



An
Bord
Pleanála

Inspector's Report ABP-300404-17

Development	The importation of soil and stone, bricks, tiles, ceramics and concrete for the raising of an agricultural field in order to improve the agricultural output of the field.
Location	Kilnaglory, Ballincollig, Cork
Planning Authority	Cork County Council
Planning Authority Reg. Ref.	17/4864
Applicant(s)	Conhor Construction Ltd
Type of Application	Permission
Planning Authority Decision	Grant, subject to 37 conditions
Type of Appeal	Section 48
Appellant(s)	Conhor Construction Ltd
Observer(s)	Kieran & Mary Spitere and Others
Date of Site Inspection	22 nd March 2018
Inspector	Hugh D. Morrison

1.0 Site Location and Description

- 1.1. The site comprises a field that is roughly regular in shape and which extends over an area of 2.44 hectares. A ditch traverses this site on an east/west axis and it is presently in agricultural use.
- 1.2. The site is accessed from the north via a farm track. This track is composed of three portions, each of which is of straight alignment. The first and third portions run on a north/south axis, while the remaining second one runs on an east/west axis. It is a total of 0.7 km in length.
- 1.3. The aforementioned farm track is accessed off the Killumney Road (L-2216) at a point some 100m to the south west of the southern roundabout, which forms part of Junction 2 (Ballincollig) of the N22.

2.0 Proposed Development

- 2.1. The proposal would entail the importation of soil and stone, bricks, tiles, ceramics and concrete for the raising of an agricultural field in order to improve the agricultural output of the field.
- 2.2. The applicant estimates that the importation of 81,200 cubic metres of the said materials would occur and that, at 14 cubic metres per load, a total of 5800 loads over 5 years would transpire.

3.0 Planning Authority Decision

3.1. Decision

Following clarification of further information, permission was granted subject to 37 conditions, the second of which states the following:

At least one month before commencing development or at the discretion of the Planning Authority within such further period or periods of time as it may nominate in writing, the developer shall pay a special contribution of €38,976 to Cork County Council, updated monthly in accordance with the Consumer Price Index from the date of grant of permission to the date of payment, in respect of specific exceptional costs not covered in the Council's

General Contributions Scheme, in respect of works proposed to be carried out, for the provision of the upkeep of the road network.

The payment of the said contribution shall be subject to the following:

(a) Where the works in question –

(i) are not commenced within 5 years of the date of payment of the contribution (or final instalment if paid by phased payment),

(ii) have commenced but have not been completed within 7 years of the date of payment of the contribution (or final instalment if paid by phased payment), or

(iii) where the Council has decided not to proceed with the proposed works or part thereof, the contribution shall, subject to paragraph (b) below, be refunded to the applicant together with any interest accrued over the period while held by the Council.

(b) Where under sub-paragraphs (ii) or (iii) of paragraph (a) above, any local authority has incurred expenditure within the required period in respect of a proportion of the works proposed to be carried out, any refund shall be in proportion to those proposed works which have not been carried out.

(c) Payment of interest at the prevailing interest rate payable by the Council's Treasurer on the Council's General Account on the contribution of any instalments thereof that have been paid, so long and in so far as it is or they are retained unexpended by the Council.

Reason: It is considered appropriate that the developer should contribute towards these specific exceptional costs, for works which will benefit the proposed development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

See decision.

3.2.2. Other Technical Reports:

Area Engineer: Recommends a special contribution towards the upgrading of the local road network. This is calculated on the basis of a charge of €0.48 per cubic metre and a conversion factor of 14 cubic metres per load. Thus,

5800 loads x 14 cubic metres per load x €0.48 per cubic metre = €38,976

4.0 Planning History

The site: None.

Site to the west: 08/8046: Raising of agricultural land with surplus construction materials, i.e. inert soil/rock and topsoil: Permitted.

5.0 Policy Context

5.1. Development Plan

Under the Cork County Development Plan 2014 – 2020, the site is shown as lying within the County Metropolitan Cork Strategic Planning Area. The farm track to the site passes through a Prominent and Strategic Metropolitan Green Belt Area on either side of the L-2216. The site and track are shown as lying within the Landscape Character Type themed 6(a) “Broad Fertile Lowland Valley”.

5.2. Natural Heritage Designations

Cork Harbour SPA (004030)

Great Island Channel SAC

6.0 The Appeal

6.1. Grounds of Appeal

The applicant has appealed condition 2 of the draft permission only. This condition requires that, under Sections 48(2)(c) and 48(12)(a) of the Planning and Development Act, 2000 – 2017, a Special Development Contribution (SDC) be paid. The applicant contends that the provisions of these Sections have not been followed in the attachment of the said condition and so they request that it be omitted in its entirety. To this end, they cite the following grounds of appeal:

- The attachment of condition 2 is justified on the basis that the SDC would be “in respect of works proposed to be carried out, for the provision of the upkeep of the road network.”

Attention is drawn to Section 48(17) which includes the refurbishment of roads under the definition of public infrastructure and facilities. Attention is also drawn to the Planning Authority's General Development Contribution Scheme 2004 (GDCS) which includes the heading of "Roads and Amenities" under which a charge is levied on a square metre of floorspace basis.

The current proposal would not entail the provision of any floorspace and so no levy under the GDCS is attracted. It is thus inappropriate for the Planning Authority to "plug this gap" by means of a SDC.

- The proposal is for an agricultural land reclamation scheme. In Appendix 1 to the GDCS, the Planning Authority cites categories of development upon which SDCs are to be levied. These do not include agricultural developments.

Under each of the aforementioned categories, criteria are set out against which levies are calculated. In the case of the current proposal only one criterion has been used in calculating the levy cited in condition 2, i.e. the volume of materials, and so other criterion, e.g. the condition of the road network and estimated costs of bringing the network up to the requisite standard, were not applied.

- Attention is drawn to Section 2 of Circular Letter PD 4/2003, which addresses SDCs and advises that works must "benefit very specific requirements of the proposed development" and to Section 7.12 of the Development Management Guidelines, which advises that the basis for the calculation be explained.
 - Condition 2 fails to describe the nature and extent of the works that would be funded by the levy. Given that only a short section of the L-2216 lies between the access point to the farm track and Junction 2 of the N22, it is difficult to envisage circumstances in which this levy of €38,976 would be needed.

Notwithstanding the absence of any basis for it in the GDCS, the Area Engineer's justification for his calculation of the levy is that the same methodology was applied elsewhere in the County. This is an inadequate justification.

- Condition 2 fails to specify the particular works that would be required and so an explanation of their expense cannot be given. In this respect, the Board has previously omitted SDC conditions for such failure, e.g. PL04.243568 and PL04.248671.
- Condition 2 fails to demonstrate that the specific exceptional costs comprised in the subject SDC are not already covered by the GDCS, i.e. no public infrastructure and facilities are cited.
- The proposal would not require the refurbishment of existing roads to facilitate it. Likewise, the upkeep of these roads would not benefit this proposal *directly*.

The proposal would be a temporary one, e.g. it could take place over less than a year. Furthermore, traffic on local roads is generated by residential, agricultural, and commercial uses in the area and it makes a significant contribution to the deterioration of these roads. Accordingly, this traffic would benefit from their upkeep, too, and, contrary to Section 7.12 of the Development Management Guidelines, no apportionment of the costs of such upkeep has been made in the relevant calculation for condition 2.

The Area Engineer's calculation is based on a standardised rate of €0.48 cubic metres and so no allowance is made for the distance over which the imported material would be carried.

In the light of the foregoing grounds, condition 2 does not represent an appropriate application of Section 48(2)(c) to the proposal and so it would place an unfair financial burden upon the applicant for the upkeep of local roads.

6.2. Planning Authority Response

The Planning Authority has provided the following explanation for its calculation of the special contribution at issue:

- The Generalised Fourth Power Law states that there is a fourth power relationship between pavement deterioration and axel loading (so e.g., if the axel loading doubles, the rate of pavement deterioration goes up by a factor of 2 to the power of 4 = 16). For this reason, the proposed 5800 HGV movements would cause significant damage to the structure of the adjoining

public road, over and above that of normal traffic. There would also be additional localised damage directly outside the proposed entrance due to the turning movements of the trucks as they enter and exit the site.

- The rate of €0.48 per cubic metre was used by the Board in the case of PL04.233506.

6.3. Observations

The observer understands that the current appeal would lead to a *de nova* assessment of the proposal. As they have no objection to the permission granted by the Planning Authority, especially as the applicant has issued a post-decision “letter of comfort” to them, they express concern that the Board may grant a permission that is less restrictive.

6.4. Further Responses

The applicant has responded to the Planning Authority’s response by reiterating many of the points raised in their grounds of appeal. Additionally, since the Board’s decision on PL04.233506, several other cases have entailed the omission of comparable conditions to the one currently under appeal, i.e. PL04.243568, PL04.248671, and PL04.249218.

7.0 Assessment

- 7.1. Under Section 48(13)(a) of the Planning and Development Act, 2000 – 2017, (hereafter referred to as the Act) where a Special Development Contribution (SDC) condition is the only subject of an appeal, the Board is empowered to consider this condition on its own and so no *de nova* assessment is necessary. The current appeal is an example of just such an appeal and so, contrary to the expectation of the observer, no *de nova* assessment is involved in determining this case.
- 7.2. The subject condition is denoted as condition 2 in the draft permission granted by the Planning Authority to application 17/4864. This condition requires that a SDC of €38,976 be paid “in respect of specific exceptional costs not covered in the General Development Contributions Scheme (GDCS), in respect of works proposed to be

carried out, for the provision of the upkeep of the road network.” The GDCS referred to is the current one operative in County Cork, i.e. this Scheme dates from 2004 and it was last updated in 2015. It is based on the planned expenditure for the provision of services over the 20-year period beginning in 2004. Such services include local and regional roads, but not national ones. Levies under the Scheme are calculated on the basis of floorspace comprised in developments.

7.3. The current proposal is for the importation of materials for the purpose of raising the level of an existing field. No floorspace would be created thereby and so the development has not attracted a levy under the GDCS.

7.4. The applicant contends that, in the absence of the opportunity to levy the development under the GDCS, the Planning Authority has resorted to a SDC. This course of action is challenged on the basis that it entails a failure to comply with the provisions of Section 48(2)(c) of the Act, which states that

A Planning Authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development.

7.5. Section 2 of Circular Letter PD 4/2003 addresses SDCs and advises that works must “benefit very specific requirements of the proposed development” and Section 7.12 of the Development Management Guidelines advises that the basis for the calculation of the SDC should be explained. In this respect, the Guidelines state that “it will be necessary to identify the nature/scope of works, the expenditure involved and the basis for the calculation, including how it is apportioned to the particular development.” An example of where a SDC would be justified is given, i.e. where the costs are incurred directly as a result of, or in order to facilitate, the development in question.

7.6. Condition 2 refers to works for the provision of the upkeep of the road network. This reference appears to be for repair and maintenance works that are anticipated as being necessary as a result of traffic generated by the proposal. There is no suggestion that these works would be needed to bring the road network up to a standard needed to carry this traffic satisfactorily and there is no suggestion that they

would be needed to alter this network from its existing form to, likewise, carry this traffic satisfactorily.

- 7.7. The applicant draws attention to the fact that the need to repair and maintain the road network would stem from not only traffic generated by the proposal but from other traffic that uses it and yet no apportionment of the resulting costs has been set out. Furthermore, the nature/scope of the works has not been delineated and the view is expressed that the short portion of the L-2216, between Junction 2 of the N22 and the entrance to the farm track to the site, would be unlikely, under any upkeep scenario for it, to need the sum cited in condition 2, especially as the traffic in question would persist for a temporary period of time only.
- 7.8. The Planning Authority has responded to the applicant's critique by simply setting out the basis of its calculation of the SDC cited in condition 2. This calculation draws upon the applicant's estimate as to the volume of materials that would be imported and to the associated number of HGV trips that would be involved in such importation. A rate per cubic metre is applied that is the same as that used by the Board in PL04.233506. The justification for this SDC is based on the known relationship between axel loadings and pavement deterioration, i.e. as axel loadings double the rate of deterioration increases by $2 \times 2 \times 2 \times 2$.
- 7.9. The appeal case cited by the Planning Authority was one in which the HGV traffic necessitated "the strengthening and upgrading of the road in question". The Board's Order adds that works thus envisaged would "not include maintenance". Accordingly, this case differs from the current one and so it is not comparable.
- 7.10. Section 48(1) & (2) of the Act makes clear that Planning Authorities can make GDCSs in respect of public infrastructure and facilities. Under Section 48(17), public infrastructure and facilities is defined as including, amongst other things, the refurbishment of roads. Ordinarily, the upkeep of roads is not funded by such Schemes, although it is conceivable that where a road is "worn out" and so beyond simply works of repair and maintenance, refurbishment under a Scheme could take place.
- 7.11. In the current case, I do not consider that the SDC would overlap with the GDCS as it relates to works of upkeep rather than refurbishment. (In this respect, it does not relate to a category of proposal that is specifically cited in Appendix 1 to the GDCS).

Similarly, under Section 48(2)(c), SDCs must be for works of “public infrastructure and facilities which benefit the proposed development.” Again, as works of upkeep are envisaged rather than refurbishment, there is no basis within this Section or any other Section of the Act for the Planning Authority to use a SDC to raise funds for works of repair and maintenance.

- 7.12. Given the foregoing “in principle” objection to the attachment of condition 2, other matters raised by the applicant do not need to be considered. However, I note their supplementary validity, i.e. the Planning Authority has not stated the scope/extent of the works with respect to the road network and it has not apportioned the cost of works of upkeep between road users. In this respect, the use of €0.48 per cubic metre cannot be “taken as read”, given that the works envisaged under PL04.233506 specifically excluded ones of maintenance.

8.0 Recommendation

- 8.1. That condition 2 be omitted from the permission granted to application 17/4864.

9.0 Reasons and Considerations

The Board considers that the special development contribution cited under condition 2 and attached to the permission granted to application 17/4864 cannot be justified, as it relates to works for the upkeep of the road network. Such works do not lie within the definition of “public infrastructure and facilities” set out in Section 48(17) of the Planning and Development Act, 2000 – 2017, and so, under Section 48(2)(c) of this Act, the Planning Authority is not entitled to attach the said condition.

Hugh D. Morrison
Planning Inspector

3rd April 2018