



An
Bord
Pleanála

Inspector's Report ABP 303085-18

Development	Nursing home, vehicular access, parking.
Location	"Fourwinds", Brighton Road/Claremont Road, Foxrock, Dublin 18
Planning Authority	Dun Laoghaire Rathdown County Council
Planning Authority Reg. Ref.	D15A/0807
Applicant(s)	FWNH Limited
Type of Application	Referral under section 34(5).
Subject of Referral	S49 Financial Contribution Condition
Referrer	First party/Applicant
Observer(s)	None
Date of Site Inspection	None
Inspector	Hugh Mannion

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1.2. **Site Location and Description**

1.3. The site has a stated area of 0.55ha and is located on Brighton Road, Foxrock, County Dublin. The site accommodated a two storey house. The main site access is onto Brighton Road about 50m from a junction of Brighton Road/Claremont Road and Glenamuck Road North.

2.0 **Proposed Development**

2.1. The proposed development determined under planning register reference D15A/0807 and appeal reference PL06D.246624 (file attached) comprised;

- the demolition of Four Winds house and associated structures on site,
- erect a three storey over basement nursing home to accommodate 121 bedrooms and ancillary residential and staff facilities,
- relocation of the main entrance on Brighton Road to provide new principal vehicular/pedestrian entrance,
- modification of Claremont Road entrance to provide service/pedestrian access,
- store/substation building,
- car parking and cycle parking, landscaping and boundary treatment

at Four Winds, Brighton Road/Claremont Road, Foxrock, Dublin 18.

3.0 **Planning Authority Decision**

3.1. **Decision**

The planning authority sought a contribution of €437,917.66 towards the completion of the Luas Line B1 Sandyford to Cherrywood in accordance with the Section 49 Supplementary Development Contribution Scheme for the Extension of Luas Line B1 - Sandyford to Cherrywood

3.2. **Planning Authority Reports**

No relevant reports.

4.0 Planning History

- 4.1. Permission was granted on appeal for a proposed development comprising the demolition of a house and construction of a nursing home at 'Four Winds' Brighton Road, Foxrock, County Dublin under PL06D.246624.
- 4.2. That permission included condition 14 requiring the payment of a contribution towards Luas Line B1 Sandyford to Cherrywood in accordance with a supplementary development contribution scheme made under section 49 of the Planning and Development Acts 2000 to 2018.

5.0 Policy Context

- 5.1. Development contributions such as in the present case are imposed in accordance with schemes made under section 49 of the Planning and Development Acts 2000 to 2018 and the Development Contributions Guidelines for Planning Authorities (DoECLG 2013).
- 5.2. Section 49 enables planning authorities to make supplementary development contribution schemes which allow planning authorities to require the payment of financial contributions in relation to public infrastructure which will directly benefit the development on which the contribution is imposed.
- 5.3. Section 49(3) provides that an appeal may be brought to the Board in relation to a contribution under a supplementary development contribution scheme but only in so far as the applicant considers that the terms of the scheme have not been properly applied.
- 5.4. Section 34(5) of the planning act allows reference to the Board on a point of detail in relation to a range of conditions. This case is referred to the Board under section 34(5).
- 5.5. **Local Planning Policy.**
- 5.6. The Dun Laoghaire County Development Plan 2016 to 2022 is the relevant county development plan for the area.

5.7. The Section 49 Supplementary Development Contribution Scheme for the Extension of Luas Line B1 - Sandyford to Cherrywood was adopted by Dun Laoghaire Rathdown County Council in 2003 and remains in effect with amendments.

5.8. **Natural Heritage Designations**

Not relevant

6.0 **The Appeal**

6.1. **Grounds of Appeal**

- The planning authority has calculated the levy under condition 14 incorrectly as commercial development when it should have been calculated as residential development.
- The Board's inspector's report and Board's order refer to the proposed development as residential development.
- The use classes in the current County Development Plan includes 'homes for older persons/nursing home' as residential institutions. Residential policy objective RES-9 refers to housing for all which includes housing for elderly people and sections 2.1.3.9 and 8.2.3 also imply that residential uses also includes accommodation for older people.
- Planning documents must be understood in their ordinary meaning. The development is residential in character and therefore should be subject to a residential rate of levy.
- Even if there is a commercial element to the scheme and if there are two rates for calculating liability, a commercial and residential rate, since development levies are analogous to taxation the applicant should be entitled to the lower of the two rates – residential in this case.

6.2. Planning Authority Response

- Private nursing homes have always been levied as commercial entities.
- There are several other operations; student accommodation, hotels, private hospitals which are partially residential but are also primarily business operations.
- Residential units are not defined under the planning acts but are defined under the Multi-Unit Development Acts 2011.
- The development was treated as commercial under the planning authority's Section 48 Development Contribution Scheme. It would be inconsistent to treat it differently under the Section 49 Scheme.

6.3. Observations

- Not relevant

7.0 Assessment

7.1. Section 49 provides that when granting a planning permission under section 34 it may include conditions requiring the payment of a contribution in respect of a public infrastructure service or project under a "supplementary development contribution scheme". The scheme should provide for payments towards public infrastructure that will benefit the development to which the permission relates when carried out but cannot include infrastructure already included for the calculations underpinning the section 48 scheme. A supplementary development contribution scheme shall specify (i) the area or areas within the functional area of the planning authority, (ii) the public infrastructure project or service, to which it relates, and (iii) the scheme may make provision for the payment of different contributions in respect of different classes or descriptions of development.

7.2. The test in the case of an appeal under section 49 is that the terms of the supplementary development contribution scheme have been properly applied and the Board may consider only that issue. Because this is not an appeal under section 49 the Board is not constrained to consider only if the terms of the scheme have been properly applied. The planning authority in reference D15A/0807 Appeal

reference PL06D.246624 imposed a condition requiring the payment of a contribution under the supplementary development contribution scheme in the sum of €437,917.66 but the applicant did not appeal that amount at the time. The Board when making its order under PL06D.246624 included condition 14 which left unspecified the amount payable under the supplementary development contribution scheme.

- 7.3. The applicant is now referring the sum sought by the planning authority under the supplementary development contribution scheme to the Board under the provisions of section 34(5) and disputing the basis for the calculation of the amount sought by the planning authority under the Section 49 scheme because the proposed development should be classed as residential and not commercial. The scheme was amended since 2013 and the sums payable were altered so that commercial development now attracts a payment of €802,047 per gross hectare of development. Applying that to the current case (€802,047/0.55ha) this would give a figure of €441,125 for the contribution payable. There is a discrepancy (rounded to €3,208) between the figure arrived at by the planning authority and that which is strictly owed applying the figures set out the supplementary development contribution scheme. The applicant points out that the planning authority has not provided any calculations to the applicant in relation to their figure and despite being given an opportunity by the Board (see Board's letter dated 10th January 2019) the planning authority has not provided clarification to the Board.
- 7.4. The site is zoned A 'to protect and or improve residential amenity' in the County Development Plan and assisted living accommodation, open space, public services, residential accommodation, residential institution and travellers' accommodation are permitted in principle in this zone. The use classes set out at 8.2.12 of the development plan also defines residential as "use of a building or part thereof including houses, flats, bedsitters, residential caravans etc designed for human habitation". The appeal points to these and other examples in the County Development Plan to make the point that a broad and inclusive list of types of accommodation including hostels, homes for the elderly and religious uses are considered residential uses. Additionally, the inspector's report and Board decision referred to the nursing home as a residential use. The conclusion is drawn that a nursing home is a residential use and not commercial and should be subject to a

residential levy rather than a commercial levy when calculating liability under the Supplementary Development Contribution scheme.

- 7.5. The referrer seeks to draw a strict line between residential development and commercial development in a manner in order to conclude that describing a building as being in residential use would preclude describing it in a different context as being commercial.
- 7.6. The planning authority in its submission makes the point that residential use can include hotel or student accommodation which is also commercial in that it is rented out for profit. The residential zoning objective in the County Development Plan includes in 'open for consideration' other uses such as hotels, small offices and public services. I conclude therefore that a definition of residential use which is so narrow as to preclude any commercial element in all circumstances is not supported by the County Development Plan.
- 7.7. The referrer makes the additional point that the relevant statutory provisions are set out in section 49. It may be noted that this case is not an appeal under section 49.
- 7.8. The referrer makes the further point that he should be able to construe the planning authority documents in their ordinary meaning as would be understood by members of the public who do not have legal training and therefore conclude that a residential use should attract a residential development contribution.
- 7.9. Section 49(2)(c) provides that in making such a supplementary development contribution scheme the planning authority may make provision for the payment of different contributions in respect of different classes or descriptions of development. In this case the planning authority has made a supplementary development contribution scheme in accordance with section 49 and exercised its power to distinguish between commercial and residential development.
- 7.10. I agree that the referrer should be able to construe planning authority documents in their ordinary meaning but I do not agree that ordinary persons could not conceive of a residential use such as a hotel, hostel, nursing home or student residence being in another context a commercial use, for example, the levying of commercial rates. Anyone reading the supplementary development contribution scheme would understand that the planning authority, for the purposes of charging development contributions under the scheme, was distinguishing between residential and

commercial development and would not have difficulty understanding a pay to stay nursing home as a commercial venture. I conclude that to consider the subject nursing home as commercial development is not arbitrary or unfair.

- 7.11. The referrer makes a final point that development contributions are analogous to taxation and that if there is an option to levy a charge at a lower rate the referrer is entitled to be levied at that lower rate and it is not within the competence of the planning authority to choose which rate to apply.
- 7.12. In my view development contributions charged under a supplementary development contribution scheme may be analogous to, but are not the same, as taxation. There is a separate statutory basis for supplementary development contribution schemes that provides that such schemes must specify the public infrastructure project or service which will benefit the development and geographical area or areas within which the contribution is being levied. The planning authority has made a scheme and imposed a contribution condition which was reasonably foreseeable by an applicant for permission. Notwithstanding the discrepancy in the calculation of the figure I recommend that the condition remain unaltered.

8.0 Recommendation

- 8.1. I recommend that the condition be attached for the reasons and considerations set out below.

9.0 Reasons and Considerations

- 9.1. Having regard to:
- a) sections 34(5) and 49 of the Planning and Development Acts 2000 to 2018,
 - b) the provisions of the Dun Laoghaire Rathdown Section 49 Supplementary Development Contribution Scheme for Extension of LUAS Line B1 – Sandyford to Cherrywood,
 - c) the submissions on file and the planning history of the site,

the Board considered that the planning authority had reasonably concluded that the subject nursing home comprised a commercial form of development for the purposes of applying a development contribution in accordance with the Supplementary Development Contribution Scheme for Extension of LUAS Line B1 – Sandyford to Cherrywood and, therefore that the relevant condition should be as follows for the reason set out.

Conditions

1. The developer shall pay to the planning authority a financial contribution of €437,917.66 (four hundred and thirty-seven thousand, nine hundred and seventeen euro and 66 cents) in respect of the extension of Luas Line B1 – Sandyford to Cherrywood' in accordance with the terms of the Supplementary Development Contribution Scheme made by the planning authority under section 49 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. The application of any indexation required by this condition shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine.

Reason: It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Supplementary Development Contribution Scheme made under section 49 of the Act be applied to the permission.

Hugh Mannion
Senior Planning Inspector

30th January 2019