



An
Bord
Pleanála

Inspector's Report PL10.248928

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| Development | Retention permission for internal and external works and permission for the change of use of 7 live/work units to offices with all associated site works. |
| Location | Ferrybank District Centre, Ross Road, Ferrybank, County Kilkenny. |
| Planning Authority | Kilkenny County Council |
| Planning Authority Reg. Ref. | 16/883 |
| Applicant(s) | Deerland Construction Limited |
| Type of Application | Permission |
| Planning Authority Decision | To Grant Permission subject to conditions |
| Type of Appeal | Third Party |
| Appellant(s) | Dunnes Stores |
| Observer(s) | No observers |
| Date of Site Inspection | 13 th February 2018 |
| Inspector | Erika Casey |

1.0 Site Location and Description

- 1.1. The subject site is located in a suburban area on Ross Road, Ferrybank, County Kilkenny. It is approximately 1.2 kilometres northeast of Waterford City Centre. The site currently accommodates the Ferrybank District Centre, a complete, but virtually unoccupied shopping centre development. The only tenants of the scheme are the Ferrybank Library and a Local Area Office. The site is accessed from the R711 road.
- 1.2. The centre is up to four storeys in height over two levels of car parking. The site has a stated area of 3.17 hectares. There is a surface car park to the north east of the site. Above ground floor podium level, the development is arranged in two blocks. There is a rectangular building (no. 1) on the east side of a central pedestrian street and a triangular building (no. 2) on the west side of this street. The two blocks are connected at their southern end by a link block.
- 1.3. To the northeast, the site adjoins residential development. To the south and east, is a cemetery, undeveloped land and sports grounds. To the west, is St. Mary's School and associated sports ground. There are large estates of residential development in close proximity to the shopping centre.

2.0 Proposed Development

2.1 A detailed breakdown of the proposed development is set out in the applicant's cover letter dated the 20th of December and presented in the planning application drawings. The principle elements of the proposal can be summarised as follows:

(a) Retention of internal and external changes to the permitted plans and elevations of Plan Ref. 05/1287, 06/2010 and 07/1420. The changes include:

- Relocation, reconfiguration and enlargement of fire escape staircases;
- Installation of additional lifts and fire escape corridors;
- Reduction in size of permitted retail warehouse, gym, offices and retail units;
- Part infill of mall voids including the addition of a number of bridges across the void space;
- Installation of travellators instead of escalators;

- Re-arrangement of food court to create 4 no. restaurant units;
- Re-arrangement of car parks resulting in a total number of car parking spaces of 1,079 spaces;
- The creation of two food kiosks (area 22 sq. metres) on level 1;
- External changes to generally include the re-arrangement of fenestration, materials and doors.

(b) Planning permission for the change of use of 7 no. permitted live/work units to offices (1,403 sq. metres total).

(c) Proposed re-wording of condition no. 3 of planning application reference 05/1287 – reproduced as condition no. 4 of planning application reference 06/2010 and 07/1420 relating to the management company of the centre.

2.2 This condition stated:

“a) An overall Management Company, details of which shall be submitted to and agreed with the Planning Authority, shall be established by the developer. Membership of this company shall be compulsory for each owner of the property, excluding residential units, within the development. All communal areas and infrastructural services associated with the development (including but not limited to car parking facilities, internal roadways, footpaths, crossings, lighting, waste storage, collection and disposal/recycling of all waste generated within the site including litter, screening and landscaping etc.) shall be vested in the Management Company prior to the occupation of any part of the development.

b) The overall Management Company shall have responsibility for all communal areas and infrastructural services associated with the development (including but not limited to car parking facilities, internal roadways, footpaths, crossings, lighting, safe storage collection and disposal/reviling of all waste generated within the site including litter, screening and landscaping etc.

Reason: In the interests of orderly development.”

2.3 On foot of a further information request, the applicant proposed the following revised wording for this condition:

“The management and maintenance of the proposed development following completion shall be the responsibility of the developer/owner or a management company which shall be established by the developer/owner. A management scheme shall make provision for adequate measures for the future maintenance of the development; including the external fabric of the buildings, internal common areas, landscaping, roads, paths, parking areas, lighting, waste storage facilities and sanitary services.

Reason: in the interests of orderly development.”

- 2.4 A similar wording was adopted by the Planning Authority in their decision to grant planning permission.
- 2.5 It is stated in the application documentation that the retention application is being made out of an ‘abundance of caution’. It notes that the same plans and particulars as those submitted under the current application were submitted to the Kilkenny County Council by way of compliance on the 3rd of September 2013. The Planning Authority have previously confirmed that they considered the drawings to be in compliance with the permission granted under P05/1287, P06/2010 and P07/1420.

3.0 Planning Authority Decision

3.1. Decision

- 3.1.1 To Grant Permission subject to conditions. Conditions of note include:

Condition 2:

“The wording of Condition No. 3 of Planning Permission Reference No. P05/1287 (reproduced as Condition No. 4 of Planning Permission Reference P.06/2010 and P.07/1420 relating to the Management Company of the Centre) at the permitted Ferrybank District Centre shall be amended to read as follows:

The management and maintenance of the Ferrybank District Centre shall be the responsibility of the developer/owner or a Management Company which shall be established by the developer/owner. The Management Scheme shall make provision for adequate measures for the future maintenance of the development,

including the external fabric of the building, common areas, landscaping, roads, paths, parking areas, lighting, waste storage facility and sanitary services.

Reason: In the interests of clarity and proper planning.”

3.2. Planning Authority Reports

3.2.1. Planning Reports (23.02.2017 and 29.06.2017)

- It is considered that the built amendments in the current application do not have a significant impact on the permitted development. They are considered internal, structural and finish amendments which are minor changes to the previous permissions granted on the subject lands.
- The proposed elevation/plan changes do not render the character/form of the structure significantly inconsistent throughout from that permitted and do not injure the visual amenities of the area.
- The proposed design changes are considered acceptable and reflect functional display requirements, building/fire regulations and internal adjustments and are insignificant in the context of the overall character of the permitted mixed use district centre.
- The shortfall of 32 car parking spaces amounts to 2.7% of the permitted car parking of 1,186 spaces. It is considered reasonable to expect that cross visitation will occur as well as a high number of walking trips due to the proximity of established residential areas in the Ferrybank area. In this context, the shortfall of spaces represents a minor deviation.

3.2.2. Other Technical Reports

Road Design (20.02.2017): No objection. Notes parking provision is less than the development plan standard.

3.3. Prescribed Bodies

Irish Water (24.01.2017): No objection.

3.4. Third Party Observations

Dunnes Stores

- Consider that the Ferrybank development has not been developed in full compliance with the sites granted planning permissions and is, therefore, unauthorised. An independent survey undertaken has revealed a large number of material deviations from the development as permitted. The current application is a piecemeal attempt to retrospectively regularise elements of what is an unauthorised development. The proposed development will exacerbate the unauthorised status of the overall development.
- The provision of 1,079 car parking spaces is a reduction of 107 spaces from that permitted. This raises significant traffic and safety issues.
- For transparency and clarity, the applicant should be requested to provide a floorspace schedule to show the variations of sizes between granted floorspace and floorspace constructed. Notes a number of other discrepancies between the planning and as built drawings.
- The proposed extent of office space conflicts with the provisions of the County Development Plan and will have a detrimental impact on Waterford City Centre.
- Object to the rewording of condition no. 3.

4.0 Planning History

4.1 The site has an extensive planning history. The most relevant planning history is summarised as follows:

Planning Authority Reference 05/1287

This is the parent permission pertaining to the site. Permission was granted in August 2006 for a District Shopping Centre comprising an anchor store with convenience and comparison shopping. The principal elements were:

- 16 no. additional smaller retail units
- 1 retail warehouse unit
- 4 units in a health & beauty zone

- 4 no. non-retail service units
- Medical centre
- Restaurant/diner
- Foodcourt
- Gym
- Crèche
- Motor sales outlet, offices and 12 no. apartments.

A first party appeal against conditions (Appeal Reference PL10.219399) was withdrawn.

Planning Authority Reference 06/2010

Permission granted in March 2007 for amendments to the District Shopping Centre permitted under the parent permission Planning Application Reference 05/1287, to include the following:

1. Extended site boundary in an easterly direction, increasing the site area from 2.72 hectares to 2.83 hectares approximately.
2. Amendments to the basement and surface car parking arrangements resulting in an additional 66 no. spaces. An external stairwell at the northern end of Building No.1 to be moved in order to facilitate the extension to the car park.
3. An increase in floor to ceiling height of Building Nos. 1 & 2 from the permitted 5 metres to 6.8 metres.
4. The construction of 3 no. additional staircores to Building No. 2 for the provision of adequate means of escape in order to comply with the Building Regulations. An external stairwell proposed to the southern end of the street to replace that omitted at the northern end of Building No.1 and also for an extended viewing area at first floor level of Building No.1.
5. Change of use of 12 no. residential units to 12 no. live/work units with multi-purpose office space at second floor incorporating 1 & 2 bed apartments at third floor level.
6. Changes to the elevations of both buildings to reflect the changes outlined above.

7. A decrease in the footprint of Building No. 2 from 3,416 sq. m. to 3,274 sq. m. with an increase of 461 sq. m. in the gross floor area permitted of Building No. 2 with a new gross floor area of 6,104 sq. m.

Planning Authority Reference 07/856

Permission granted in June 2007 for a development comprising amendments to the previously permitted mixed-use district centre scheme on an enlarged site of 3.47 hectares, (increased from the original 2.83 hectare site to accommodate additional surface car parking if required). The development comprised:

1. Additional floorspace to incorporate the redistribution and change of use of some permitted floorspace at ground, first, second and third floor levels, respectively together with ancillary works.
2. Addition of an infill mixed-use block to link permitted Building Nos. 1 and 2, and associated amendments including the option, if required, to increase the number of car parking spaces by an additional 237 no. spaces at grade level on the enlarged site area.
3. Increase in the gross floor area of the scheme by 3,406 sq. m. from 30,883 sq. m. permitted under Planning Application Reference 096/2010 to 34,289 sq. m., with the floorspace of the permitted convenience (net retail sales area), retail warehousing (net retail sales area), health and beauty, medical centre, gym and managements suite not affected by the proposal.

A third party appeal (An Bord Pleanála Reference PL10.224439) was withdrawn.

Planning Authority Reference 07/1420

Permission granted in September 2007 for a development comprising amendments to the previously permitted mixed-use district centre scheme (Kilkenny County Council Planning Application Reference 05/1287 and Kilkenny County Council Planning Application Reference 06/2010). The development comprised the provision of additional floorspace and the redistribution and change of use of some of the permitted floor space at ground, first, second and third floor levels. The gross floor area of the scheme increased by 3,406 sq. m. to 34,289 sq. m. with the floorspace of the permitted convenience and comparison, retail floorspace, retail warehousing, health and beauty, medical centre, gym and management suite not affected. The

development resulted in an increase in office floorspace by 2,278 sq. m. from 3,433 sq. m. to 5,711 sq. m.

Planning Authority Reference 07/1066

Permission was granted in November 2007 for changes to the immediate road layout to facilitate the Ferrybank Centre. A third party appeal (An Bord Pleanála Reference PL10.226371) was withdrawn.

4.2 More recent planning history pertaining to the site are the following applications:

Planning Authority Reference 14/189/Appeal Reference PL10.243661

Permission granted in December 2014 for a development comprising retention of (a) lift motor room/staircore enclosure overrun on the east elevation, (b) external landscaped area at the northern boundary of the site including omission of the permitted pedestrian bridge, (c) red glazing panels instead of the permitted stone panels to the ground floor main entrance lobby, (d) 2.6 metre high aluminium louvred screens to the southern roof plant/equipment area and (e) 2.9 metre high aluminium louvred screens to the northern roof plant/equipment area.

Planning Authority Reference 14/4

Retention permission granted in February 2014 for change of use from the permitted restaurant use (Planning Application Reference 05/1287) to public library (313 square metres) on the ground floor at the northern end of Building no. 2.

4.3 There have also been a number of referrals relating to the site.

Dec 152 - Referral by Deerland Construction under Section 5 of the Planning and Development Act seeking to determine whether the relocation of retail (convenience and comparison, retail warehouse and non-retail services to the ground floor within the Ferrybank Shopping Centre constitutes exempted development. Decision - the works required is development and is exempted development.

Dec 234 - Referral by Deerland Construction under Section 5 of the Planning and Development Act seeking an amendment to the Dec 152 referral in relation to the reordering of 2 of the ground floor units in Building 1 (unit 18 and part of unit 19) for use as a restaurant and the ground floor use of Unit E in building 2 as an office and whether this reordering constitutes exempted development. Decision - a) The works required to execute the change of use is development and is exempted

development. b) The restaurant use of 370 sq. m. located in unit E in building 2 relocated to unit no. 18 in building 1 and that the office use located in unit 18 in building 1 relocated to unit E in building 2 is not a material change of use and is exempted development.

5.0 Development Plan

Ferrybank/Belview Local Area Plan 2017

5.1.1 The operative Development Plan for the area is the Ferrybank/Belview Local Area Plan 2017 which came into force on the 15th of January 2018. This notes that the centre was constructed in 2009 but with the exception of the library and Council Area Office, it has not been occupied. It is designated a Level 2 District Centre in the County Retail Hierarchy and has permission for approximately 4,500 sq. metres of convenience and 4,300 sq. metres comparison net retail area. The total permitted gross floorspace of the centre is 34,289 sq. m. It is stated that the opening of the Ferrybank District Centre would help in the creation of a focal point for the plan area and stimulate business activity in the area. Under objective 4C, it is stated that no further significant retail development will be allowed over and above that permitted within the plan area.

5.1.2 The site is zoned "Urban Village". It is the purpose of this zone to *"create a focus for the plan area by encouraging and providing residential, retail, commercial and office, cultural and other uses appropriate to the centre of a developing area. (Maximum 60% of the land area to be allowed for residential needs and no significant retail development will be allowable outside of the District Centre). The optimal location for retail will be in the existing District Centre"*. Office is a permissible use under this zoning objective.

5.1.3 **Section 4.2** addresses commercial/office development. This states:

"Apart from the Marine Point offices at Belview, there is little available office accommodation in the plan area. The availability of high quality office space is seen as an integral part of a developing economy. Permission exists for over 5,000 sq. m. of office space within the District Centre and this can contribute to meeting overall demand for office and service uses over the life of the Plan. Furthermore, office

capacity here could be expanded, either through reconfiguration or amalgamation of existing permitted units or in additional office space if considered appropriate.”

Kilkenny County Development Plan 2014-2020

5.1.4 Chapter 4 of the development plan relates to Economic Development. Section 4.8.2 notes that the Ferrybank Shopping Centre has the potential to deliver a range of retail and non-retail service functions (e.g. banks, post office, local offices, restaurants, public houses, community and cultural facilities) for the community at a level consistent with the function of the centre in the Ferrybank/Belview area of the Waterford Gateway.

5.2 Natural Heritage Designations

5.2.1 The nearest Natura site is the Lower River Suir SAC which is located c. 700 metres to the south of the site.

6.0 The Appeal

6.1. Grounds of Appeal

- Consider that the Ferrybank development has not been constructed in accordance with the schemes permitted planning permissions. State that all compliances have not been secured as required by condition of previous permissions. Note that the subject planning application includes 102 alterations and variations from the previously approved permissions pertaining to the site. Cumulatively these amendments are significant and demonstrate that the development is unauthorised.
- Notes the planning history of the site and contends that there are further irregularities and potential unauthorised development. States that an independent survey undertaken has revealed a large number of material deviations from the development as permitted.
- Concerns raised regarding the number of ad-hoc retention applications that have been made by the applicant in an effort to regularise an unauthorised development. Consider that the current application is another piecemeal

attempt to regularise the development and that there is a fundamental question as to the legal planning status of the Ferrybank development.

- Note that the Ferrybank development as permitted was to provide 1,186 car parking spaces with an option of providing an additional 237 additional spaces as per condition no. 11 of planning application reference 07/1420. The current application proposes 1,079 spaces – a reduction of 107 parking spaces. The proposed parking provision does not comply with the parking standards set out in the Kilkenny County Development Plan as there is a shortfall of 32 no. spaces. It is considered that the actual shortfall is in excess of 100 spaces.
- Questions the need and appropriateness of increasing office space within the Ferrybank District Centre. It is considered that the extent of office space proposed for the Ferrybank Shopping Centre is far in excess of what is needed for the centres local catchment. Such development should be directed to Waterford City Centre. Furthermore, it is considered that the current proposal will eliminate the last remaining element of residential development within the shopping centre development.
- Objects to the re-wording of condition 3. States that the fact that the developer wishes to remove from the condition the wording “prior to occupation of any part of the development” is evidence that developer has breached the condition. Consider that it is illegal to vary a condition of a planning permission that has expired.

6.2. Applicant Response

- Consider that the appeal is vexatious and frivolous and that all the points raised in the appeal were subject to a previous appeal – An Bord Pleanála Reference PL10.243661 and subsequent judicial review proceedings in the High Court Dunnes Stores – v – An Bord Pleanála – 2015 IEHC 716.
- The conclusion of the judicial review judgement stated:
“the court finds that the true object of this judicial review application is to enable Dunnes to delay or avoid compliance with its contractual obligations to fit out and occupy the anchor store and/or to facilitate the creation of a contrived legal

justification for Dunnes' long time failure to comply with those obligations. These purposes are entirely collateral to the remedies being sought in the within application and have no connection to the objects which the public law procedures now being invoked by Dunnes were designed to achieve. That this is the true purpose of Dunnes is not a matter of conjecture or surmise. It is the irresistible and logical conclusion to be drawn from the detailed consideration of the facts in which the court has engaged above. The court refutes the reliefs sought, declines to enter into any consideration of the purported planning related issues raised by Dunnes, and dismisses the proceedings as involving an 'abuse of process'."

- There has been no physical change at the shopping centre since the consideration by the Board of the previous appeal. Contrary to the assertion by Dunnes Stores, the centre has been constructed in substantial compliance with the implemented planning permissions. The purpose of the appeal seems to be invite An Bord Pleanála to make a determination in respect of alleged unauthorised development. This matter has been addressed in the previous Inspector's report. Any complaint in relation to non-compliance should have been made in the first instance to the Planning Authority as the enforcement authority.
- The issue of the independent report carried out in 2012 formed a key part of the judicial review proceedings and the following was noted:

"The court entertains no doubt, on the evidence before it, that these purported planning concerns are entirely to do with the on-going arbitration and, in particular, the then petition for winding up of Dunnes. What the evidence shows is a major ramping up of engagement at this time between Dunnes and its legal team and other professional advisors and lo and behold – one finds the spectre of planning issues raised as the phantom issue on which, from this point onwards, Dunnes seeks to hang its continuing efforts to avoid doing as it is contractually required to do."
- Kilkenny County Council have confirmed that the centre's as built drawings are substantially compliant with the development as permitted. Correspondence confirming this was issued on the 3rd of October 2013. The current application

has been made out of an 'abundance of caution' and was chosen as a course of action to put the matters that are continually and unjustifiably raised by Dunnes beyond any doubt.

- It is clear that all of the claimed non compliances are of a trivial and minor nature and of no material planning consequence. Reference is made to the judgement of *Kenny v Dublin City Council 2009* where it was noted that there will inevitably be small departures from some or even many of the plans and drawings in every development and that it is improbable that any development is ever carried into effect an exact and literal compliance with the terms of the plans and drawings lodged. The lack of bona fides on the part of Dunnes has already been confirmed by the High Court and it is their collateral objective to avoid their contractual obligations to open its anchor store in the centre that underpins the appeal.
- Contrary to the assertions of the appellant, the Ferrybank Belview LAP clearly supports the provision of additional office accommodation in the area. There is a significant demand for own door office accommodation in the area. The impact of the proposal on Waterford City in terms of office quantum or vacancy will be imperceptible.
- The appeal grossly exaggerates the change in car parking provision and in particular the claimed shortfall. Based on the current County Development Plan standards, 1,111 spaces would be required. A total of 1,079 spaces are provided which equates to a shortfall of 32 spaces and not 107 spaces as claimed by the appellant. The permitted mixed use development will generate cross visitation which will reduce car parking demand. Such cross visitation can reduced demand by 20%.
- Contrary to the appellant's suggestion, a Management Company has been established, the details of which were submitted and agreed with the local authority. The applicants concern with the wording is that it creates potential legal and contractual difficulties with the future tenants going forward. The permissions granted have been fully implemented and as such, the conditions stand and are capable of being amended.

6.3. Planning Authority Response

- The Ferrybank District Centre received formal planning permission under a number of planning permission references. The points raised by Dunnes have been made previously in their appeal against permission Planning Application Reference 14/189. These arguments were not supported by An Bord Pleanála and subsequently the High Court in judicial review proceedings of that decision taken by Dunnes which were unsuccessfully challenged and dismissed.
- On the 3rd of September 2013, Deerland Construction issued a set of as built drawings to Kilkenny County Council by way of compliance. The Planning Authority considered that the submitted building drawings were in compliance with the planning permissions granted.
- The drawings submitted with the current application are similar to those submitted by way of compliance but are more comprehensively described and include new elements relating to the change of use of the permitted live works units and the rewording of Condition 3.
- The Planning Authority considers that the proposed elevation/plan changes do not render the character/form of the structure significantly inconsistent throughout from that permitted and do not injure the visual amenities of the area. The proposed design changes are considered acceptable and are insignificant in the context of the overall character of the permitted mixed use district centre.
- By virtue of the consent permissions, commencement and completion of the centre, the Planning Authority considers that the use was established/authorised and expiry of the permission does not affect the continuance of such use.
- The Planning Authority considered the development as executed to date is constructed in accordance with the relevant planning history. Any difference between the development as constructed and permissions granted are not considered material in the context of the scale of the permitted development as a district centre.

- The Ferrybank District Centre development is well served by public transport, footpath/cycleway paths and bus routes. It is considered reasonable to expect cross visitation as well as a high number of walking trips due to the central location and proximity of established residential areas in the Ferrybank Area. In this context, including improvements in smarter travel/green infrastructure for Ferrybank and transport objectives in the 2017 Ferrybank Belview Plan, the Planning Authority consider a shortfall of 32 spaces to be a minor deviation.
- The proposed change of use of the live works units will result in a net increase of approximately 650 sq. metres of office space in the District Centre as a whole. This amounts to around 2% of the total permitted floorspace in the centre. The proposed 7 no. small own door office units of varying size will assist future business start ups in an expanding urban population and facilitate creating employment and economic activity consistent with National and Regional policy.
- The impact of the proposal on Ferrybank area and Waterford City in terms of office quantum or vacancy is considered imperceptible. Ferrybank is under provided in terms of office accommodation as noted in the LAP and the proposal will not adversely affect or influence the vacancy rates in Waterford or the Ferrybank area and is in accordance with the zoning objectives of the area.
- The revised wording of condition no. 3 is considered acceptable by the Planning Authority.

6.4. **Observations**

- No observations.

6.5. **Further Responses**

Dunnes Stores (17.10.2017)

- Consider that the legal status of the underlining development is a material consideration in the assessment of the planning application. Require confirmation from an independent body – An Bord Pleanála - that the scheme as currently constructed is lawful. While it is accepted that the Board has no

enforcement function in law, this is entirely separate from finding that a development is authorised or unauthorised.

- The appeal submitted in respect of Appeal Reference PL10.2463661 highlighted the applicant's failure to submit a planning application to comprehensively cover all of the deviations highlighted in the independent survey undertaken in 2012. These concerns have been vindicated in the current application which seeks additional amendments. The applicant's assertion that the application has been made out of an abundance of caution is misleading.
- In the High Court case of Frank Harrington v. An Bord Pleanála, the court found that the Board was obliged to take into account the legal status of the underlying development. To consider the current appeal, it is important, therefore, to determine if the development as a whole is an authorised development. It is contended that the applicant have been trying to regularise the development through a number of piecemeal applications.
- It is considered that the loss of 107 car parking spaces is unacceptable and that the development should provide 1,186 spaces.
- Given that the shopping centre services a local catchment of approximately 5,000 people, it is considered that the office space permitted within the shopping centre is excessive and that there is sufficient office space permitted within the centre to meet future demand up to and beyond 2022.

7.0 **Assessment**

7.1.1 The main issues in this appeal are those raised in the grounds of appeal and observation. Appropriate Assessment also needs to be addressed. I am satisfied that no other substantive issues arise. The issues can be dealt with under the following headings:

- Legal Status of Ferrybank Shopping Centre.
- Car Parking.
- Principle of Live Work Units.

- Wording of Condition no. 3
- Appropriate Assessment.

7.1.2 It is noted that the applicant has sought the dismissal of the appeal on the basis that it is considered frivolous and vexatious. Having reviewed the documentation, I am satisfied that the appellant has raised legitimate planning grounds in their submission.

7.2 **Legal Status of Ferrybank Shopping Centre**

7.2.1 The appellants are of the view that the Ferrybank Shopping Centre has not been constructed in accordance with the various permissions pertaining to the site and that the development as a whole is unauthorised. Concerns are raised regarding the number of ad-hoc retention applications that have been made by the applicant in an effort to regularise an unauthorised development and that the legal status of the underlining development is a material consideration in the assessment of the planning application. They have requested confirmation from an independent body – An Bord Pleanála - that the scheme as currently constructed is lawful.

7.2.2 It is noted that similar issues were raised by the appellant in their appeal in respect of the previous amendment application – Appeal Reference PL10.243661. As identified in the Inspector’s assessment of this appeal, the Board has no enforcement function in law and, therefore, I consider that to request a determination as to whether the scheme as constructed is lawful is outside the remit of the Board and outside the scope of this assessment. With regard to the alleged unauthorised status of the shopping centre, it is noted however, that the Planning Authority, who are the enforcement authority, have explicitly stated in their Planner’s Report and response to appeal, that they do not consider the overall Ferrybank Development to be unauthorised and that it has been constructed in substantial compliance with the various permissions relating to it.

7.2.3 The appellant contends the applicants has being trying to regularise the development through a number of piecemeal applications. I do not consider however, that there is any evidence that this is the case. The first retention application related to a specific change of use from restaurant to public library (PA Ref. 14/4). There has been one other previous application for retention of amendments in relation to the subject site – the aforementioned Appeal Reference

PL10.243661. In this instance the Inspector noted that the works constituted fairly minor cosmetic adjustments which were not material having regard to the nature and extent of the development as constructed. In the subsequent High Court Case, Mr. Justice Barrett stated:

“The court rather arches an eyebrow at the reference to ‘material deviations’ when it recalls the minor and cosmetic alterations that are the subject of the (impugned) retention permission and which are the focus of this application.”

7.2.4 What is before the Board in the current application is a further application for retention of a series of very minor alterations to the permitted development. The subject works were subject to a previous planning compliance submission which Kilkenny County Council confirmed was in accordance with the permissions granted. It is detailed by the applicant that the current application was made to the Planning Authority out of an ‘abundance of caution’ due to ongoing legal and contractual difficulties with Dunnes Stores. I do not consider the proposed works to be material in any way or that cumulatively the amendments could be considered ‘significant’ in planning terms. It is typical for large complex urban project such as this to have a number of small deviations from the planning drawings permitted due to changes that evolve during design development and construction and in response to specific regulatory requirements under the fire and building codes.

7.2.5 I would concur with the applicant that the subject works are of a minor nature and of no material consequence. The findings from the judgement of the Supreme Court in the case of Kenny v Dublin City Council (2009) are pertinent in this regard where the judgement stated:

“There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within plans, drawings, specification and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect an exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of the permission there are enforcement procedures. However, planning laws are not intended to make life impossible for developers, but those executing works such as architects, engineers or contractors

or for the planning authorities supervising them. Nor are they there to encourage fine tooth combing or nit picking scrutiny of the works.”

- 7.2.6 I do not, therefore, consider that either of the two applications for retention of amendments to the permitted scheme that have been made are a piecemeal or ad-hoc mechanism to regularise the unauthorised status of the Ferrybank Development. There is no evidence to suggest that the development is in fact unauthorised and this contention has been dismissed by the Planning Authority. The subject application has been made to tidy up a number of small irregularities that have occurred between planning and construction stage. As highlighted in the Planner’s Report they are internal, structural and finishes amendments which are minor changes to the previously permitted planning permission granted. They have no bearing on the overall quantum of development permitted or result in any material change to the visual appearance of the development.
- 7.2.7 In conclusion, I am satisfied that no evidence has been advanced by the appellant that the subject shopping centre is unauthorised and that the current application would represent an inappropriate consolidation or exacerbation of an unauthorised use. Based on the evidence submitted by the Planning Authority and the applicant, I have no concerns regarding the legal status of the development. This issue was previously given detailed consideration by both the Board under Appeal Reference PL10.243661 and the subsequent high court case. The judgement of the case (*Dunnes Stores V An Bord Pleanála 2015 IEHC*) was clear that the true object of the judicial review application was to enable Dunnes Stores to delay or avoid compliance with its contractual obligations to fit out and occupy the anchor store and/or to facilitate the creation of a contrived legal justification for Dunnes long time failure to comply with those obligations.
- 7.2.8 The current application is an application for retention of a number of minor amendments to the scheme, none of which have any material significance from a planning perspective. The applicant is entitled to make such an application for retention under the planning acts and I do not consider that such an application in any way undermines the planning status of the development as permitted under the parent permissions pertaining to it. In this regard, I consider that the proposed amendments for which retention permission is sought are acceptable in principle and in accordance with the proper planning and sustainable development of the area.

7.3 Car Parking

- 7.3.1 Permission has been sought for the retention of 1,079 parking spaces. Concerns are raised by the appellant regarding the quantum of car parking proposed. They note that the proposed parking provision does not comply with the parking standards set out in the Kilkenny County Development Plan 2014 as there is a shortfall of 32 no. spaces. It is considered that the actual shortfall is in excess of 100 spaces.
- 7.3.2 Permission was granted on the subject site for 1,186 car parking spaces. Condition 11 of application PA reference 07/1420 requested details of final car parking arrangements to be agreed with Kilkenny County Council which would address whether there was a requirement for an additional 237 car parking spaces. It is unclear what was agreed with Kilkenny County Council through compliance. However, it is evident that the provision of these spaces was optional.
- 7.3.3 It is stated by the applicant that a reduced level of car parking on the site is appropriate having regard to changes that have occurred to the overall land use mix within the centre as well as changes to the parking standards that have occurred in the intervening time since the scheme was constructed. It is noted that there have been a number of amendments to the parking standards set out in the current Kilkenny County Development Plan 2014-2020 from that previously set out under the 2002-2008 County Plan which was applicable when the development was permitted. Notably the level of parking for shopping centres, supermarkets, department stores changed from 5 spaces per 93 sq. metres (1 per 18.6 sq. metres) to 1 space per 25 sq. metres. A detailed schedule is provided by the applicant setting out the various land use changes that have occurred and the resulting parking demand based on the current standards. I am satisfied based on the information provided that the level parking is generally consistent with the current plan standards and would result in a small shortfall of approximately 32 spaces.
- 7.3.4 It is noted that the district centre accommodates a wide range of land uses including retail, commercial, retail services, gym, medical centre, crèche etc. The centre also currently accommodates a public library and council area office. Having regard to the mixed use nature of the development, I would concur with the view of the applicant and the Planning Authority that it is likely that a degree of cross visitation is likely to occur in the development. The range of uses is likely to generate degree of

commercial synergy, with those visiting the centre making linked trips. There is, therefore, potential for dual usage of spaces due to the complementary nature of land uses.

7.3.5 As detailed by the applicant, it is also likely that due to the variance of land uses that the use of spaces will differ over the course of a day. For example the retail use will have different peak parking demand compared to other uses such as the crèche, medical centre, gym etc. The assertion that such cross visitation and dual usage of spaces would allow for up to a 20% variation in demand seems reasonable and it is noted that Kilkenny County Council have raised no objection to the quantum of parking proposed stating that they consider a shortfall of 32 spaces to be a minor deviation.

7.3.6 The district centre is located in close proximity to a large residential catchment population which will encourage trips to the centre by pedestrians and cyclists. Chapter 8 of the Ferrybank Belview LAP 2017 also sets out a number of long term strategic walking and cycling routes with the objective of creating a comprehensive walking and cycling network over the plan area. Having regard to these factors, I consider that the quantum of parking is sufficient and that the small shortfall in spaces will not result in any material adverse impacts including overspill car parking to the surrounding road network.

7.4 Principle of Live Work Units

7.4.1 The application also proposes the change of use of 7 permitted live work units to office accommodation with a total gross floor area of 1,413 sq. m. The appellant objects to this proposal on the basis that this will result in an excessive quantum of office floorspace in the shopping centre and that it will have a detrimental impact on Waterford City Centre, where they consider that such floorspace should be directed.

7.4.2 The extent of office space previously permitted within the development amounts to 5,711 sq. metres (Planning Authority Reference 07/1420). The live work units as constructed already provide for in excess of 750 sq. m. of office/commercial space, with the remainder providing for residential accommodation. The proposed change of use will, therefore, result in a net increase of c. 650 sq. metres of office space in the district centre as a whole. The current Ferrybank Belview LAP supports the provision of additional office floorspace in the District Centre noting in section 4.2 of

the plan that *“further office capacity here could be expanded, either through reconfiguration or amalgamation of existing permitted units or in additional office space if considered appropriate”*. The plan also notes that professional services are unrepresented in the area, that there is a lack of good quality office accommodation in the plan area and that the availability of high quality office space is seen as an integral part of a developing economy.

7.4.3 It is noted that in making the current LAP, as set out in the Chief Executive Report on the Material Alterations to the Ferrybank Belview Draft Local Plan 2017, that the Department of Housing, Planning, Community and Local Government initially sought clarification relating to the potential expansion of office use at the district centre. Clarification was provided by the Council on the rationale for the policy relating to office development in that it was considered that the office use would help secure the sustainable use of an existing but underutilised development. The report states:

“The context for the inclusion of the provision allowing for further office capacity expansion is the potential for the centre to attract FDI, especially in the context of the current low levels of office space available within the greater Waterford Area. It is not intended that expansion of the office area would compete or divert office development in the existing City area but would be available in the context of a significant FDI investment. In this regard, the Department sent the Council an email dated 16.11.2017, stating “your authority’s proposals are acceptable to this Department given that they are fundamentally focused on securing a sustainable use of an existing but underutilised development”. No change is now sought to the wording of the proposed Material Alterations.”

7.4.4 In this regard, it is considered that the policy of the LAP to promote additional office floorspace within the district centre is robust. It is evident that the proposal is plan led and in accordance with the policies and objectives set out in the LAP. Having regard to the urban village zoning which aims to create a focus for the plan area by encouraging a mix of land uses including office accommodation, I am satisfied that the extent of additional office space proposed is not so significant as to have a material negative impact on the vitality and viability of Waterford City Centre. It will provide niche own door office accommodation within a planned level 2 District Centre. The ongoing vacancy of these units and the need to provide an appropriate alternative use is also noted. I am satisfied that the additional own door offices will

complement the other range of land uses represented in the centre and is appropriate from a planning and development perspective.

7.5 Wording of Condition no. 3

- 7.5.1 The applicant seeks the re-wording of condition 3. A detailed rationale for the revised wording was set out at Further Information Stage. It stated that the wording of condition 3 of Planning Authority Reference 05/1287, reproduced as condition no. 4 of Plan Ref 06/2010 and Plan Ref 06/2010 is commercially impractical as it requires that the title to the common areas are vested in the Management Company and membership of the Management Company will be compulsory for each owner of the property. Whilst such a condition may be appropriate for a residential development, it is not the norm for a commercial/retail development.
- 7.5.2 The applicant clarifies that the title to the district centre will remain vested in the applicant/owner who will then engage a management company to manage the common areas of the shopping centre. The applicant/owner will enter into direct covenants with the unit owners and tenants to manage and operate the common areas and to carry out and provide the standard services for the efficient running of the district centre development. It is important that the applicant/owner retains ownership of the district centre, including common areas in order to maintain stability and cohesiveness in the management decisions relating to the operation of the shopping centre and management of common areas.
- 7.5.3 The appellant objects to the proposed re-wording and states that it is a deliberate attempt of the applicant to remove the requirement of this condition to agree the terms of condition 3 (05/1287)/condition no. 4 (06/2010) prior to the occupation of the development. It is also questioned whether it is legally permissible to vary a condition of a planning permission that has now expired. The applicant has confirmed that a Management Company has been established, the details of which were previously submitted and agreed with the local authority.
- 7.5.4 The Ferrybank Shopping Centre is a constructed and completed development. The various planning permissions pertaining to it have, therefore, been implemented. The planning conditions imposed relate to the development as permitted and constructed and apply in perpetuity. As the permission has been implemented, the conditions have not expired as contended by the appellant.

7.5.5 It is evident however, that in certain instances, that a condition that has been imposed may no longer be necessary or appropriate. In this instance, it has been set out that the wording of the condition has been determined to have unfortunate consequences, which is affecting the successful occupation of the centre and poses legal and contractual difficulties. It is considered, therefore, reasonable to seek a rewording of the condition to remove this impediment. The applicant has sought to remedy this through the current planning application, which I consider appropriate. It is noted that Kilkenny County Council have no objection to the proposed re-wording, which will provides a more flexible wording. I consider the rewording of the condition to form part of the current application. It is, therefore, a condition of a new permission which supersedes previous conditions. I would, therefore, recommend that the wording of the condition is amended.

7.6 **Appropriate Assessment**

7.6.1 A Screening Assessment has been carried out by Kilkenny County Council which has determined that it is not anticipated that the project will affect any Natura 2000 site. Having regard to the nature and scale of the proposed development, comprising retention of minor amendments to an existing district centre and a modest increase in office floorspace within an established and fully serviced urban area, and its distance to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.0 **Recommendation**

8.1 It is recommended that permission be granted subject to conditions for the reasons and considerations set out below.

9.0 **Reasons and Considerations**

9.1 Having regard to the Urban Village zoning objective for the area set out in the Ferrybank Belview Local Area Plan 2017, to the nature and scale of the development which it is proposed to retain and extent of additional office space proposed, it is considered that subject to compliance with the conditions below, the proposed

development would not seriously injure the amenities of the area or of property in the vicinity; would be in accordance with the Level 2 District Centre designation within the retail hierarchy; would not have a negative impact on the vitality or viability of Waterford City Centre and would be acceptable in terms of traffic and parking. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

10.0 Conditions

1. The development shall be retained and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars lodged on the 7th of June 2017 except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

2. The management and maintenance of the Ferrybank District Centre shall be the responsibility of the developer/owner or to a management company which shall be established by the developer/owner. The management scheme shall make provision for adequate measures for the future maintenance of the development, including the external fabric of the building, common areas, landscaping, roads, paths, parking areas, lighting, waste storage facility and sanitary services.

In the interest of clarity this condition supersedes condition no. 3 of Planning Application Reference 05/1287 and Condition 4 of Planning Application Reference 06/2010 and 07/1420.

Reason: In the interests of clarity and proper planning

3. Water supply and drainage arrangements, including the attenuation and disposal of surface water, shall comply with the requirements of the planning authority for such works and services.

Reason: In the interest of public health.

4. Details of all external signage relating to the office units shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

Reason: In the interest of the amenities of the area/visual amenity.

Erika Casey
Senior Planning Inspector

14th February 2018