



An
Bord
Pleanála

Inspector's Report ABP-300226-17

Development

Retention permission for 2 no floors slabs, alterations to internal layouts and elevations and the supply and fitting of windows and doors as was approved but now expired under planning reference permission no 06/441. Also, permission to complete external doors, windows to rear, curtain walling, install new switch room in lieu of transformer and external finishes and all associated site works.

Location

Commercial Unit No 3, Area 5
Parklands Business Centre, Kilkenny.

Planning Authority

Kilkenny County Council

Planning Authority Reg. Ref.

17393

Applicant(s)

Bluetrack Limited

Type of Application

Permission

Planning Authority Decision

Grant permission subject to conditions

Type of Appeal	Third Party
Appellant(s)	Alexander J.Wilsdon.
Observer(s)	None.
Date of Site Inspection	7 th March, 2018
Inspector	Stephen Kay

1.0 Site Location and Description

- 1.1. The appeal site is located at the southern end of the Hebron Industrial Estate and within Area No.5. The site is currently occupied by a partially completed warehouse development with a stated floor area of 3,154 sq. metres and a height of 7.95 metres.
- 1.2. The development as undertaken on site to date comprises two separate buildings. The first is a two storey building containing 4 no. separate units. The second building is located at the far south east corner of the site and comprises a single standalone unit over two levels. In the first building, the structure is roofed and the central units have been largely completed with windows added. The northern and southern ends of this building are however incomplete with the concrete structure open to the elements. Similarly, in the case of the building at the south east corner of the site, this building comprises a shell with no windows or internal fit out undertaken.
- 1.3. To the west of the buildings an open area of the site is unsurfaced and has open excavations for services. The site is currently fenced off from the rest of the industrial estate. To the west, the site adjoins the An Post Delivery Centre.
- 1.4. The stated overall area of the appeal site is 0.37 ha.

2.0 Proposed Development

- 2.1. The proposed development comprises the retention of a number of alterations undertaken to the building as previously permitted. The works proposed as part of the proposed development comprise the following:
 - The retention of 2 no. floor slabs at unit 4 at the southern end of the main building and at the stand alone building at the south east corner of the site that contains Unit 5.
 - The retention of alterations to the elevation of the main building comprising changes to the fenestration of the west facing elevation to Units 2 and 3. These alterations are indicated on drawing No.2 submitted to the Planning

Authority and original permitted layout (as per Ref. 06/443) is indicated in Drawing No.C01. Retention is also sought for alterations to the internal layout arising from revisions to the division of units and changes to the stair and service cores arising from these changes.

- Application for completion of the previously permitted elevations comprising changes at the northern and southern ends of the main building as well as completion of the fenestration of the standalone building.
- Installation of a new switch room in lieu of transformer. This switch room is indicated as being located on the western side of the site to the south of the vehicular access.
- All associated site works including tarmacadam and finishing of external areas and parking area, and installation of surface water soakaway. A total of 33 no. car parking spaces are proposed.

2.2. The application has arisen due to the cessation of works on the development following the serving of a warning notice. This was due to the original permission (Ref. 06/443) having expired and a number of works (notably the floor slabs) being completed before works ceased. What is sought in this application is the retention of the works undertaken when the permission had expired and the completion of the other elements of the development largely in accordance with the previous permission, Ref. 06/443.

3.0 Planning Authority Decision

3.1. Decision

Permission was granted by the Planning authority for the development subject to a total of 6 no. conditions the most notable of which are considered to be as follows:

Condition No. 1 – Development to be retained and completed in accordance with submitted plans and revised plans and particulars submitted by way of further information.

Condition No.2 (a) requires that all site runoff shall be attenuated and disposed of to a soakpit.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The initial report of the Planning Officer noted the planning history of the site and internal reports received. It is noted that while the building is located on lands in the applicant's ownership, that there is a dispute regarding the ownership of lands across which access to the site and sewer connection is located. Stated that the issue of ownership and control of the site require clarification by way of further information.

A subsequent planning officer report notes the information received on foot of the further information request and considers that the land registry details submitted are satisfactory and that permission should be granted. A grant of permission consistent with the Notification of Decision issued by the Planning Authority is recommended.

3.2.2. Other Technical Reports

Fire Officer – Report notes that a fire safety certificate is required for the development.

3.3. Prescribed Bodies

Irish Water – request further information on the basis that Irish Water records indicate that there is a public watermain that traverses the site and that surface water soakpits proposed appear to be located within this wayleave area. Clarification of the location of the watermain and the soakpits is required.

3.4. Third Party Observations

A third party observation was received from Mr Alexander J.Wilsdon. The main issues raised in this objection can be summarised as follows:

- That the application is invalid as the applicant does not have sufficient legal interest to undertake the works as Mr Wilsdon is owner of a strip of the site.
- That the fact that the applicant was informed by the council that the previous permission had expired implies that it was not considered that the development had been substantially completed. It is submitted that the appropriate course should be that permission for the development be resubmitted.
- That there is no statute of limitations applying to conditions and therefore condition 21 attaching to Ref. P.06/441 requiring the installation of a petrol interceptor should be clarified. It is not possible for the applicant to install this interceptor as it is outside of the lands in his ownership / control.
- That the 32 no. car parking spaces permitted under Ref. P06/441 are partially located on lands that are outside of the control of the applicant.

4.0 Planning History

Kilkenny County Council Ref. P.98/36 – Permission granted for an extension of the Hebron Industrial Estate over a site of 6.8 ha.

Kilkenny County Council Ref. P06/441 – Permission granted by the Planning Authority for the construction of 4 no. distribution units, entrance and ancillary works.

Enforcement case Ref. ENF17024 – warning letter issued relating to unauthorised re commencement of works on site for which Planning Ref. P06/441 had expired.

5.0 Policy Context

5.1. Development Plan

The site is located within the area covered by the *Kilkenny City and Environs Development Plan, 2014-2020*.

The site is zoned 'Industrial / Warehousing' under the provisions of the above plan. Under this land use zoning objective Permitted Uses include general industrial uses and ancillary offices and warehouses. Open for Consideration uses include Science and technology based industry and recreational use / buildings. A full list of uses is set out at 3.4.5.8 of the Plan.

5.2. Natural Heritage Designations

The site is not located within or immediately any European site. The River Barrow and River Nore SAC is located c. 0.5km from the site to the south west and to the north east. The River Nore SPA is located c.0.5 km to the south west of the site at the closest point.

6.0 The Appeal

6.1. Grounds of Appeal

The following is a summary of the main issues raised in the third party appeal submitted:

- That the applicant does not have ownership or consent for development over the entirety of the site as indicated on the application drawings. Specifically there is a section at the south western end of the site which is not in the ownership of the applicant but is owned by the appellant.
- That the issue of ownership was explored by way of further information but that no clear evidence of ownership was submitted by the applicant in response. The submitted information states that there has been an error in some of the mapping of folio KK2635L and that this is the subject of dispute.

The Planning Authority accepted this information without affording the appellant any opportunity to provide further clarity on the issue.

- That the decision of the Planning Authority errs in that it interprets the lease on the lands to grant the applicant the use of the lands. This lease only provides for right of access, egress and connection to services on the public road.
- That there is no statute of limitations applying to conditions and therefore condition 21 attaching to Ref. P.06/441 requiring the installation of a petrol interceptor should be clarified. It is not possible for the applicant to install this interceptor as it is outside of the lands in his ownership / control.
- That the 32 no. car parking spaces permitted under Ref. P06/441 are partially located on lands that are outside of the control of the applicant.
- The application provides for a standalone ESB switch room that is located on lands that are not in their control or ownership.
- Understood that issues of landownership are not normally a planning matter, however in this case the applicant will not be able to implement the permission in full and comply with parking and other conditions attached to the original permission.

6.2. Applicant Response

No record of any response received.

6.3. Planning Authority Response

Submission received by the Board stating that the Planning Authority has no further comments to make on this appeal.

7.0 **Assessment**

7.1. The following are the main issues in the assessment of this appeal:

- Principle of Development
- Design and Layout
- Site Servicing
- Site Ownership and Validity of Application
- Appropriate Assessment
- Other Issues

7.2. **Principle of Development**

- 7.2.1. The area of the appeal site is zoned Industrial / Warehousing under the provisions of the Kilkenny City and Environs Development Plan, 2014-2020. Under this land use zoning objective Permitted Uses include general industrial uses and ancillary offices and warehouses. The information submitted with the application does not identify an intended end user however the covering letter describes the development as commercial units. The public notices for the original application (Ref. 06/443) describes the development as wholesale distribution units. The proposed design and layout is, in my opinion consistent with light industrial or warehousing uses.
- 7.2.2. The appeal site is located in an established commercial / industrial area and the proposed development is in my opinion consistent with the prevailing form of development and uses in the vicinity of the site.

7.3. **Design and Layout**

- 7.3.1. The design of the existing structure on site is a standard two storey commercial unit. The elevational treatment indicated on the plans is a Kingspan architectural wall panel or similar to a colour and detail to be the subject of agreement. Such a finish is consistent with the location and surrounding development and is considered to be acceptable.

- 7.3.2. The alterations proposed to the fenestration and windows are indicated on drawings Nos. 2 and 4 and are considered to be consistent with the location and form of building and to be acceptable.
- 7.3.3. The current application includes some revisions to the internal layout and sizes of the units. Most significantly, the large unit proposed at the northern end of the main building is proposed to be sub divided into two smaller units to create a total of 5 no. units. This revision is considered to be acceptable. The current application also proposes the omission of some stair cores and the relocation of others. There is no objection in principle to these alterations. As noted by the Fire Officer from the council a fire safety certificate will be required for the development and the revised layout will therefore have to satisfy the requirements of the Fire Officer.

7.4. Site Servicing

- 7.4.1. The development is proposed to be connected to the public water and foul drainage networks. Drawing No.5 submitted with the 2006 application and resubmitted by the applicant in response to the further information request issued by the Planning Authority, indicates an existing watermain running north – south along the western side of the site. This watermain is indicated as having a 10 metre wayleave. A surface water drain also runs north – south along the western side of the site. Foul drainage is proposed to be collected and to be discharged to the foul drainage network within the industrial estate via a connection running east between the two buildings.
- 7.4.2. Drawing No. 5 submitted with the current application indicate two surface water soakaways located under the car parking area in the southern part of the site with what appear to be two similar structures located in the northern part of the site. It is noted that the layout permitted under Ref. 06/443 indicated that surface water would be discharged from the site to the surface water sewer, however this has been replaced with the proposed soakaways in the current application despite a surface water sewer running through the site.

- 7.4.3. The further information request issued by the planning authority sought confirmation regarding the alignment of the water main that traverses the site and also noted that it would appear that the proposed soakaways would impinge on the wayleave around this watermain. It was requested that a plan be prepared setting out the relative locations of the watermain, associated wayleave and the surface water soakaways. The submitted plan, Drawing No.5 received by the Planning Authority on 3 October, 2017 indicates the alignment of the watermain and associated wayleave. This information appears to have been verified by excavation on site. The plan submitted in response to the further information request does not however indicate the location of the proposed soakaways relative to the watermain and wayleave. It is in fact not clear what surface water drainage method is now proposed and it is noted that the letter from Smithwick Solicitors which accompanies the further information response states that '*I also understand that soakpits are not now being used and that surface water is being diverted into a chamber*'. No other information regarding surface water attenuation and disposal is provided in the response to further information and no internal report from the environment section relating to the further information response is on file. The Notification of Decision issued by the Planning Authority requires at Condition No.2 (a) that all site runoff shall be attenuated and disposed of to a soakpit.
- 7.4.4. The application details regarding surface water drainage are therefore considered to be deficient and such that an assessment of the drainage of the site and the impact on the watermain and associated wayleave cannot be undertaken. In addition, as will be discussed below, there is significant uncertainty regarding the extent of site over which the applicant has sufficient control to undertake surface water drainage works and it is unclear therefore whether attenuation that does not impact on the wayleave can be accommodated on the site.

7.5. **Site Ownership and Validity of Application**

- 7.5.1. Mr Alexander Wilsdon has raised issues regarding the legal interest of the first party to undertake the proposed development. It is contended that part of the site was sold by Mr Wilsdon to the original developer of the site, however work on foot of the permission Ref. 06/443 stopped when the developer went into receivership. The

partially completed development was sold in 2015 to Bluetrack Limited who recommenced works on the development. These works ceased when a warning notice was issued by the Council as permission Ref. 06/443 had expired.

- 7.5.2. The issue of ownership of the site and the legal interest of the first party to undertake the proposed development was raised by the Planning Authority as part of the further information request issued. In their response to the further information request, the applicant has acknowledged that there have been issues with regard to the mapping of the ownership of the entirety of the site as indicated in the subject planning application, however it is contended that notwithstanding this that they have full rights of access and egress from the site and access for all services to and from the site.
- 7.5.3. I note that the response of the first party to the request for further information relates to Folio Ref. KK2635L and that the submitted map indicates that the extent of this folio extends as extending to the buildings and a relatively limited area to the front (west) of the buildings. I also note that Mr Wilsdon has submitted evidence that he is the legal owner of Folio KK11774 which incorporates the western side of the site comprising the existing site access and part of the site. Other than stating that this is in dispute and is a mapping issue, the first party has not provided any clear evidence that Mr Wilsdon is not the owner of these lands.
- 7.5.4. The submission of the first party in response to the further information request includes a copy of the lease arrangement relating to the main part of the site on which the buildings are located. This 999 year lease is subject of a number of easements which are detailed in the schedules. While there is reference in these schedules to *'the free passage and running to and from the sold land of water, soil, gas, electricity, telephone signals, oil and heating fuels and other services....'*, there is no reference to any right for development unrelated to services to extend beyond the boundary of Folio KK2635L over which the first party has provided proof of ownership. I would therefore agree with the appellant that the proposed construction of parking spaces, switch room and surface water attenuation infrastructure would involve works on lands that are outside of the ownership and control of the applicant. I also note the comments of the third party with regard to the requirement under conditions attached to Ref. 06/443 regarding the installation of a petrol interceptor which also appears to me to be located on lands that are outside his ownership /

control. These works are central to the overall development and, as noted by the appellant, while land ownership issues are not normally a planning matter, it is not in my opinion appropriate that the Board would grant permission in these circumstances having regard to the lack of evidence provided by the first party with regard to ownership of these lands.

7.5.5. I note that the third party appellant has submitted information that indicates that services connections to the first party lands as being only facilitated between points A and B as indicated on the submitted Land registry Map. I cannot see any specific reference to points A and B or such a restriction on service or access connections in the text of the Indenture submitted by the first party and am not therefore able to verify that this restriction on access is in place. Were this to be the case it would have further significant implications for the proposed layout as site access is proposed to be via an access that is located outside of the line formed by points A and B. Notwithstanding this issue, while the first party appears to have a right of access, egress and connection to public services via lands within Folio KK11774, I consider that on the basis of the information presented, the first party has not demonstrated that they have the legal interest or control to develop on lands identified as Folio KK11774 in the submitted documentation.

7.5.6. The Board will note that the first party did not provide any response submission to the grounds of the third party appeal and that the most recent submission from the first party was in October, 2017 in its response to the further information request of the Planning Authority. This submission states that the lands covered by Folio KK11774 are the subject of dispute and that the case is in the circuit court. Given these circumstances, the Board may consider it appropriate to make a further request to the first party for comments on the grounds of appeal.

7.6. **Appropriate Assessment**

7.6.1. The site is located such that there are two European sites that are located in close proximity. These sites are the River Barrow and River Nore SAC site (site code 002162) which is located c.0.5km to the north east and c.0.5km to the south west of the appeal site at the closest point and secondly the River Nore SPA (site code

004233) which is located c.0.5km to the south west of the appeal site at the closest point. There are no other European sites located within 10km of the appeal site.

7.6.2. No appropriate assessment screening is submitted with the application. Appropriate assessment screening was not referenced in the report of the Planning Officer. Given the uncertainty with regard to surface water drainage it is assumed for the purposes of this assessment that surface water is to be disposed of to soakaways within the site boundary.

7.6.3. The following is a summary of the conservation objectives and qualifying interests of the two identified European sites:

River Nore SPA (site code 004233)

To maintain or restore the favourable conservation condition of the following bird species listed as Special Conservation Interests for this SPA:

- Kingfisher.

River Barrow and River Nore SAC (site code 002162)

7.6.4. To maintain or restore the favourable conservation condition of the following habitats and species listed as Special Conservation Interests for this SAC:

- Estuaries
- Mudflats and sandflats not covered by seawater at low tide
- Reefs
- Salicornia and other annuals colonising mud and sand
- Atlantic salt meadows (*Glauco-Puccinellietalia maritima*)
- Mediterranean salt meadows (*Juncetalia maritimi*)
- Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation
- European dry heaths
- Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels

- Petrifying springs with tufa formation (Cratoneurion)
- Old sessile oak woods with Ilex and Blechnum in the British Isles
- Alluvial forests with Alnus glutinosa and Fraxinus excelsior (Alno-Padion, Alnion incanae, Salicion albae)
- Vertigo moulinsiana (Desmoulin's Whorl Snail)
- Margaritifera margaritifera (Freshwater Pearl Mussel)
- Austropotamobius pallipes (White-clawed Crayfish)
- Petromyzon marinus (Sea Lamprey)
- Lampetra planeri (Brook Lamprey)
- Lampetra fluviatilis (River Lamprey)
- Alosa fallax fallax (Twaite Shad)
- Salmo salar (Salmon)
- Lutra lutra (Otter)
- Trichomanes speciosum (Killarney Fern)
- Margaritifera durrovensis (Nore Pearl Mussel)

7.6.5. The proposed development is to be connected to the public water supply and foul drainage network. The Purcellsinch waste water treatment plant was upgraded in 2017 with the capacity increased by 81,000 p.e.. There is therefore adequate capacity to accommodate the proposed development without impacting significantly on water quality such as to have an adverse impact on any European sites. Surface water disposal to ground is proposed as part of the proposed development. Given the size of the site and the separation from any European sites, it is not considered that the discharge of surface water to the ground via soakaways would have any significant impact on the River Barrow or River Nore systems such as would impact on the conservation objectives for the River Barrow and River Nore SAC or the River Nore SPA.

7.6.6. Having regard to the above, the proposed development is not likely to have significant effects on any European sites in light of the conservation objectives for these sites.

7.7. Other Issues

7.7.1. I note that the report of the Planning Officer states that it is not proposed that development contributions would be attached to the grant of permission on the basis that the works included in the application relate primarily to elevational features to be replaced or retained. It is not however clear whether all development contributions were paid in respect of Kilkenny County Council Ref. 06/443 given that the floor slab and other aspects of this permission were not completed at the time of the initial construction activity on the site. It is therefore recommended that in the event of a grant of permission a general condition requiring the payment of a financial contribution under s.48 would be attached.

8.0 Recommendation

8.1. It is recommended that permission be refused based on the following reasons and considerations:

9.0 Reasons and Considerations

1. Having regard to the information submitted with the application that indicates the use of surface water soakaways and the clarification of the alignment of the Irish Water public watermain and associated wayleave that traverses the site as submitted to the Planning Authority on 3rd day of October, 2017, the Board is not satisfied that the proposed surface water drainage system can be constructed without impacting on the wayleave. The proposed development would therefore be prejudicial to public health and contrary to the proper planning and sustainable development of the area.

2. On the basis of the information presented, the Board is not satisfied that the applicant has demonstrated sufficient legal interest or control over the lands on the western and south western side of the appeal site, identified as Folio KK11774 in the submission of the third party appellant, such as to enable the entire development to be undertaken. The Board is not therefore satisfied that the applicant has sufficient legal interest in the site to validate the application and that to grant permission would be contrary to the proper planning and sustainable development of the area.

Stephen Kay
Planning Inspector

25 April, 2018