Board amended the development contributions charged accordingly. I note that the issue of outstanding development levies on the existing structure did not arise. The case is not considered to be directly analogous to the subject case.

8.3.5 PL06S.218902 Belgard Inn, Cookstown Road, Tallaght, Dublin 24

Regarding the demolition of the existing Belgard Inn to basement level and the construction of retail units, relocated public house, relocated betting office,

restaurants, crèche, 100 apartments, car parking spaces, off-street bus/taxi pick-up area, new access road, partial change of use of 50% of the existing 240 car space below ground carpark previously approved under reg. ref. S98A/0445 from park and ride to commercial car park, retention and completion of a basement level car park deck below the existing multi-storey car park. The appeal requested that allowance should be made for (a) substantial payments made in connection with development applications on the site over the past 25 years; (b) contributions previously paid in respect of footpaths and carparking under reg. ref. 98/445; (c) the existing uses on the site and the multiple use of the carpark and (d) the floor area of the existing building, the Belgard Inn, to be demolished. The relevant development contributions scheme did not include any allowances for contributions previously paid in respect of any prior grant of planning permission for development on an application site. The development contributions imposed did not require any amount payable for the existing floor area to be retained and included a deduction from the commercial floor area, allowing for the floor areas to be demolished. The Board concluded that the PA had correctly applied the scheme but amended the relevant conditions to allow for an agreement between the developer and the PA for phasing of payment. This case is not considered to be directly analogous to the subject case.

8.3.6 PL09.2160174 Claregate Street, Kildare, Co. Kildare

Relating to the partial demolition of a shop and house and the construction of a building with a shop/office on the ground floor, office and apartment at first floor level. Permission had already been granted for a similar development under reg. ref. 02/2204, however there was some variation from the permitted development and an issue had arisen regarding compliance with archaeological assessment requirements of 02/2204. The relevant financial contribution under 02/2204 had been paid. The Board decided that contribution already paid should be deducted from the total contribution due under the development contribution scheme. The case is not considered to be directly analogous to the subject case.

8.3.7 PL09.216199 Johnstown, Naas, Co. Kildare

Relating to alterations of existing layout of recreational facility (previous permission 02/1408), increase car parking. The Board decided to amend the relevant development contribution conditions. Further details are unavailable.

8.3.8 PL09.221374 Main Street, Monasterevin, Co. Kildare

Relating to a change of use from shop unit to coffee shop, within a larger mixed use scheme permitted under reg. ref. 03/2711. On appeal, the PA accepted that the relevant development contribution condition could not be imposed and that an allowance could be made for any development contributions already paid in respect of a development, despite a lack of any

specific provision for this in the development contribution scheme. The contributions for the parent application had been paid in full. The Board directed the PA to remove the financial contribution condition accordingly. The case is not considered to be directly analogous to the subject case.

8.4 Relevant Case Law

- 8.4.1 The appeal refers to the High Court case 'Cork City Council and An Bord Pleanála and O'Flynn Construction Limited'. The Council sought judicial review to quash a Board decision to reduce from €4,316,208 to €2,606,048 the amount payable by the developer to the council pursuant to a condition of a planning permission granted by it on 6th July, 2005, ref. PL28.213361. The relevant judgement notes:

It is clear that the function of the board in an appeal under s. 48(10) is extremely limited. It has no entitlement to consider or review the merits of the scheme under which the contribution is required. Its remit is confined solely to the question of whether or not the terms of the relevant scheme have been properly applied.

Also:

Whilst they may very well be correct to say that the scheme is contrary to land use efficiency and sustainable development interests, such a view has no part to play in the statutory function being undertaken by the board under s. 48(10)(b) of the Act. Its sole task is to consider whether the terms of the scheme have or have not been properly applied in respect of any condition laid down by the planning authority.

And:

I am of the view that the exercise engaged in by the board as demonstrated from the inspectors report and the board's decision was not that prescribed under s. 48(10)(b) of the Act but amounted to a rewriting of the GDC Scheme to include in it provisions which were not there ... I am of the view that in reaching its decision the board misinterpreted the scheme, misapplied its functions and was wrong in law in so doing.

The Board decision was quashed on this basis.

8.5 Assessment of Applicant's Case

- 8.5.1 I note that the permission granted under 01/1064 PL09.131257 does not include any specific structures at the subject site. I have examined the current County Kildare Development Contribution Scheme 2015-2022. As discussed

above, section 12(k) of the scheme specifically provides for an exemption in cases where a building will replace an existing structure. I am satisfied that the exemption applies in this case. While I note the stated policy of Kildare County Council regarding outstanding development contributions in such cases, I can confirm there is no specific provision for such a situation in the scheme. I note that section 9(b)(iii), relating to retention applications, states that where development contributions have not previously been paid, contributions on such applications will be applied based on the proposed floor area of the permitted development. Section 9(b)(iv) relates to applications to retain an extended area to that previously granted. In such cases, contributions are to be applied to the permitted extended floor area only, "where contributions have previously been paid in full". Section 12(d) provides an exemption in cases of replacement buildings constructed on the same footprint as the original structure following extensive accidental damage in the instance of subsidence, fire or flood. It specifies that contributions applied to previous conditions must be paid in full. However those provisions are not relevant to the current case. I therefore conclude that the scheme has been incorrectly applied in this case and that condition no. 19 should be omitted.

9.0 CONCLUSION AND RECOMMENDATION

In light of the above assessment, I recommend that the Board should direct the Council under section 48(10)(b) of the Act to remove condition no. 19 for the reasons and considerations set out below.

REASONS AND CONSIDERATIONS

The Board decided that the terms of the Kildare County Council Development Contribution Scheme 2015-2022 had not been properly applied in respect of condition number 19. Section 12(k) of the Scheme, relating to projects replacing existing development, provides that the relevant contribution charge will be applied to the additional floor area per square metre. The floor area of the subject development is less than the structure to be replaced. Under section 48(10)(b) of the Planning and Development Act 2000, the statutory function of the Board is limited to consideration of whether the terms of the Development Contribution Scheme have or have not been properly applied in respect of any condition laid down by the planning authority. In this case, the terms of the Scheme do not include any provision regarding outstanding development contributions for development already permitted at the site.

**Sarah Moran,
Senior Planning Inspector
12th July 2016**