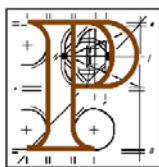


An Bord Pleanála



Inspector's Report

Appeal Reference No: PL09.246482

Development: Demolition of an existing house and construction of a new house and retention of existing single storey building with all associated site works.
Mill Lane, Sallins Road, Naas, Co. Kildare.

Planning Application

Planning Authority: Kildare County Council
Planning Authority Reg. Ref.: 15/1011
Applicant: Adeline Molloy & David Muldoon
Planning Authority Decision: Grant Permission

Planning Appeal

Appellant(s): Adeline Molloy & David Muldoon
Type of Appeal: First Party v Development Contribution Condition
Observers: None on file
Date of Site Inspection: Not inspected.

Inspector: Sarah Moran

1.0 SITE LOCATION AND DESCRIPTION

1.1 The site is located on Sallins Road on the northern side of Naas, Co. Kildare. It is within the built up area of the town, c. 1.5 km from the town centre and is accessed from Mill Lane, off the Sallins Road. Old Town Demesne lies on the opposite side of the road, north of the subject site. The stated total site area is 0.347 ha. The site is occupied by an existing 1970s bungalow, 'Mill Lane House', along with various associated outbuildings. The documentation on file indicates that the existing house previously functioned as a Bed and Breakfast. The site is adjoined by residential properties within the Millwood estate to the east and by the grounds of the Mill House Manor Nursing Home to the south west. There are agricultural lands to the immediate east.

2.0 PROPOSED DEVELOPMENT

2.1 The proposed development comprises the following:

- Demolition of existing dormer bungalow at the site, stated total floor area 341.5 sq.m., also associated outbuildings.
- Construction of a detached 2 storey house, stated total floor area 385 sq.m.
- Retention of existing single storey building at the south western corner of the site, to the rear of the existing house, stated floor area 105.2 sq.m. The building is currently laid out internally as 3 no. separate residential units. It is to be converted into a games room, garden store and fuel store, along with changes to the external elevations.
- Conversion of an existing small building at the eastern side of the site into a plant room.
- Development to connect to existing public water supply and sewer.
- Landscaping, drainage and associated site works.

2.2 The applicant submitted further information to the PA on 10th March 2016 comprising additional surface water drainage details; revised design for vehicular entrance and confirmation that an existing wooden cabin in the front garden is to be demolished.

3.0 PLANNING HISTORY

3.1 There is no recent planning history on file in relation to the subject site.

3.2 Permission was originally granted to Thomas McDermott for a bungalow and septic tank at the site under reg. ref. 78/1263. The historic documents submitted by the PA for 78/1263 indicate that the structure had a total floor area of 80.82 sq.m.

3.3 File ref. 80/1308 granted permission to T.P. McDermott for a single storey wooden chalet on the site (37.16 sq.m.), to the west of the permitted

- bungalow. Condition no. 2 limited the permission for the chalet to 7 years duration.
- 3.4 Under 92/172, the PA granted retention permission to Thomas McDermott for a revised dormer bungalow and chalet at the site. The historic documentation submitted by the PA indicates that the permitted house had a floor area of 91.97 sq.m. and the chalet 32.6 sq.m.
- 3.5 Under 92/927, W. Mather was granted permission for retention and completion of alterations to the house and relocation of new septic tank. The site layout indicates that the house and chalet had generally the same locations within the site as those permitted under 80/1308. The application form on file states a total area of 182 sq.m., it is unclear whether this relates to the house only or to the combined area of both structures.
- 3.6 Reg. ref. 95/500063 relates to the single storey structure at the south western corner of the site, which is now to be converted into a games room, etc. There is no record of any other planning history relating to this structure. W. Mather sought permission to convert an existing garage into a dwelling unit (75 sq.m.) and to construct a new garage (30.6 sq.m.). The PA refused permission on grounds relating to overdevelopment of the site, undesirable precedent, substandard development and public health hazard.

4.0 PLANNING AUTHORITY DECISION

4.1 Planning and Technical Reports

- 4.1.1 Kildare County Council Roads, Transportation and Public Safety Department 30th November 2015. No objection subject to conditions.
- 4.1.2 Kildare County Council Environmental Health Officer 30th November 2015. No objection.
- 4.1.3 Kildare County Council Naas Area Engineer 11th December 2015. Requires further information. Second report 15th March on foot of further information submission recommends conditions.
- 4.1.4 Kildare County Council Water Services 8th December 2015. Recommends conditions. Irish Water submission to Kildare County Council 18th December 2015. No objection.
- 4.1.5 Kildare County Council Fire Service 6th January 2016. No objection.
- 4.1.6 Kildare County Council Environment Section 7th January 2016. No objection, recommends conditions.
- 4.1.7 Kildare County Council planning report 13th January 2016. Recommends a further information request. Attached Appropriate Assessment Screening

report concludes that effects on Natura sites are unlikely and AA is not required. Second planning report dated 16th March 2016, prepared in response to the further information submission, recommends permission subject to conditions.

4.2 Third Party Submissions

4.2.1 None on file.

4.3 Planning Authority Decision

4.3.1 The PA sought further information on 18th January 2016 in relation to surface water drainage details; visibility at vehicular entrance and use of existing wooden cabin in front of the building. The PA issued a notification of a decision to grant permission on 5th April 2016, subject to 27 no. conditions.

5.0 GROUNDS OF FIRST PARTY APPEAL

5.1 The first party appeal relates solely to condition no. 27, which requires a development contribution of €27,093.75 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). The main points made in the grounds of appeal may be summarised as follows:

- The appeal is submitted pursuant to section 48(10)(b) of the Act. It contends that condition no. 27 is outside the ambit of the Kildare County Council Development Contribution Scheme 2015 and that the scheme has not been properly applied. The Board is requested to limit its assessment of the appeal to the matter of the financial contribution only.
- The development involves the demolition of the existing house and the construction of a new house and the conversion of an existing standalone structure within the curtilage of the property to a games room, garden and fuel store and plant room.
- Sections 8(i) and (ii) of the development contribution scheme set out relevant development contributions and prescribe 4 no. rates, depending on the area involved. Section 12(k) of the scheme provides for the replacement of existing development and section 12(g) of the scheme relates to waivers in change of use permissions.
- The development contribution required under condition no. 27 has been calculated by the PA on the basis that the plans permitted for the existing house at the site under 78/1263 differ significantly from those granted under the subject permission. The levy is applied to the entire floor area of the proposed house, i.e. 385 sq.m. A levy is applied to the games room less the floor areas of the attached store room and plant room as both are exempt from the application of a levy, resulting in a floor area of 72 sq.m.
- Section 12(k) takes into account the floorspace which is to be removed from a development site in the assessment of any contribution which might fall due on a replacement building. In the case PL09.222386, which fell under the previous County Kildare Development Contribution Scheme. In that case, the Board took account of existing floorspace and placed great weight on the nexus between new proposals and the additional demands for services when calculating an appropriate levy. The appeal also refers

to several other ABP cases involving the replacement and reuse of floorspace.

- The PA comment on file states that the exemption of section 12(k) of the scheme is subject to 2 conditions, i.e. that the building to be replaced must have been permitted and that any previous levy must have been paid in full. Section 12(k) does not explicitly state these prerequisites. It does not even require the area to be demolished to have been authorised in the first instance. It is not open to the PA to read additional requirements into the text, where the adopted document does not contain such stipulations. The High Court case *Cork City Council v An Bord Pleanála*, ruled that the Board 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.
- The PA failed to refer to additional Council decisions relating to this site. The electronic register refers to 3 no. applications, i.e. 78/1263, 80/1308 and the subject application. The original maps refer to 3 no. additional planning applications at this site, ref. 92/927, 92/172 and 95/63. The Council's records have not been properly taken into account in calculating the development contribution. The appeal submits that the historic documents are so incomplete that they are likely to be of little value and that they were not taken into account by the PA when drafting condition no. 27, even though they were recorded on the planning register.
- As the buildings to be demolished has a gross floor area of 384.2 sq.m. and the new house would accommodate 385 sq.m., the net chargeable space is 0.8 sq.m., rather than the 385 sq.m. on which the PA calculations have been based.
- The site contains a domestic outbuilding, stated area 105 sq.m., which includes a store and plant room. Section 12(k) has been applied to an area of 72 sq.m. only, which is to be used as a games area. The memorandum attached to the planning report on file appears to assume that this existing feature is chargeable as it comprises floorspace which has not previously been authorised, although it would be open to the Council to revisit this conclusion after a review of the historical files in relation to this site. The outbuilding structure would have been exempted development during the period between the original permission in 1978 and new provisions in the Local Government (Planning and Development) Regulations, 1994.
- Section 12(g) of the scheme provides that no charge would apply for a change of use unless the PA could show a particular requirement for the need for new or upgraded infrastructure / services or a significant intensification of demand placed on existing infrastructure. The use of this 75.2 sq.m. area as a games room would not place any increased demands on public infrastructure in the vicinity of the site. The application papers also sought retention of this structure but any levy in a particular case should be calculated on the basis of the adopted scheme. This is especially so given the rule in *Tallaght Block Company v Dublin County Council* has since been superseded by *William P. Keeling v Fingal County*

Council with the effect that it is now possible for an applicant to argue that permission is not needed for a particular development, even though that feature might have been included as part of a planning application.

6.0 PLANNING AUTHORITY RESPONSE TO FIRST PARTY APPEAL

6.0 The main points made may be summarised as follows:

- The development contribution of €25,068.75 is based on a charge of €65 per sq.m. for 385 sq.m. of residential development at the Band 4 residential rate plus a charge for the 75.2 sq.m. games room at the rate for miscellaneous developments.
- Paragraph 12(k) of the Kildare County Council Development Contribution Scheme 2015-2022 provides for waivers in the case of redevelopment projects. The proposed development was reviewed to consider whether the existing floor area to be replaced qualifies for the waiver with regard to the following:
 - a) Had the existing dwelling 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 previous permission on the site ref. 78/1263 refers to a bungalow that is significantly different to the plans of the existing dwelling submitted under 15/1011. In the absence of a previous related planning permission for the existing dwelling and for the purposes of applying the levy at the date of the decision to grant, the permitted gross floor area was included in the calculation.
- The PA carried out a historical planning search for the subject site. The relevant planning permissions were identified as follows:

78/1263 Permission for a bungalow measuring 80.82 sq.m. and construction of septic tank.

80/1308 Permission for erection of a chalet measuring 37.16 sq.m. at the west wing of bungalow, to be removed 7 years from the date of the order to grant unless before that date permission for its retention is granted.

92/172 Retention permission for a dormer bungalow measuring 91.97 sq.m. and chalet measuring 32.6 sq.m. Chalet not to be let, sold or otherwise conveyed or transferred save as part of the existing dwelling.

92/927 Permission for retention and completion of alterations and additions to dwelling to measure 182 sq.m.

95/50063 Permission refused for application to convert existing garage to dwelling unit and to build new garage.

15/1011 Subject permission.

- The PA has established that the area of the dwelling permitted under 92/927 is 182 sq.m. The existing dwelling differs from that granted under 92/927 by way of the following:
 - Ground floor rear kitchen extension to north west; playroom and dining room extension to north east; extensions to rear to accommodate 2 no. ensuite bathrooms.
 - First floor conversion and extension of attic storage space to habitable space. Condition no. 7 of 92/927 stipulated that the use of the first floor rooms in the house shall not be habitable accommodation.
- The single storey building to be converted into a games room is a separate building to the chalet permitted under 80/1308 and 92/927. The chalet is positioned in the same location on the site layout plans submitted with the subject application, 95/500063 and 92/927, i.e. to the right side of the dwelling while the single storey building/games room is located further back to the rear right hand side of the site. The single storey building is similar in design/size and in the same position on the site as the dwelling unit refused under 95/500063. The subject permission included the retention of the existing single storey building and its conversion into a games room/fuel store/garden store.
- The appeal refers to the possibility of the single storey building having been erected under Class 3 of Part 1 of the Third Schedule of the Planning and Development Regulations 1997. Development in accordance with Class 3, i.e. *The Construction, erection or placing within the curtilage of any tent, awning, shade or other object, greenhouse, garage, store, shed or other similar structure* are subject to conditions and limitations. Condition/limitation of Class 3 restricts the development to a total area of less than 25 sq.m., taken together with any other such structures previously constructed, erected or placed within the curtilage. The subject structure measures 105 sq.m. Condition/limitation 6 of Class 3 further restricts development such that it shall not be used for human habitation or for the keeping of pigs, poultry, pigeons, ponies or horses, or for any purpose other than a purpose incidental to the enjoyment of the house as such. The single storey building, as per the existing floor plan submitted with 15/1011, incorporates 3 kitchen areas, 5 bedrooms and 3 bathrooms.
- No levy was applied to the plant room.
- 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 within paragraph 12(k) or (g) of the development contribution scheme. If the levy is removed from 15/1011, then a leviable development has taken place without having made a contribution.

- The PA recommends that the floor area of the original permitted dwelling measuring 183 sq.m. is exempt from the application of a levy as it is covered by the previous permission reg. ref. 92/927, wherein the payment of a development contribution was not conditioned. However, the following areas of the permission should be subject to the application of a levy:
 - The attic conversion as it does not have the benefit of a previous permission and was conditioned under 92/927 not to be used as habitable accommodation;
 - The extensions as detailed above which in addition to the attic conversion are not considered to be exempt;
 - The single storey building which does not have the benefit of a previous grant of permission, is not covered by a declaration of exemption and appears similar to the building refused permission under 95/500063.
- The PA now recommends a revised levy contribution as follows:
 - Dwelling in accordance with the requirements of paragraph 12(k): Floor area of 182 sq.m. permitted under 92/927 is exempt. Proposed additional floor area of 203 sq.m. to be levied at band 2 extension rate, i.e. €50 per sq.m., resulting in a charge of €10,150.00.
 - Retention and conversion of single storey building in accordance with paragraph 12(g) change of use. Although the scheme provides for waivers of 100%, it is the policy of the PA that waivers are only granted to change of use floor areas that have the benefit of a previous grant of permission or are covered by an exemption from planning. The 75.2 floor area of the single storey detached games room is to be levied at the miscellaneous rate for built development, i.e. €27.51 per sq.m., resulting in a charge of €2,068.75.
 - Therefore the total levy to be applied is €12,218.75.
- The submission is accompanied by extracts from 15/1011, 95/5000693, 92/927, 92/172, 809/1308 and 78/1263.

7.0 ADDITIONAL COMMENT BY APPLICANT

7.1 The PA response was circulated for submissions/observations and the applicant submitted a response. The main points made may be summarised as follows:

7.2 Planning Law

- Paragraphs 12(g) and (k) of the development contribution scheme should be construed in their published form. The PA considers that new clauses that are not part of the scheme document are to be informally added to its text, i.e. that the exemptions in paragraphs 12(g) and (k) only apply where a building is lawful and where any previous contribution condition has been discharged. This is clearly not so given that the scheme, as adopted,

does not actually contain provisions to this effect. It was open to the PA to include these extra prerequisites in the scheme but it did not do so.

- The PA does not disagree that paragraphs 12(g) and (k) do not contain any such stipulations. There is no suggestion that the applicant has misunderstood the words that have been printed in the published policy. The comment again refers to the case *Cork City Council v An Bord Pleanála*, as per the original appeal. The PA submission does not suggest that this judgement has been superseded.
- The PA invites the Board to conclude that paragraphs 12(g) and (k) require the structures in question on the appeal site to be lawful in the first instance and / or that any previous contribution condition must have been complied with, in order for the relevant floorspace to be considered in the calculation of the levy. This approach is rejected for a combination of legal and practical reasons.
- As some structures to be removed might pre-date planning approval, the PA approach would effectively require landowners seeking to avail of paragraphs 12(g) or (k) to prove that established use rights still exist. The Board will appreciate that obtaining documents to prove lawfulness on 1st October 1964 is becoming more difficult with each passing decade.
- The contribution memorandum on the subject file is incomplete and failed to consider the planning history of the site. The PA only undertook a proper assessment of the planning history upon receiving notification of the appeal, subsequent to issuing a decision to grant. A similar situation arose in the course of PL09.246569, when the Council concluded that it had not undertaken enough research before imposing a levy and later confirmed that no contribution should be sought. The PA now passes blame onto the landowner, the applicant disagrees with this approach. The difficulty that arose was as a result of the PA unwillingness to properly examine its planning register. The applicant submits that, due to difficulties in obtaining planning records, it is inappropriate to place the onus on an applicant to prove the provenance of a particular structure or the fact that a previous contribution condition has been satisfied. Such a burden is disproportionate and is not contemplated in paragraph 12 of the adopted development contribution scheme and should not be supported by the Board.
- The Council comment relies on absent paperwork and proceeds on the premise that, even when documents in its possession have been lost, landowners must still be refused this exemption.

7.3 Residential Contribution

- The PA is relying on the floor area of the permission 92/927, i.e. 182 sq.m., rather than any other consent. With regard to the relevant application form on file 92/927, it remains unclear as to whether the area of 182 sq.m. related to the size of the building before the 'alterations and additions', or to the proposed alterations and additions themselves.

- There are discrepancies in the relevant drawings on file 92/927. Condition no. 1 identifies the permitted plans as those submitted to the PA on 22/7/1992 and 10/09/1992, however the drawings submitted to the Board are date stamped 14th September 1992. Much of the material presented under reg. ref. 92/927 is illegible. It is impossible for the Board to reach conclusions on the size of the development which was then permitted.
- The submission refers to ABP case no. PL09.2459654, which relied on a single planning drawing from 1977, when suggesting that a permitted house was smaller than that to be demolished.
- While condition no. 7 of 92/927 states that the permitted first floor shall not be used as habitable accommodation, these areas could lawfully be provided and could legally be used as part of the house such as storage or bathrooms and form part of the gross floor space for the purposes of calculating any levy which the Board might deem appropriate.
- With regard to the *Cork City Council* case, the permitted area of the house is an illegitimate consideration in the calculation of any development contribution, on the basis that paragraph 12(k) of the adopted scheme directs the Board to base any levy on the additional floor area and does not require or mandate the Board to question the lawfulness of the existing structure.
- Due to difficulties associated with obtaining historical papers and due to the dangers of depending on incomplete or illegible documents, problems of interpretation often arise and whilst the Council now uses such uncertainties as a lever to deny the exemption in section 12(k), the applicant does not consider this approach to be practical. Indeed, it is impossible to endorse the view that materials from reg. ref. 92/927 support the PA view that the existing house is unlawful.

7.4 Contribution for the Games Room

- The applicant now accepts that the games room does not benefit from a previous permission. However, given that section 12(k) of the scheme does not depend on the space to be removed having previously been authorised, section 12(g) is equally not subject to such a condition.
- The PA response does not explain why this provision does not apply to the outbuilding at the site and does not identify how and in what ways the use of this structure as a games room would place pressure on the public purse for new or upgraded infrastructure in this area. The PA policy that waivers are only granted to change of use floor areas that have the benefit of a previous grant of permission is at variance with the adopted scheme, which contains no such clause.
- In applying the 'miscellaneous developments' rate to this domestic games room, the PA is attempting to 'shoehorn' this structure into a use category within the scheme, simply to justify the imposition of a charge in the first place. It is submitted that the provisions in the scheme relating to miscellaneous developments seek to cover a range of activities which do

not readily fall into any remaining classes and that this rate should not apply to a games room.

- In the event that the Board considers that this 75 sq.m. area is chargeable, it should consider the provisions of section 8(ii) of the scheme, relating to residential extensions, and, having taken account of the 40 sq.m. exemption, should seek a levy of €1,750 on the basis that the remaining 35 sq.m. should be charged at a rate of €50 per sq.m.

7.5 Conclusion

- The system of development contributions now envisages that applicants should be able to calculate development contributions by applying the contribution scheme, as published. The informal introduction of new clauses into the adopted development contribution scheme is counter to the certainty contemplated in the Planning and Development Act 2000 and the dicta of the High Court in *Cork City Council v An Bord Pleanála* and should be dismissed by the Board.
- Whilst the Kildare County Council Development Contribution Scheme 2011-2015 did not contain an allowance for existing space, the 2015-2022 scheme states that only the net increase in area is chargeable and section 12 comprises an unmistakable change in policy. Notwithstanding this, there is a degree of resistance in executive level to this provision. There have been several cases where the benefit of this exemption has been denied on the basis of stipulations not contained within the text. Given the likelihood of similar cases coming forward over the lifetime of the scheme, it would be useful to achieve clarity on whether section 12 of the scheme only applies to lawful developments, or to instances where all levies have already been paid.

8.0 **POLICY CONTEXT NAAS TOWN DEVELOPMENT PLAN 2011-2017**

- 8.1 The site is located within the development boundary of the Naas Town Development Plan. It is zoned Objective B Existing / Infill Residential:

“To protect and improve existing residential amenity, to provide for appropriate infill residential development and to provide new and improved ancillary services.”

The lands to the immediate south of the site are zoned ‘E: Community and Education’ and lands to the west are zoned ‘M: Future Park / Green Belt’.

9.0 **ASSESSMENT**

- 9.1 The sole 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.

In addition, section 48(13)(a) provides:

Notwithstanding sections 37 and 139, where an appeal received by the Board after the commencement of this section relates solely to a condition dealing with a special contribution, and no appeal is brought by any other person under section 37 of the decision of the planning authority under that section, the Board shall not determine the relevant application as if it had been made to it in the first instance, but shall determine only the matters under appeal.

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 Board decisions
- Relevant case law
- Assessment of applicant's case
- Conclusion

9.2 Planning Authority Calculation of Development Contributions

9.2.1 Condition no. 27 of the subject permission states the following:

The applicant / developer to pay to Kildare County Council the sum of €27,093.75 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.

9.2.2 Section 8(i) of the Kildare County Council Development Contribution Scheme 2015-2022 states that development contributions for residential development will be applied at the following rates:

Floor Area	< 230 sq.m.	231sq.m. – 370 sq.m.	> 371 sq.m.
Rate per sq.m.	€50	€56	€65

Section 8(xiv) provides for ‘miscellaneous developments’, which are to have the following rates applied:

	Built per sq.m.	Open per ha.
Rate (€)	27.51	15,000.00

The “Built” category applied to all developments including development not specifically defined in the other categories of the development contribution scheme, e.g. smoking areas, etc.

Section 12(g) provides for waivers in the case of change of use planning permissions. There is a 100% reduction in contribution charges where the development does not lead to the need for new or upgraded infrastructure/services or significant intensification of demand placed on existing infrastructure. 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.

9.2.3 The permitted development involves:

- Demolition of the existing house at the site (stated total floor area 341.5 sq.m.);
- Construction of a new house (stated total floor area 385 sq.m.);
- Retention of an existing single storey building in garden and its conversion to a games room, garden store and fuel store (stated floor area 105.2 sq.m);
- Conversion of existing structure into plant room.

9.2.4 There is a memorandum attached to the Kildare County Council planning report on file, dated 4th April 2016, which sets out the PA calculation of development contributions. It specifies a charge of €25,025.00 for the permitted house, based on the residential development rate of €65 per sq.m. for houses > 371 sq.m., as per section 8(i) of the Scheme, which is applied to

the entire 385 sq.m. stated floor area. A total of 75.2 sq.m. of the games room structure is charged at the rate applicable to 'miscellaneous developments' as per section 8(xiv) of the Scheme, i.e. €27.51 x 75.2 = €2,068.75. There is no charge for the plant room. This results in a total applicable levy of €27,093.75. The memo notes section 12(k) of the scheme and states in relation to same:

The abovementioned exemption applies under the condition that the building to be replaced has been granted permission, and that, if a levy has been applied properly, it must be paid in full. An application form indicates that there has been no previous grant of permission on site. The Planners report indicates that Pl. Ref. 78/1263 refers to the site. A review of Pl. Ref. 78/1263 illustrates the plans permitted under same differ significantly from the plans granted under Pl. Ref. 15/1011 ... Having consideration of the above, and the absence of a previous permission related to the development to be demolished under Pl. Ref. 15/1011, a levy is to be applied to the total floor area of the proposed dwelling measuring 385 sq.m. A levy is also to be applied to the games room less the floor area of the attached store room and plant room as both are exempt from the application of a levy. The floor area of the games room as confirmed by the technicians office measures 75.2 sq.m.

- 9.2.5 The PA submitted a revised calculation in its response to the appeal, with regard to the detailed planning history of the site. For the residential development, the calculation exempts the floor area permitted under 92/927, i.e. 182 sq.m., resulting in a chargeable residential floor area as follows:

385 sq.m. (proposed floor area) – 182 sq.m. (permitted floor area) = 203 sq.m.

The relevant residential development contribution rate is €50 per sq.m., resulting in a charge of €10,150. The same charge of €2,068.75 is applied for the single storey building, as above, resulting in a total recommended charge of €12,128.75.

9.3 Relevant Appeal Cases

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

9.3.2 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.

9.3.3 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.

9.3.4 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.

9.3.5 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.

9.3.6 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.

9.3.7 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.

9.3.8 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.

9.4 Relevant Case Law

9.4.1 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.

9.5 Assessment of Applicant's Case

9.5.1 The appellant submits that the PA has incorrectly applied the relevant development contribution scheme as the normal exemption provided under section 12 of the scheme has not been applied. As set out above, section 12(k) specifically provides for an exemption in cases where a building will replace an existing structure, such that the relevant contribution charge is to be applied to the additional floor area per sq.m. The PA has charged the applicant for the entire 385 sq.m. stated floor area of the proposed house. Clearly, this is incorrect as no allowance has been made for the existing or permitted residential floor area at the site. Given that there is already a house

at the site, I am satisfied that the exemption provided for under section 12(k) of the scheme applies in this case. The PA response to the appeal recommends a revised charge, which deducts the 182 sq.m. dwelling permitted at the site under 92/927 from the chargeable residential floor area. However, the applicant submits that the floor area of the *existing* residential development at the site, which does not have the benefit of planning permission, should be deducted from the chargeable floor area, on the basis that section 12(k) refers only to 'existing development' and does not make any specific reference to 'permitted development' or otherwise. I can find no other reference to any such requirement elsewhere in the scheme. While I note the stated policy of Kildare County Council regarding outstanding development contributions in such cases, I accept the point of the applicant, with regard to the *Cork City Council v An Bord Pleanála* case, that the remit of the Board is limited to the issue of whether or not the terms of the development contribution scheme have been properly applied and that there is no scope for the consideration of matters outside the specific terms of the scheme. Therefore, I consider that, as per section 12(k), an allowance should be made for the existing stated residential floor area at the site. I note that the total floor area of the existing buildings at the site is stated as 384.2 sq.m. in the application form on file. However, that figure includes various outbuildings and the floor area of the existing house is stated in the documentation accompanying the application as 341.5 sq.m. The development contribution may therefore be calculated as follows:

385 sq.m. (proposed residential floor area) – 341.5 sq.m. (stated existing residential floor area) = 43.5 sq.m.

As per section 8(i) of the scheme, the rate for residential development >230 sq.m. is €50 per sq.m., resulting in a total charge of €2,175 for the residential element of the development.

- 9.5.2 The PA has applied a charge for the games room part of the single storey building conversion at the rate specified miscellaneous developments in section 8(xiv) of the development contribution scheme. However, I note that this aspect of the development involves the conversion of an existing structure at the site, albeit unauthorised. There is no additional floor area involved. Given that section 12(k) only relates to *additional* floor area, no charges apply for this aspect of the development. In addition, I note that section 12(g) of the scheme provides a 100% waiver for a change of use where the development does not lead to a need for new or upgraded infrastructure/services or a significant intensification of demand placed on existing infrastructure. I accept the point of the applicant that the use of this 75.2 sq.m. area as a games room would not place any increased demands on public infrastructure in the vicinity of the site. Therefore, the waiver provided under section 12(g) applies.

10.0 CONCLUSION AND RECOMMENDATION

- 10.1 To conclude, it is considered that Kildare County Council has incorrectly applied the terms of the Kildare County Council Development Contribution Scheme 2015-2022. I therefore recommend that the Board should direct the Council to amend condition no. 27 of the relevant permission, such that it states the following, for the reasons and considerations set out below:

The applicant / developer to pay to Kildare County Council the sum of €2,175 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.

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 27. 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 scheme does not make any specific reference to whether the existing development at the site is permitted or otherwise. 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 unauthorised development at the site. The exemption provided in section 12(k) therefore relates to all existing development at the

site, permitted or otherwise. Similarly, the exemption provided under section 12(g) in relation to change of use applies to the proposed conversion of an existing single storey structure at the site into a games room, fuel store and garden store.

Sarah Moran,
Senior Planning Inspector,
11th August 2016