



An  
Bord  
Pleanála

## Inspector's Report ABP-302691-18

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<b>Question</b>	Point of detail regarding financial contribution condition no 17 of F08A/1355(extended under F08A/1355/E2)
<b>Location</b>	Oatlands House, Diswellstown, Castleknock, Dublin 15
<b>Planning Authority</b>	Fingal County Council
<b>Planning Authority Reg. Ref.</b>	F08A/1355
<b>Applicant for Declaration</b>	Bushnell Investments Limited
<b>Referral Type</b>	Point of Detail Referral
<b>Referred by</b>	Bushnell Investments Limited
<b>Owner/Occupier</b>	Bushnell Investments Limited
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	17 <sup>th</sup> of January 2019
<b>Inspector</b>	Angela Brereton

## 1.0 Introduction

- 1.1. This case is a referral under section 34(5) of the Planning and Development Act 2000, as amended. It was received by the Board from Bushnell Investments Ltd., and concerns a point of detail relative to the payment of the development contributions as per Condition 17 which was attached to a grant of planning permission issued by Fingal County Council (Reg.Ref. F08A/1355/E2 refers).

## 2.0 Site Location and Description

- 2.1. The subject site includes Oatlands house, a Protected Structure and associated structures within the attendant grounds (c.1.45ha). The House forms part of a larger property including the house, gate lodge, avenue and associated outbuildings. The outbuildings have recently been converted into 5 separate dwelling units. Oatlands House is surrounded by a mature strand of trees which provide a significant level of screening to the dwellings and outbuildings. There is a garden associated with Oatlands House to the south of the dwelling. These lands also fall significantly to the Strawberry Beds to the south. To the north of the dwelling and the east of the avenue is a large grassed field which is in the ownership of the applicant. The gatelodge is located to the north west of the dwelling and is accessed off the Porterstown Road. The junction with Diswellstown Manor is to the north west on the opposite side of the road. The M50 is located to the east of the site.
- 2.2. On my site visit I noted that the entrance to the site is not accessible to the general public and is restricted to works vehicles. I also noted the signage advertising the housing units in Oatlands Park, and the gate lodge with separate entrance. In view of the barriers at the entrance and security cameras and security signs nearby, it does not appear that the residential units are occupied.

## 3.0 Background

- 3.1. The Referrer, Bushnell Investments Ltd, provides that discussions were held with Fingal County Council, where it was indicated that Financial Contributions be charged in line with the 2003 Development Contribution Scheme. The Referrer is of the opinion that they should be charged in line with the 2016-2020 Development

Contributions Scheme, which provides for exemptions and reductions for Protected Structures. They refer to the more recent Planning History (as noted in the relevant section below) and to Condition no.17 of the parent permission Reg.Ref. F08A/1355 having regard to Fingal's Calculation of Development Contributions. The point of detail referred to generally queries the need for any such payment and regard is had to this and the calculation of the level of contribution provided for in this condition, taking into account current legislation and the Council's current Development Contributions Scheme.

Condition no.17 provides for the following:

*The developer shall pay the sum of €276,153 (updated at date of commencement of development, in accordance with changes in the Tender Price Index) to the planning authority as a contribution towards the expenditure that was/or that is proposed to be incurred by the planning authority in respect of public infrastructure and facilities benefitting development in the area of the Authority, as provided for in the Contribution Scheme for Fingal County Council made by the Council. The phasing of payments and the giving of security to ensure payment shall be agreed in writing with the planning authority prior to the commencement of development.*

*REASON: It is considered reasonable that the payment of a contribution be required in respect of the public infrastructure and facilities benefitting development in the area of the planning authority and this is provided, or that is intended will be provided, by or on behalf of the Local Authority.*

## **4.0 Referral**

### **4.1. Referrers Case**

4.1.1. This can be summarised as follows:

- As the commencement notice for the site was lodged in 2017 (Appendix 2 contains confirmation of this) and none of the houses were sold (Appendix 3), they were of the understanding that Fingal County Council would be obliged to review the financial contributions on Reg.Ref.F08A/0355/E2- the mother permission.

- This would be in line with the Urban Regeneration and Housing Act 2015 based on the fact that Oatlands House and its outbuildings are Protected Structures and are exempt from financial contributions under the 2016-2020 Development Contributions Scheme (Appendix 4 refers).
- Protected Structures were not exempt from development contributions in the 2003 Development Contributions Scheme, which was the contribution scheme under which the application was levied.
- They were of the understanding that their financial contributions totalling €237,568.75 would be waived in line with Ministerial advice.
- Following discussions with Fingal County Council they were advised that the contribution on Reg.Ref. F08A/0355 would not be waived, but that if they lodged a new application for permission for the scheme again, the financial contribution would be waived.
- Hence, they lodged planning application Reg.Ref. FW18A/092 for minor retention items and for the removal of the financial contribution in line with Government Policy. While the retention element was granted, the amendment to the financial contribution element was refused in a split decision by the Council.
- The financial contribution of €237,568.75 is still outstanding to the Council as can be seen in the financial statement for the site which is included in Appendix 7.
- This referral seeks the removal of the financial contributions for the scheme as provided for in the 2015 Act.

Their Referral has regard to the following issues:

Reg. Ref. F08A/0355 – Fingal’s Calculations of S48 Contribution

- They provide background details relative to the inclusion of Condition no.17.
- This permission was granted in 2009 and was levied under the 2003 DCS which does not provide for exemptions for protected structures.

- The Urban Regeneration & Housing Act allows the Council to apply the current rate to permissions that were granted under previous schemes, i.e the 2016-2020 Contributions Scheme. The Council has not allowed for this.
- The water & foul drainage element is included in the overall rate as indicated on the Financial Statement (Appendix 7) as the permission pre-dates Irish Water.
- They provide details of the S48 rate for 2017 and note that the breakdown rates applied by the Council total €237,568.76.
- They ask the Board to review this contribution in light of new Government Policy which aims to promote the provision of much required housing in the national housing crisis.

Background to Reg. Ref. FW18A/0092 (see Appendix 8)

- The applicant's Bushnell Investments Ltd welcome the decision to grant permission for the minor alterations issued by the Council. They decided not to appeal the Condition relating to financial contributions, instead it was decided to make this referral.
- Financial contributions were waived on the amendment application for just the changes with a S48 contribution of €429.70 being apportioned to the revised scheme. However, the Council did not remove the financial contribution from the mother permission as was the intent of this application.
- They note the Council's decision to refuse the removal of the development contribution relevant to the mother permission. They consider that the removal of this condition is not a material contravention of previous or current permissions on the overall site. Rather it is in line with Government Policy as per the Urban Regeneration and Housing Act 2015, 3(A).
- They consider that the removal of the contribution is in line with the Council's DCS 2016-2020 for redevelopment of a P.S and in line with the intent of the Act, which is to reduce the financial burden on house providers and to promote house building.

### Planner's Report on Reg.Ref.FW18A/0092 (Appendix 9)

- This has regard to reference in the Planner's Report of the changes facilitated in Section 29 of the Urban Regeneration and Housing Act 2015 (as amended). The Council did not apply reductions to the development contribution of the mother permission. They consider that this is not the intent of the Urban Regeneration and Housing Act 2015 and note Fingal have not applied the financial contributions for the overall scheme of F08A/1355 in line with recent legislation and government guidance.

### FCC DSC 2016-2020 – Oatlands House, Gate Lodge and Out-Buildings PS

- They note that all of the above are listed as Protected Structures Ref. no. 0737 and all of the proposed development is within the PS.
- They note the exemptions relative to the payment of contributions in the case of works to PS in the current DCS 2016-2020 (Appendix 4).
- The application at Oatlands consists of 1510sq.m of existing structures and 545sqm of extensions. They are of the opinion that the extensions are subservient in scale to the PS and contribute to the conservation and restoration of the structure.
- They consider the development at Oatlands House to be exempt from financial contributions as per Section 10(p) of the Fingal DCS 2016-2020, which would amount to a nil contribution.

### Urban Regeneration and Housing Act 2015

- They refer to Sections 3A(b) of the above Act and confirm (Appendix 3) that the houses/units on site have not been sold and the commencement notice was lodged in 2017. In compliance with this Section of the Act the contribution payable should be based on the current Fingal DCS 2016-2020.
- PS as outlined are exempted development from financial contributions under the current DCS i.e they have no monetary value.
- They request in the spirit of the Minister's wishes and the 2015 Act, the Board to waive the financial contribution required in Condition No. 17, to nil in line

with the current DCS as this would reduce the amount of contribution payable as per the 2015 Act.

- They include a list of Appendices 1-10 relevant to their Referral.

## 4.2. Planning Authority Response

4.2.1. The Planning Authority Response can be summarised as follows:

- ABP-302691-18 – F08A/1355 (extended under F08A/1355/E2) in respect of the renovation of Oatlands House, inclusive of the outbuildings and gate lodge and the development of 14no. residential units was granted on the 24<sup>th</sup> of June 2009. Condition no.17 was included relative to Development Contributions and as per the terms of the Council's DCS 2003.
- They provide details of the calculation of the Development Contribution.
- They note that the development did not commence due to commercial factors and an application for extension of duration was lodged on the 1<sup>st</sup> of August 2014 and extended up to and including 8<sup>th</sup> of August 2019. A commencement notice was submitted giving a commencement date of 25<sup>th</sup> of September 2017.
- They have regard to Section 29 of the Urban Regeneration & Housing Act 2015. They also note Amendment of Section 48 of the 2000 Act – development contributions (insertion of subsections 3A – 3C).
- They provide that the PA applied the 2017 Development Contribution Rate in addition to the Irish Water Rate, in accordance with the Urban Regeneration & Housing Act 2015 to permission Reg.Ref. F08A/1355 and determined €237,568.75, (they note regard to indexation and further reductions) to be the most beneficial rate and it was applied to this permission.
- They note the submissions of the applicant relative to applying the terms of the current DCS 2016-2020. The applicant was advised that in order for the terms of the new scheme to be applied a new permission covering the full development would need to be submitted. However, it was noted that development had commenced, under Reg.Ref. F08A/1355/E2 at this stage.

- A split decision issued under Reg.Ref.FW18A/0092, resulting in refusal of the removal of the financial contribution Condition no.17 under F08A/1355. It is the Council's view that any amendment to this financial contribution should be undertaken on the basis of the parent permission having regard to the relevant legislation and terms of the DCS as it applies to Condition no.17.
- It is the view of the PA that the exemption for PS under the Council's current DCS 2016-2020 cannot be applied retrospectively.
- The Board is advised that permission was recently granted under Reg.Ref.FW18A/0124 for 2 storey office over basement apartment to 2 storey over-basement dwelling.
- The PA requests that the terms of Condition no.17 be included in the Board's determination.

## 5.0 Planning History

- Reg.Ref.F08A/1355 – Permission granted on the 15<sup>th</sup> of May 2009, by the Council subject to conditions for Renovations to and redevelopment, including extensions, of the existing protected structure and associated outbuildings and gate lodge at Oaklands House. This is referred to as the 'parent' or 'mother' permission. Condition no.17 is the pertinent condition relative to contributions and the subject referral.
- Reg.Ref.F08A/1355/E2 – An extension of the above permission was granted by the Council on the 12<sup>th</sup> of September, 2014 to the 8<sup>th</sup> of August 2019.
- Reg.Ref.FW18A/0092 – The Council made a split decision on the 22<sup>nd</sup> of August 2018 and granted permission subject to conditions, for retention of alterations to approved access and parking areas and of minor internal alterations and elevation revisions to approved houses 2-13 inclusive, incorporating extensions.

They refused permission in respect of the removal of financial contribution Condition no.17 from F08A/1355 as provided for under the Fingal Contribution Scheme 2016-2020 and the Urban Regeneration and Housing Act 2015 as



being contrary to the proper planning and development. Schedule 2 provides their reason for refusal and is as follows:

*The proposed removal of condition 17 would contravene materially the terms of Permission Reg.Ref. F08A/1355 and sub-section (1) of section 48 of the Planning and Development Act 2000 as amended, which enables a Planning Authority to include a condition requiring the payment of a contribution in respect of public infrastructure and facilities benefitting development in that area. The proposed removal would result in no contribution to the public infrastructure in the area and would therefore be contrary to the proper planning and sustainable development of the area.*

A note to the Applicant was included with this refusal i.e: *The applicant is advised to discuss the Development Contributions associated with this development, as part of the Fingal Contribution Scheme 2016-2020 and the Urban Regeneration and Housing Act 2015, with the Development Contribution Section of Fingal County Council.*

- Reg.Ref.FW18A/0124 – Permission granted subject to conditions by the Council for Alterations to development permitted under F08A/1355 to consist of change of permitted use for Oatlands House from 2 storey office over basement apartment to 2 storey over basement dwellings.

Copies of these permissions are included in the History Appendix to this Report.

## **6.0 Policy Context**

### **6.1. Fingal County Development Plan 2017-2023**

Chapter 7 refers to Movement and Infrastructure. Section 7.1 includes reference to Section 48 and 49 Levies and notes: *Financial contributions will be sought as part of the development management process for certain development under the provisions of Section 48 and Section 49 of the Planning and Development Act, 2000 (as amended). Section 48 (general) schemes relate to proposed provision of public infrastructure and facilities which benefit development within the area of the Planning*

*Authority, and are applied as a general levy on development.*

Objective MT44 seeks to: *Utilise, where appropriate, the provisions of Section 48 and 49 of the Planning and Development Act, 2000 (as amended) to generate financial contributions towards the capital costs of providing local and strategic transport infrastructure, services or projects in the County. This will be done in conjunction with adjoining Local Authorities where appropriate.*

Chapter 9 refers to Natural Heritage. Objectives NH51 and NH52 seek to protect high amenity areas from inappropriate development and reinforce their character, distinctiveness and sense of place.

Chapter 11 refers to the Land Use Zoning Objectives. The application site is within the High Amenity land-use zoning where the objective is: *To protect and improve high amenity areas. The vision is to: Protect these highly sensitive and scenic locations from inappropriate development and reinforce their character, distinctiveness and sense of place. In recognition of the amenity potential of these areas opportunities to increase public access will be explored.*

## **6.2. Fingal County Council Development Contributions Scheme 2016-2020**

Regard is had to the Section 48 General Contributions Scheme and to the public infrastructure and facilities included and basis for determination of contribution.

Section 9 provides the Levels of Contributions for Residential and Non-residential It is noted that this has been increased by 7.2% in accordance with the Tender Price Index from the 1<sup>st</sup> of January 2019 to Residential €92.13 per sq.m and Non-residential €71.94.

Section 10 provides the Exemptions and Reductions. Section 10(i) provides a number of categories of development (a) – (r) will be exempted from the requirement to pay development contributions under the scheme or subject to reductions. This includes category (p) i.e:

*Renovations to restore/refurbish structures deemed to be “Protected Structures” in the County Development Plan, where the Council is satisfied that the works substantially contribute to the conservation or restoration of the structure, are exempt. Extensions to Protected Structures for private residential purposes are also exempt (provided extension is subservient in scale). Extensions to Protected Structures for commercial purposes are subject to a reduction of 50% in the appropriate rate. These exemptions do not generally extend to development on the site detached from the protected structure. However, development within the curtilage of a Protected Structure may be considered for up to a 50% reduction in the rate for that part of the development which is considered by the Council to be necessary to ensure the protection, conservation or restoration of the structure.*

Note is had of the following:

10(i)(r) *Change of use applications are exempt unless the revised usage constitutes a substantial intensification of use of the building or services.*

10(ii)(a) *Exemptions and Reductions shall not apply to permissions for retention of development.*

The following Sections are also of note:

Payment of Contribution

11. *Conditions requiring payment of the contributions provided for in the Scheme will be imposed in all decisions to grant planning permissions made following the making of the Scheme by the Council. **The operative date of the scheme is from 1st January 2016.***

12. *The contributions under the Scheme shall be payable **prior to commencement of development or as otherwise agreed by the Council.** Contributions shall be payable at the index adjusted rate pertaining to the year in which implementation of the planning permission is commenced, as provided for in Note 1 to the table at Article 9 above.*

15. *An appeal may be brought to the Board where the applicant for planning permission under Section 34 of the Act considers that the terms of the Scheme have not been properly applied in respect of any conditions laid down by the Council.*

## Review of the Scheme

16. *The Scheme may be reviewed from time to time by the Council having regard to circumstances prevailing at the time. After a review of the Scheme, a new Scheme may be made. The Scheme is effective from 1 January 2016 until 31 December 2020, unless a New Scheme is made in the interim. The duration of the Scheme may be extended beyond 2020 if considered appropriate subject to the approval of the elected members.*

## Effective Date

18. *This Scheme is **effective** in respect of permissions granted from 1<sup>st</sup> of January 2016.*

### 6.3. **Development Contributions - Guidelines for Planning Authorities 2013**

The Minister for the Environment, Community and Local Government has issued these guidelines under section 28 of the Planning and Development Act 2000 (as amended). Planning authorities and An Bord Pleanála are required to have regard to the guidelines in performance of their functions under the Planning Acts.

The primary objective of the development contribution mechanism is to partly fund the provision of essential public infrastructure, without which development could not proceed. Development contributions have enabled much essential public infrastructure to be funded since 2000 in combination with other sources of, mainly exchequer, funding. Discussion is had of the concept of the General Development Scheme, Special Contributions and Supplementary Contributions Schemes.

Chapter 2 provides Key Messages for Supporting Economic Development. This includes: *Development contributions are not cash-cows: there is an important balance to be struck between the funding of public infrastructure and the need to encourage economic activity and promote sustainable development patterns. It is essential that development contribution schemes do not impede job creation or facilitate unsustainable development patterns.*

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000 (as amended)

Section 34(5) provides: *The conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and F262 [the person carrying out the development; if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination].*

### 7.2. Section 48 Development Contributions

Section 48 of the Planning and Development Act 2000, (as amended) details the methodology and guiding principles by which Development Contributions Schemes should be arrived at. This includes:

Section 48(1) - *A planning authority may, when granting a permission under section 34, include conditions for requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority and that is provided, or that it is intended will be provided, by or on behalf of a local authority (regardless of other sources of funding for the infrastructure and facilities).*

Section 48(2)(a) - *Subject to paragraph (c), the basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section, and a planning authority may make one or more schemes in respect of different parts of its functional area.*

(b) *A scheme may make provision for payment of different contributions in respect of different classes or descriptions of development.*

(c) *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.*

Section 48(3)(a) - *A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme.*

(b) *In stating the basis for determining the contributions in accordance with paragraph (a), the scheme shall indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities which are provided or to be provided by any local authority and the planning authority shall have regard to the actual estimated cost of providing the classes of public infrastructure and facilities, except that any benefit which accrues in respect of existing development may not be included in any such determination.*

(c) *A scheme may allow for the payment of a reduced contribution or no contribution in certain circumstances, in accordance with the provisions of the scheme.*

Regard is had to the insertion of subsections (3A – 3C) - Inserted (1.09.2015) by *Urban Regeneration and Housing Act 2015 (33/2015)*, s. 29, S.I. No. 364 of 2015.

### 7.3. **Urban Regeneration and Housing Act 2015**

Part 4 provides for Amendment of Parts II and III of the Act 2000 regarding Development Plans and Development Contributions.

Section 29 provides for an amendment of Section 48 of the Act of 2000 – development contributions i.e: *Section 48 (as amended by Section 30 of the Act of 2010 is amended by inserting after subsection (3) the following:*

“(3A) Where a permission which includes conditions referred to in subsection (1) has been granted under section 34 in respect of a development and the basis for the determination of the contribution under subsection (1) has changed—

(a) where the development is one to which Part II of the Building Control Regulations 1997 ( S.I. No. 496 of 1997 ) applies and a commencement notice within the meaning of that Part in

respect of the development has not been lodged, or

(b) where the development comprises houses and one or more of those houses has not been sold,

the planning authority shall apply that change to the conditions of the permission where to do so would reduce the amount of the contribution payable.

(3B) Where a development referred to in subsection (3A) comprises houses one or more of which has not been sold the planning authority shall apply the change in the basis for the determination of the contribution referred to in that subsection only in respect of the unsold houses.

(3C) Where the planning authority applies a change in the basis for the determination of a development contribution under subsection (3A) it may amend a condition referred to in subsection (1) in order to reflect the change.”.

## 8.0 Assessment

### 8.1. Regard to Point of Detail Referral

- 8.1.1. Prior to addressing the issues arising, I note that this case is a point of detail referral under section 34(5) of the Planning and Development Act 2000, as amended, and not an appeal under section 48(10). The wording of S.48(10)(b) of the 2000 Act states that *‘an appeal may be brought to the Board where an applicant for permission under section 34 considers that the terms of the scheme have not been properly applied in respect of any condition laid down by the Planning authority’*. The wording of this section is restrictive in so far as it limits consideration of such appeals to the application of the terms of the adopted development contribution scheme and the powers of the Board to consider other matters.
- 8.1.2. Section 34(5) of the Planning and Development Act 2000(as amended) states that *“the conditions under subsection (1) may provide that points of detail relating to a*

*grant of permission may be agreed between the planning authority and the person carrying out the development; if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination”.*

- 8.1.3. The point of detail arising from condition no. 17 of permission Reg.Ref. F08A/1355 (subsequently extended under F08A/1355/E2) relates to the application of the terms of the development contribution scheme, upon which the referrer and the planning authority did not reach agreement. In default of such agreement, the matter of the proper application of the terms of the scheme has therefore been referred to the Board for determination. Accordingly, the Board, in this case, is limited solely to determining the issues arising in the of the point of detail and relative to the payment of financial contribution Condition no.17.
- 8.1.4. Note is also had to the more recent planning history including the Council’s split decision in Reg.Ref.18A/0092 which refused the removal of financial contribution Condition no.17 from Reg. Ref. F08A/1355 which the Referrer contends is provided for under the Fingal Contribution Scheme 2016-2020. The state that the aim of this referral is to amend the financial contributions for the overall scheme in Reg.Ref. F08A/1355 in line with the Fingal DCS 2016-2020 and the Urban Regeneration and Housing Act 2015.

## **8.2. Application of the Fingal County Development Contribution Scheme**

- 8.2.1. There are two different Development Contribution Schemes referred to in the course of this referral (copies of both schemes are on file). It has been noted that the parent permission (Reg.Ref.08A/1355) was granted in 2009 when the Council’s DCS 2003 was the relevant scheme. This differed from the current scheme in that Exemptions and Reductions were not then provided relevant to works to Protected Structures. It must be noted that the Council’s decision at that time (including Condition no.17) and in the subsequent extension of permission also granted by the Council (Reg.Ref.08A/1355/E2 refers – permission valid until 8<sup>th</sup> of August 2019) was not the subject of an appeal to An Bord Pleánala.
- 8.2.2. Subsequently, as noted above, the current Fingal County DCS 2016-2020 allows for Exemptions and Reductions – Section 10(i)(p) specifically relates to *Renovations to restore/refurbish structures deemed to be ‘Protected Structures’ in the County*



*Development Plan, where the Council is satisfied that the works substantially contribute to the conservation or restoration of the structure, are exempt.* Extensions (provided they are subservient in scale) are allowed a 50% reduction. The issue for consideration here is that it has not been detailed or clearly stated in this context as to how satisfied the Planning Authority were relevant to satisfying these criteria when the application was originally submitted and the decision made to grant in 2009. This is because the application pre-dates the criteria provided in the current DCS in Section 10(i)(p) above and was considered under the 2003 DCS, where no such exemptions and reductions applied.

- 8.2.3. In their response to the Referral, the Council do not consider this exemption/reduction applicable relative to the historic nature of this permission and request that Condition 17 be retained. This is reflected in their split decision relative to refusal of the omission of this condition in Reg.Ref. FW18A/0092. They consider that there is no need for this condition to be removed as this development would avail of public infrastructure in the area. It is of note that this later decision which (as noted in the Planning History Section above) included permission for the retention element of parts of the parent scheme permitted in Reg.Ref.FW08A/1355, also has not been appealed to the Board.
- 8.2.4. It must be noted that there is no provision in the Scheme for individual circumstances to be taken into account when assessing contributions payable, other than those exemptions and reductions explicitly listed in Section 10. The question now is as to whether it is considered that they would apply retrospectively in this case.
- 8.2.5. Chapter 2 of The Development Contributions Guidelines for Planning Authorities 2013, is of note in that it includes that development contributions schemes should reflect the reduced costs of infrastructure provision in recent years relative to when schemes were last revisited. This notes that planning authorities are required to include a number of exemptions and reductions in their development contributions schemes including: *waivers in respect of works on protected structures where such works • substantially contribute to the restoration or protection of the protected structure (i.e. waiver would not apply, for example, to works for purposes of adding an extension to a protected structure).* However, this would appear to apply to current schemes and it is not stated in the Guidelines, that such a waiver applies retrospectively to developments that were permitted under earlier development contribution schemes.

8.2.6. It also includes relative to Retention Permission: *However, no exemption or waiver should apply to any applications for retention of development. Planning authorities are encouraged to impose higher rates in respect of such applications.* It is noted that Reg.Ref.FW18A/0092 refers to retention issues relative to the development.

### 8.3. **Urban Regeneration and Housing Act 2015**

8.3.1. As has been noted in the Legislation Section of this Report, section 29 of Part 4 of this Act provides an amendment of section 48 of the Act of 2000. The Referrer contends that this would allow for the development contribution to be exempt under Section 10 (i)(p) of the DCS 2016-2020. Regard is had to whether each of the criteria (in sub-sections 3(A) – 3 (C)) given in Section 29 (as quoted in full in the Legislation Section above) would be met relevant to the issues raised by the Referrer.

#### Compliance with Section 29 sub-sections 3(A)- 3(C)

8.3.2. In 3(A) it is of note that conditions providing for the imposition of development contributions are not specifically referred to in Section 34 of the Act of 2000 as amended. Section 34(4)(m) provides for general infrastructural conditions but does not specifically refer to development contributions. Therefore, this could be interpreted that Section 34(5) relative to points of detail would not be applicable in such cases. However, this would appear to be allowed as Section 48(1) provides a planning authority *when granting a permission under section 34 to include conditions for requiring the payment of a contributions in respect of public infrastructure and facilities benefiting development in the area.*

8.3.3. 3(A)(a) It is noted that Appendix 2 of the Referral includes a Commencement Notice Validation email for Reg.Ref.F08A/0355 (note reference in error should read F08A/1355/E2). This would appear not to comply with this section which includes: *a commencement notice within the meaning of that part in respect of the development has not been lodged.* It is of note that the Planning Authority response to the Referral notes that development had commenced under F08/1355/E2 in 2017.

8.3.4. 3(A)(b) This includes the criteria i.e: *where the development comprises houses and one or more of those houses has not been sold.* It is noted that Appendix 3 of the Referral includes a letter dated 17<sup>th</sup> of September 2017 to confirm that none of the properties at the development known as Oatlands House have been sold. When on

site I noted that the access to the site while it appeared to be complete, was not open to the public. There was signage at the frontage to Porterstown Road advertising 'Oaklands Park Luxury Development 2/3 bedroom houses, including reference to their website'.

8.3.5. Having regard to their website and in the absence of any information regarding the units it is difficult to ascertain whether at the current time the units remain sold/unsold to ensure compliance with 3(B) i.e *Where a development referred to in subsection 3(A) comprises houses one or more of which has not been sold the planning authority shall apply the change in the basis for the determination of the contribution referred to in that subsection only in respect of the unsold houses.*

8.3.6. *3(C) Where the planning authority applies a change in the basis for the determination of a development contribution under subsection (3A) it may amend a condition referred to in subsection (1) in order to reflect the change.*

Having regard to the commencement notice being issued as noted above and to the lack of information submitted as to the current status of the units, and to the Council's statement that the development has commenced under Reg.Ref. F08A/1355/E2 I would not consider that the provisions of subsections (3(A) -3(C) would be applicable retrospectively in this case.

#### 8.4. **Regard to Level of Development Contribution**

8.4.1. Condition no.17 provided for a Development Contribution of €276,153 (updated at date of commencement of development, in accordance with changes in the Tender Price Index). The Planner's response to this Point of Detail Referral notes that they applied the 2017 Development Contribution Rate in addition to the Irish Water Rate, in accordance with the Urban Regeneration & Housing Act 2015 to the 2008 permission (F08A/1355) allowing for a reduction to €237,568.75.

8.4.2. They provide that the PA has used, as a basis for its determination, the contribution rate within the current scheme for 2017, i.e €109/sqm for residential and €86.67/sq.m for commercial i.e:

14 Residential Units	1476.6sq/m x €109	= €161,997.78
Commercial Unit	461.9sq/m x €85.67	= €39,570.97

Open Space Shortfall = €36,000.00  
= €237,568.75

8.4.3. They considered this the most beneficial rate and it was applied to the 2008 permission, providing a reduction from €276,153 as originally required by Condition no.17. They note that following further representations from the applicant's agent the Open Space Shortfall was reduced to €36,000. It is the view of the PA that the exemption for Protected Structures cannot be applied retrospectively.

8.4.4. The Planner's Report relative to the parent permission noted that: *In terms of the commercial/office use, it is proposed to use the ground and first floor of the dwelling as commercial/offices and the basement to be returned to a residential use.* It is noted that the Council granted permission for Reg.Ref. FW18A/0124 for a Change of Use of Oatlands House from 2 storey office over-basement apartment to 2 storey over basement dwelling.

8.4.5. Condition no.3 of this most recent permission provides:

*Apart from development authorised by this permission, the development shall be carried out and completed in accordance with the terms and conditions of the overall permission to this site, in particular Reg.Ref. F08A/1355/E2.*

*Reason: In the interest of proper planning and sustainability.*

## 8.5. Precedent Cases

8.5.1. The Board had dealt with a number of cases concerning points of detail relative to development contributions cases. While, it is difficult to find a similar point of detail to that referred in the subject Referral, regard is had to a number of cases below.

8.5.2. Ref. 09RP.2152, concerned a Point of detail in relation to Condition no.16 (development contributions) of Planning Reg.Ref.13/347. This application provided for extensions and development works to a house at Newtown, Kildare, Co. Kildare. In this case the Board considered that: *As the area of the (previously converted) attic forms an integral part of the development that is the subject of the development approved under planning register reference no. 13/347, and in particular item (4) in the development description, and as the previous attic conversion was not the subject of any permission, and as the Development Contribution Scheme does not*

*provide for any exemption that would apply to the floor area of the original attic conversion, the planning authority applied the terms of the Development Contribution Scheme.*

8.5.3. Also of note is a Point of detail regarding financial contribution condition no.3 of PL06F.245865. This application (Ref.06F.RP.2144) concerned erection of signage and retention of change of use from light industrial to motor sales outlet at Unit 8, Block 6, Plato Business Park, Damastown, Dublin. In this case the Board noted that: *the Fingal County Council Development Contribution Scheme 2016-2020 does not allow for exemptions and reductions to apply for permissions for retention of development, and that the planning permission in question was, inter alia, for the retention of the change of use of these premises from light industrial to motor sales outlet, servicing of motor vehicles and ancillary associated uses. The Board therefore considered that the terms of the Scheme had been correctly applied by the planning authority.*

8.5.4. Ref.15.RP.2133, concerned a Point of detail in relation to Conditions 5 and 6 of Planning Ref. No.04/441. This related to a development comprising of a distribution facility with attached two storey block and associated works. These conditions related to development contributions. It is noted that the Board had regard to the provisions of the Louth County Council Development Contribution Scheme (February 2004) including Table A of Appendix A setting out the development contributions as applied to the development. The Board determined that: *the terms of the Development Contribution Scheme were correctly applied by the planning authority; furthermore, all contributions were paid in full following agreement by the Council to alternative payment arrangement, and it is considered that there is no other matter under conditions 5 or 6 that comes within the remit of the Board under Section 34(5) of the Planning and Development Act 2000, as amended.*

## 8.6. Conclusion

8.6.1. Regard has been had to the documentation submitted, to the provisions of the legislation and guidelines including the Council's Development Contributions Schemes 2003 and 2016-2020, the 2013 Guidelines on Development Contributions and to the Amendment of section 48 of the Act 2000 as inserted by the 2015 Act (Section 29, 3(A) -3(C) refer). Taking all of the above into consideration, I am not

satisfied that it has been stated or provided beyond reasonable doubt that such exemptions and reductions as provided by Section 10(p) of the 2016-2020 Fingal DCS can be retrospectively applied.

## 9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** by order made on the 15<sup>th</sup> of May, 2009, Fingal County Council granted, subject to conditions, permission register reference F08A/1355, to M50 Motors Ltd for renovations to and redevelopment, including extensions, to the existing protected structure and associated outbuildings and gate lodge at Oatlands House to provide residential and part office development and all ancillary works at Oatlands House, Diswellstown, Castlenock, Dublin 15. An Extension of Duration of Permission was subsequently granted, (Register Reference, F08A/1355/E2 refers) on the 12<sup>th</sup> of September, 2014 to extend the permission until the 8<sup>th</sup> of August 2019.

**AND WHEREAS** Condition no.17 of the said permission required the applicant to pay Fingal County Council €276,153 being the appropriate contribution to be applied to this development in accordance with the Fingal County Council Development Contributions Scheme 2003 as adopted by Fingal County Council on the 8<sup>th</sup> of December 2003 in accordance with Section 48 of the Planning and Development Act 2000 as amended.

**AND WHEREAS** the developer and the planning authority failed to agree on the amount of the contribution to be paid pursuant to condition 17, and on application of the terms of the relevant Development Contribution Scheme in compliance with the terms of this condition and the matter was referred by Bushnell Investments Limited on the 4<sup>th</sup> day of October 2018.

**NOW THEREFORE** An Bord Pleánala, in exercise of the powers conferred on it by section 34(5) of the Planning and Development Act, 2000, as

amended, and for the Reasons and Considerations set out below, hereby determines that the development contribution condition cannot be removed retrospectively. The amount payable under condition no.17 of Register Reference F08A/1355 and extension of duration permission F08A/1355/E2 is as determined and reduced by Fingal County Council to €237,568.75 in respect of public infrastructure benefitting the development that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended.

## **Reasons and Considerations**

Having regard to:

- (a) Sections 34(5) and 48 of the Planning and Development Act 2000, as amended,
- (b) The Fingal County Council Development Contributions Schemes 2003 and 2016-2020,
- (c) Section 29 (3(A) – 3(C)) of Part 4 of the Urban Regeneration and Housing Act 2015,
- (d) The submissions on file, and the planning history of the site,

The Board considered it appropriate that the Development Contribution be amended so that it be reduced in line with the reductions provided by Fingal County Council in their response to this point of detail referral.

## **Matters Considered**

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations and observations received by it in accordance with statutory provisions.

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Angela Brereton  
Planning Inspector

22<sup>nd</sup> of January 2019