



An
Bord
Pleanála

Inspector's Report

ABP-304266-19

Development	Demolish existing derelict building/hall and for permission to replace it with new four storey building containing four shop units, two office units and six apartments , bin and bicycle spaces and all associated site works
Location	Cutlery Road Newbridge County Kildare
Planning Authority	Kildare County Council
Planning Authority Reg. Ref.	18740
Applicant	O'Modhráin Hall Ltd.
Type of Application	Permission
Planning Authority Decision	Grant with Conditions
Type of Appeal	Third Party
Appellants	(1) Rita Cosgrove (2) Kathleen Carr
Date of Site Inspection	31 st , July 2019
Inspector	Paddy Keogh

1.0 Site Location and Description

- 1.1. The site of the proposed development which has a stated area of 0.09 hectares is located midway along the north-eastern side of Cutlery Road. The site occupies a town centre location within Newbridge.
- 1.2. Cutlery Road is a busy commercial street with traffic movements along the street confined to one-way only. Buildings along the north-eastern side of Cutlery Road are low rise generally one and two-storey in height and are predominantly in commercial use. The Whitewater Shopping Centre, a substantial large scale shopping centre scaling to four storeys in height, is located on the opposite side of Cutlery Road to the appeal site. The Whitewater Shopping Centre occupies the bulk of the road frontage on the south-western side of Cutlery Road.
- 1.3. There are a number of openings along the north-eastern side of Cutlery Road which facilitate vehicular access to lands and buildings to the rear. The head offices of Bord na Mona are located to the rear of the site.
- 1.4. The site is linear in shape and shallow in depth with significant road frontage onto Cutlery Road. The bulk of the site is currently covered by O'Modhrain Hall. The latter building is vacant/derelict.
- 1.5. The history of the site and building is detailed in a '*Built Heritage and Significance*' Report prepared by Judith Hill, Architectural Historian, submitted as further information to the planning authority. Briefly, the O'Modhrain Hall was built in 1819 as part of a new barracks that had been constructed adjacent to Newbridge. The British army left Newbridge barracks on 16th, May 1922 and was replaced by the Free State army. By 1924 the buildings were empty. The building was transferred from the Ministry for Defence to the Ministry for Finance in 1939 and was leased to Irish Ropes around that time. In 1956 the hall was acquired as A Memorial Hall to commemorate Eamonn O'Modhráin a republican who had been imprisoned by the British army. In later years the hall was used as a youth and community centre and hall. It has been vacant in recent decades.

2.0 Proposed Development

The proposed development is described per the revised public notices lodged with the planning authority on 27th, February 2019 as an application for planning permission, as follows:

- To demolish the existing derelict building/hall
- Construction of a new replacement 4 storey building containing 4 shop units, two office units, six apartments together with bin and bicycle spaces
- All associated site works

The revised public notices highlight that amendments to the proposed development set out in further information lodged with the planning authority provide for potential pedestrian access to the Bord na Mona site adjoining the appeal site and for the omission of balcony and smoking areas to the northern and southern end of the proposed development.

3.0 Planning Authority Decision

3.1. Decision

- 3.1.1. Notification of a decision to grant planning permission for the proposed development subject to 24 conditions issued from the planning authority per Order dated 26th, March 2019.

3.2. Planning Authority Reports

3.2.1. *Planning Reports*

A report from the planning authority Senior Executive Planner dated 25th, March 2019, following receipt of (7 items) of further information includes the following:

- The site of the proposed development is zoned 'Town Centre' in the Newbridge Local Area Plan 2013-2019. The stated objective of this zoning is 'To provide for the development and improvement of appropriate town centre uses including retail, residential, commercial and civic uses'.

- The applicant has submitted a 'Built Heritage Significance Report' which sets out the historical significance of the site. The building is currently in a ruinous state and has no significant architectural merit due to significant previous alterations but has historical significance due to being one of the few remaining barracks buildings in existence and its use as a former community building. The report recommends that stone from the site be re-used as cladding on the proposed new structure and that prior to demolition a survey be undertaken following vegetation removal of the east wall of the structure. The planning authority Conservation Officer recommended that the applicant be requested to submit clarification of further information in respect of the extent, if any, of medieval stonework incorporated into the existing building. It is noted that the building is not included in the National Inventory of Architectural Heritage or on the Record of Protected Structures.
- A dispute has arisen between the applicant and a third party in respect of the ownership of a portion of the application site. A submission from another third party states that the portion of land in question is owned by neither of the parties to the dispute but remains in the ownership of a community charitable trust and that the matter of ownership is currently being investigated by the Charities Regulator. Bord na Mona (the owners of site to the north-east) have also queried land ownership matters. The third party objector has not demonstrated that the applicant does not have sufficient legal interest. The issues raised by the parties constitute a civil matter more appropriately addressed between the relevant parties within the context of the correct civil forum and not through the planning application process. In this regard Section 34(14) of the *Planning and Development Act, 2000*, as amended applies.
- The development will give rise to a slight negative impact in terms of overshadowing onto neighbouring properties. However, this is not considered to be at a scale or extent which would significantly alter the levels of light being enjoyed by neighbouring buildings.
- The *Sustainable Urban Housing : Design Standards for New apartments, Guidelines for Planning Authorities* (DHPLG, 2018) set out minimum

standards required for items such as floor space, aggregate floor space, aspect and open space etc. The proposed development complies with the requirements and standards as set out in these guidelines in Specific Planning Policy Requirements 2, 3, 4 and 6.

- The planning authority Transportation Department have accepted the calculation (based on Development Plan standards) in relation to car parking requirement to serve the proposed development as provided by the applicant (total = 40 space), subject to the payment of a financial levy towards the shortfall in car parking spaces being provided by the applicant.
- A condition should be attached to any grant of planning permission requiring that the applicant prepare, submit and agree with the planning authority details of a Construction and Demolition Waster Management Plan (to include details of Asbestos removal from the site – remnants of corrugate asbestos roof).
- The development will incorporate ‘Swift Bricks’ together with a Swift calling system in order to take account of the concerns expressed in a submission from Birdwatch Ireland.
- The heritage and cultural value of the existing building has been well established. However, at this point the building has been extensively modified and is in a derelict and ruinous state. While the building has a high heritage value, it is of little architectural merit. The proposal provides for the retention of historic stonework and its re-use as cladding on the proposed building. It is considered that this approach will vastly improve the streetscape and will retain the actual usable historic elements (the stonework) to embed the development in the past.
- The site is located in the town centre in an area primed for regeneration and higher density. The scale of the proposed development is deemed to be acceptable having regard to the setback of the top floor level and the position of the proposed development opposite the 4 storey high Whitewater Shopping Centre. The design of the proposed development is acceptable subject to some modifications (viz. the reversal of the proposed elevational treatments with regard to brick and render finishes).

- Further information submitted by the applicant includes provision for a possible future pedestrian link to the Bord na Mona lands to the east of the site (in accordance with an objective contained in the Newbridge Town Local Area Plan). There are outstanding issues in relation to the ownership of the section of site pertinent to this possible future pedestrian route. The route of the proposed connection is considered to be acceptable in principle.
- The applicant has been granted a Part V exemption certificate under Section 97(3) of the *Planning and Development Act, 2000*, as amended.

The decision of the planning authority reflects the recommendation of the Senior Executive Planner.

3.2.2. **Other Technical Reports**

Environment Section – Report dated 14th, August 2018 indicates no objection to the proposed development subject to conditions.

Chief Fire Office – Report dated 3rd, August 2018 indicates no objection to the proposed development subject to conditions.

Principal Environmental Health Officer – Report dated 22nd, February 2019 (following the receipt of additional information) indicates no objection to the proposed development subject to conditions.

Roads and Transportation Section – Report from the planning authority Executive Engineer dated 15th, March 2019 (following the receipt of further information) indicates no objection to the proposed development subject to conditions.

Municipal District Engineer – Report dated 1st, March 2019 (following the receipt of further information) indicates no objection to the proposed development subject to conditions.

Water Services – Report dated 21st, March 2019 (following receipt of further information) indicates no objection to the proposed development subject to conditions.

Architectural Conservation Officer – Report dated 11th, August 2018 recommended that further information be requested from the applicant viz. the applicant engage an Architectural Historian to provide a built heritage significance report for this historic

warehouse building. A Built Heritage Significance Report prepared by Dr. Judith Hill Architectural Historian and revisions to the proposed development providing for the re-use of historic stone in the construction of bin and bicycle stores was submitted by the applicant in response to a request for further information from the planning authority. A subsequent report from the planning authority Architectural Conservation Officer dated 1st, March 2019 (following the receipt of further information) recommends that the applicant be requested to submit clarification of further information. The report recommends that the applicant be requested to contact the National Monuments Service to confirm whether medieval fabric has been incorporated into the historic construction of this Newbridge Barracks stable block.

Heritage Officer - Report dated 3rd, August 2018 recommends that further information be requested from the applicant viz. an historical appraisal to determine the historical significance of the building should be prepared and recommendations regarding the historic stone work be provided. [No subsequent report received from the Heritage Officer].

3.3. **Prescribed Bodies**

Irish Water – Report dated 1st, August 2018 indicated no objection to the proposed development subject to conditions.

3.4. **Third Party Observations**

Third party observations in respect to the proposed development were received by the planning authority from the following:

- (1) Rita Cosgrove (first named third party appellant)
- (2) Kathleen Carr (second named third party appellant)
- (3) Gavin Cosgrove
- (4) Robbie Doyle (O'Modhráin Residence)
- (5) Orla O'Neill
- (6) Birdwatch Ireland

Matters raised in the third party observations include:

- Development should include Swift nest boxes or bricks together with a calling system.
- O'Modhráin Hall is an original cavalry barracks of historic and cultural significance. Loss of architectural and historic heritage if demolition of the building is permitted.
- Development Plan policies in relation to conservation should be followed and the proposed development should be refused planning permission.
- Documentary proof should be provided that the Charities Regulator have approved the sale of the property.
- Adverse impacts of the proposed development during the construction phase.
- Remnants of corrugated asbestos in the roof of the structure to be demolished.
- Overlooking.
- Scale and visual dominance of the proposed building.
- Land ownership dispute in relation to a portion of the application site.
- Inadequacy of proposed quantum of car parking provision.

4.0 Recent Planning History

- 4.1.1. There is no record of recent planning history on the subject site.
- 4.1.2. Outline planning permission for the development of the site for use as a Cultural Centre was granted by the planning authority to O'Modhrain Hall Trustees per Order dated 13th, May 1999 (Reg. Ref. 98/2118).

5.0 Policy Context

5.1. Newbridge Local Area Plan 2013-2019

- 5.1.1. I note that pursuant to Section 19 of the *Planning and Development Act, 2000*, as amended the life of this plan has been extended to 22nd, December 2021.

- 5.1.2. The site of the proposed development is located within an area zoned 'A' – 'Town Centre' in the Local Area Plan. The stated objective of this zoning is *"To provide for the development and improvement of appropriate town centre uses including retail, residential, commercial and civic uses"*. Both residential and retail use is permitted in principle within this zoning per the Zoning Matrix set out at Table 18 of the Local Area Plan.
- 5.1.3. Policy 'HL1' seeks *'To ensure that the density and design of development respects the character of the existing and historic town in terms of structure, pattern, scale, design and materials with adequate provision of open space'*.
- 5.1.4. Policy 'HL6' seeks *'To restrict apartment developments generally to town centre locations or suitably located sites adjoining public transport connections'*.
- 5.1.5. Policy 'TC2' seeks *'To create a more attractive, vibrant and consolidated town centre by utilising quality urban design principles'*.
- 5.1.6. Policy 'TC3' seeks *'To ensure that the important economic, social, cultural and residential role of the town centre is protected and enhanced and that its vibrancy, vitality and environmental quality are maintained and improved'*.
- 5.1.7. Policy 'RR1' seeks *'To encourage the development of the retail and service of Newbridge...'*.
- 5.1.8. Policy 'RR2' seeks *'To secure the continued consolidation of Newbridge Town Centre through the regeneration of backland and brownfield areas in the town centre'*.
- 5.1.9. Policy 'RR7' seeks *'To provide for sustainable urban expansion areas by prioritising the development of derelict/brownfield and key infill/gap sites'*.
- 5.1.10. Policy 'RR8' seeks *'To promote high quality urban designs and to improve the image of the town by enhancing the physical environment and streetscape'*.
- 5.1.11. Policy 'RR10' seeks *'To encourage new residential development in the town centre by encouraging mixed use developments, especially at first floor level and above'*.
- 5.1.12. Policy 'UD1' seeks *'To ensure all proposed developments in the traditional and more historic areas are designed to have regard to the urban built fabric of the town including its urban blocks/grain, plots, buildings, streetscape and connecting lanes'*.

5.1.13. Policy 'PKO 2' seeks '*To ensure that all new development contains an adequate level of parking provision with regard to the policies outlined in the County Development Plan, and the to the standards set out in Chapter 17 of the County Development Plan*'.

5.1.14. Policy 'AH1' seeks '*To resist the demolition of vernacular architecture of historical, cultural and aesthetic merit, which make a contribution to the character, appearance and quality of the local streetscape and the sustainable development of Newbridge.*

5.1.15. Section 7.6.6 of the Plan sets out a Design Brief for Cutlery Road/Bord na Mona. This states:

This large urban block is located in the town centre, with a total area of c. 5 hectares. Although there are a variety of uses within the block such as retailing and commercial, Bord na Mona is the key land user incorporating fine Protected Structures within an industrial style complex. Higher order commercial uses are incorporated at the periphery.....while smaller individual retail stores and a Builders Providers are located along Cutlery Road. The overall block is highly legible with three busy routes defining its edges. Access is currently via Main Street and the Athgarvan/Military and Cutlery Roads. Despite this, there is no public through road and the block is largely impermeable.

It is further stated that:

....The design briefprovides an overall strategy within which existing uses are recognised and allowing individual land owners to set out proposals within a clearly defined context.

It is envisaged that the built form will include:

Development along Cutlery Road to include new 3-4 storey developments setback behind the existing building line to create a new built edge'.

5.1.16. Objective 'RO1' seeks '*To reinforce the heart of the town as the priority location for new retail development...*'

5.1.17. Objective 'RO2' seeks '*To encourage the re-use and regeneration of derelict/brownfield land and buildings for retail and other town centre uses...*'

5.1.18. Objective 'RO6' seeks 'To safeguard the important architectural and streetscape heritage of the Town Centre area.

5.1.19. O'Modhráin Hall does not appear on the list of Protected Structures.

5.1.20. O'Modhráin Hall is not included on the National Inventory of Architectural Heritage.

5.2. **Kildare County Development Plan 2017-2023**

5.2.1. Car Parking Standards as set out per Table 17.9 of the Development Plan stipulates a car parking requirement for apartments of 1.5 spaces per unit plus 1 visitor space per 4 apartments; for town centre offices of 1 space per 30 sq.m. gross floor area; for retail development 1 space per 20 sq.m. gross floor area for convenience goods and 1 space per 15 sq.m. gross floor area for convenience goods in the case of convenience stores of less than 1000 sq. m. gross floor area.

5.2.2. The Development Plan stipulates that lower rates of parking may be appropriate in the case of certain sites. In determining circumstances where lower rates of car parking provision may apply the planning authority will have regard to certain matters including:- the proximity to public transport; the proximity to the town centre; the proximity to public parking and the potential for dual use of spaces etc.

5.3. **Development Management Guidelines for Planning Authorities** (Dept. of Environment, Housing and Local Government, 2007)

5.3.1. Section 5.13 states:

Under the Planning and Development Regulations, as amended, a planning applicant who is not the legal owner of the land or structure in question must submit a letter of consent from the owner in order to make the planning application. Where an applicant is not the owner and does not submit such a letter of consent, the application must be invalidated.

and

...the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution by the courts.....

and

.... The terms of the application itself, or a submission made by a third party, or information which may otherwise reach the authority, raise doubts as to the sufficiency of the legal interest, further information may have to be sought under Article 33 of the Regulations. Only where it is clear from the response that the applicant does not have sufficient legal interest should permission be refused on that basis. If notwithstanding the further information some doubt still remains, the planning authority may decide to grant planning permission. However, such a grant of permission is subject to the provisions of Section 34(13) of the Act...

5.4. Natural Heritage Designations

- 5.4.1. The site of the proposed development is located c. 2 km. to the east of Pollardstown Fen Special Area of Conservation (SAC) (Site Code 000396).
- 5.4.2. The site of the proposed development is located c. 4 km. to the south of Moulds Bod Special Areas of Conservation (SAC) (Site Code 004063).

5.5. EIA Screening

- 5.5.1. Having regard to the nature and scale of the proposed development and to the nature of the receiving environment there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

5.6. Appropriate Assessment Screening

- 5.6.1. Having regard to the nature, urban context and limited scale of the proposed development which will be served by public water and sewer facilities and to the nature of the receiving environment together with the separation distance from any designated European site, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on any European site.

6.0 The Appeal

6.1. Grounds of Appeal

Two separate third party appeals against the planning authority decision to grant planning permission for the proposed have been received by the Board.

(1) Rita Cosgrave

The appellant is the lessee of No. 6 Cutlery Road from which she operates a Travel Agency. No. 6 is the immediately adjoining property located to the north (north-west) of the appeal site. The grounds of appeal include:

- The existing boundary wall at the northern end of the appeal site is c. 5.3 m from the gable side of No. 6 Cutlery Road. The walled in area (known as the 'yard' between the appeal site and No. 6 has been used and maintained by the appellant for more than 6 years and prior to that for more than 30 years by the 'Tyre Shop' who operated their business from a site that included the 'yard' area). The applicant has incorrectly included a 1.9m wide strip of the yard within their site. Ownership of this 1.9 m strip is currently in dispute between the applicant and the owner of No. 6.
- The applicants have no legal right to build on any portion of the 'yard' or to demolish the stone wall which is a boundary wall between No. 6 and the appeal site.
- The proposed development of a 4 storey building on a shallow site located within a row of single and 1.5 storey shops would be visually incongruous in the streetscape. The proposed development will result in a narrow tunnelling effect between the proposed building and the 4 storey Whitewater Shopping Centre on the opposite side on Cutlery Road.
- Cutlery Road is a one-way street accessed from the Newbridge Ring Road. It is a busy and congested road. To allow a 4 storey building with living accommodation at upper floor levels is not good planning.

- The proposed development would compromise the development potential of other town centre lands in Newbridge including the Bord na Mona site to the north of the appeal site.
- The appellant has concerns in relation to health and safety arising from the construction of the proposed development including potential for noise and dust nuisance and in relation to potential injury arising from falling materials during the construction phase.
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(2) Kathleen Carr

The appellant, who has an address at Ailesbury Road in Dublin, is the owner of Nos. 4, 5 & 6 Cutlery Road. The grounds of appeal include:

- The applicant has misrepresented the northern boundary line of its site. The applicant seeks to purportedly setback the boundary of its site beyond the old stone boundary wall with the appellant's property extending into the appellants yard (attached to No. 6 Cutlery road). The applicants seek to rely on a purported sale agreement with a vendor who is not in possession of full legal interest in the site. The applicants refer to an agreed 'Contract of Sale' with vendors (the O'Modhrain Trust). No details of the Contract for Sale or the legal title held by the O'Modhrain Trust have been disclosed.
- The applicant should not be allowed to rely on a grant of planning permission to contravene the purpose of building 'setback' rules.
- The applicant has failed to show 'sufficient legal interest' in the appeal site to ground a valid planning application. Any beneficial ownership in the land which may be held by either the purported vendor of the site of the applicant is insufficient to grounds a valid planning application. A valid planning application must be made by the legal owner or by a person who has obtained the consent of the legal owner (by way of a letter of consent). The *Development Management Guidelines* (the 'DMG') make this clear – Section 5.13 of the DMG states "*where an applicant is not the owner and does not submit such a letter of consent, the application must be invalidated*".

- Section 5.13 of the DMG reflects the decided Irish case law in this area as set out by the Supreme Court in *Frascati Estates v Walker* [1975] IR 177. The Supreme Court concluded ‘...an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development.’ This decision was affirmed by the High Court by Laffoy, J in *Lennon v Limerick County Council* [2006] IEHC 112 unreported, 3rd, April 2006.
- Details of the legal title acquired by the appellant to her property is set out in narrative form. This includes detail of the title acquired from the previous owner including reference to an Affidavit sworn by Kildare Tyres Ltd. who previously occupied the yard stating that prior to conveyance, to the appellant, the yard was occupied, used and maintained by Kildare Tyres Ltd. for over 30 years without claims from any third party to dispute title to the yard.
- Ownership of a 1.9m wide portion of the 5.3 m wide yard (immediately to the north of the boundary stone wall between No. 6 Cutlery Road and the appeal site) is in dispute. This strip is required by the applicant in order to provide adequate setback of the proposed retail/residential structure from the site boundary and to facilitate the provision of future bicycle storage area..
- Windows from the proposed development will overlook the yard attached to the appellant’s property. The location of these windows together with the excessive height of the proposed development will have a seriously negative impact on the appellant’s property. Thus, the proposed development will devalue the present and future value of the appellant’s property. The applicant has agreed in the context of further information submitted to the planning authority to remove all windows originally proposed on the eastern side of the proposed development in order to prevent overlooking of the Bord na Mona property to the east. Windows overlooking the appellant’s property should be removed in order to provide similar protection to the appellant’s property to that provided to the Bord na Mona property.

- Car parking provision is inadequate and will result in increased congestion on the already congested Cutlery Road.
- The height of the proposed development is excessive and breaches the height requirements stipulated in the Kildare County Development Plan 2017-2023 and the Newbridge Town Local Area Plan 2013-2019.
- The Newbridge Town Local Area Plan has mandated that access be provided between Cutlery Road and the River Liffey. The applicant has mandated to provide future pedestrian access through the site but has not clearly demonstrated the details of such access. It should be a condition of any grant of planning permission that such access not be provided over the appellant's yard.

6.2. Applicant Response

6.2.1. A submission from the applicant's agent per letter dated 22nd, May 2019, in response to both third party appeals, includes the following:

- The applicant has no objection to retaining the old stone (disputed 'boundary' wall) if deemed to be appropriate and to be of historic interest by the Board. The wall originally formed a gable wall to a stable block that had a further lime store attached during the time that it was used as a British army barracks. The wall was not a boundary wall as has been suggested by the appellants. The applicant's preference would be to demolish the wall and to re-use the salvaged stone to rebuild the wall at the same location at a safe height.
- Vincent Byrne purchased the property in good faith based on a map prepared for the sale of the site in 2017. A map attached to a 1959 'Indenture of Conveyance' confirms that the site conveyed matches the site of the current application. A submission made by Orla O'Neill to Kildare County Council strongly refutes the ownership claim to the site by the second named third party appellant.
- The applicant has no objection to locating bin stores on the southern end of the site only.

- The application does not include a connection through to the Bord na Mona site to the east. It merely indicates the location of a possible future connection which would have to be the subject of a future planning application.
- The proposed building is 5 m lower than the Whitewater Shopping Centre on the opposite side of Cutlery Road. The proposed height is in keeping with the proposed redevelopment of the town centre into a cultural and civic quarter to be centred around the Town Hall and GAA pitch (recently approved by the planning authority) (Map attached). Furthermore, the setback propose at top floor level will give the building the appearance of a three storey building only at street level.
- Issues in relation to noise and dust nuisance associated with the proposed development have been adequately addressed by way of conditions attached by the planning authority in their notification of decision to grant planning permission for the proposed development.
- The appellants have failed to mention that the developer will be required to pay €113,000.00 financial contribution to compensate for the shortfall in car parking provision and for public infrastructure to facilitate the propose redevelopment of this 0.09 hectare site in addition to the existing 10 car parking spaces on the applicant's site.
- During the planning stage, the applicant removed proposed smoking areas over proposed bicycle and bin storage areas in order to facilitate the appellants. The applicant is prepared to fit obscure glass to the windows on the north-west elevation if deemed to be appropriate by the Board.

6.2.2. A further submissions from the applicant's agent per letter dated 27th, July 2019, in response to the third party appeal from the second named third party appellant (Kathleen Carr) attaches a letter from John C. Reidy of Reidy Associates. This letter, in response to the submitted grounds of appeal, includes:

- The matter in relation to title raised in the grounds of appeal my come before the civil courts for determination. It is not a matter for determination by An Bord Pleanála.
- The applicant disputes the claims made by the appellant.

- The applicant has entered into a Contract of Sale in relation to the appeal site. This sale cannot close because of the dispute in relation to title which has yet to be resolved.

6.2.3. A submission from Vincent Byrne (applicant) per letter (undated) received by the Board on 29th, July 2019, in response to the letter dated 3rd, July 2019 from the second named third party appellant (Kathleen Carr) includes:

- Vincent Byrne agrees to storing household waste only from the proposed apartments at the southern end of the site. However, it is considered to be unreasonable to require that all bins be located at the southern end of the site.
- A possible future pedestrian link through the appeal site to the Bord na Mona lands has been indicated (in accordance with Development Plan requirements). However, planning permission for a link is not currently being sought. Such a connection will form part of a future planning application if and when required.
- The proposed development will scale to 11.58m in height. The Whitewater Shopping Centre scales to 16.6m in height. The proposed development will visually read as a three storey building. The Whitewater Shopping Centre reads as a five storey building.
- Matters in relation to dust, noise and car parking have been adequately dealt with by the planning authority and by way of conditions attached to the planning authority notification of decision to grant planning permission for the proposed development.
- The design of the proposed building includes windows at both the southern and northern end to provide for a more aesthetically attractive building. There is no objection to windows on the northern end being fitted with obscure glass.

6.3. Planning Authority Response

6.3.1. A submission from the planning authority per email dated 22nd, May 2019, in response to the submitted grounds of appeal, states that the planning authority maintains its position that the proposed development can be accommodated on the subject site, supporting town centre renewal principles and encouraging

development of brownfield sites. The conditions provided in Schedule 2 of the notification to grant permission, in fact, overcome many of the items set out in both appeals and the planning authority is satisfied in this regard that the decision to grant planning permission should not be overturned.

6.4. Further Responses

- 6.4.1. A submission dated 4th, July 2019 from the first named third party objector (Rita Cosgrove), in response to the submission on behalf of the applicant dated 22nd, May 2019, re-states her grounds of objection and appeal against the proposed development.
- 6.4.2. A submission dated 4th, July 2019 from the second named third party appellant, in response to the submission on behalf of the applicant dated 22nd, May 2019, acknowledges that there may have been a lean-to attached to the stone wall between the applicants and appellants property at some stage in the past. However, this structure fell into disrepair and was removed. The stone wall has served as the boundary wall between the properties for a considerable number of years. The appellant re-asserts her ownership (and that of her predecessors in title) of the property and refers to Affidavits (attached to the submission) which set out a narrative in relation to the ownership of the property and law in relation to Adverse Possession and her claim to title of the entirety of the yard (including the 1.9m strip in dispute). The appellant welcomes the proposal to locate all bin stores at the southern end of the site. The appellant states that the location of the proposed future pedestrian access to the Bord na Mona lands remains unclear. The appellant re-states her objection to the height of the proposed development. The appellant considers that the applicant has not satisfactorily addressed her concerns in relation to car parking and congestion. The use of obscure glaze windows on the north-east facing elevation would help address the issue of potential overlooking of the appellant's property subject to a requirement that the proposed building is adequate setback from the site boundary.
- 6.4.3. A further submission from the planning authority (by letter dated 19th, July 2019) indicates that the planning authority has no further comment or observations to make

in relation to the third party submission in response to the applicant's submission dated 22nd, May 2019.

- 6.4.4. A submission from the planning authority (per email dated 21st, June 2019) indicates that the planning authority have no further comment or observations to make in relation to the first party response (dated 22nd, May 2019) to the third party appeal submissions.

7.0 **Assessment**

I consider that the key matters for determination arising out of the submitted grounds of appeal include:

- (1) Legal & Procedural
- (2) Visual Impact
- (3) Car parking & Traffic
- (4) Overlooking
- (5) Health & Safety

7.1. (1) Legal & Procedural

- 7.1.1. The submitted grounds of appeal provide significant details in relation to a dispute over land ownership in relation to a portion of the application site as indicated by the red line boundary of the site included in the application documentation. The grounds of appeal allege that a c. 1.9m strip at the northern (north-western) end of the site is owner by the second named appellant. It is submitted that this area forms part of the yard of the appellant's property and has done so for a significant period of time. It is submitted that the entire yard (including the 1.9m. wide strip) was occupied by the appellants predecessor in title for over 30 years. Documentation submitted by the second named appellant states that she is currently in the process of registering title to the yard. It is unclear whether or not the appellants title (or that of her predecessor in title) arises from a claim to adverse possession.
- 7.1.2. The applicant's agent states that the applicant has entered into a Contract of Sale to purchase the application/appeal site. It is stated that closing of the sale has been delayed as a consequence of legal dispute.

- 7.1.3. The submitted grounds of appeal question the purported vendors title to the application site and, thus, their right/power to enter into an agreement to sell the property.
- 7.1.4. I consider that the Board has no statutory power to adjudicate upon the matters relating to title and ownership of property raised in the grounds of appeal. These matters constitute civil matters that can only be resolved by agreement between the parties or in the civil courts. The Development Management Guidelines make this clear. In this regard, I note the provisions of Section 5.13 of the Guidelines which state '*...the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution by the courts.....*'
- 7.1.5. The submitted grounds of appeal further suggest that the application lodged with the planning authority should have been invalidated in circumstances where the applicant has failed to provide written consent to the making of a planning application from the legal owner of the application site. The second named appellant highlights the provisions of the Development Management Guidelines at Section 5.13 which point out that '*under the Planning and Development Regulations, as amended, a planning applicant who is not the legal owner of the land or structure in question must submit a letter of consent from the owner in order to make the planning application. Where an applicant is not the owner and does not submit such a letter of consent, the application must be invalidated*'.
- 7.1.6. The grounds of appeal question whether or not the purported owner (seller) is the legal (and not merely the beneficial) owner of the property and whether the applicant as agreed purchaser can ever become the legal owner of the property.
- 7.1.7. In the circumstances outlined and having regard to the provisions of Section 5.13 of the Development Management Guidelines the Board may wish to write to the applicant (pursuant to Section 131 of the *Planning & Development Act 2000*, as amended) seeking clarification of ownership and/or a letter of consent to the making of the current application from the legal owner. However, notwithstanding the provisions of the Development Management Guidelines regarding the need for a letter of consent from the land owner, I consider that (based on the decision of the Irish Supreme Court in *Frascati Estates – v -Walker* [1975] IR 177) it is only

necessary for the applicant to demonstrate that they have ‘*sufficient legal interest*’ in the site for the making of a valid planning application.

- 7.1.8. The submitted grounds of appeal refer to the decision of the Irish Supreme Court in *Frascati Estates – v -Walker* [1975] IR 177 and in particular the statement therein that ‘*....an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development..*’. This requirement that an applicant can demonstrate ‘*sufficient legal estate or interest*’ does not equate with a requirement to demonstrate legal title (as opposed to beneficial title or other), it simply refers to a demonstration of sufficient legal estate to ground a valid planning application. In my opinion, on balance the Supreme Court set a relatively low hurdle in relation to what constitutes sufficient legal estate and an applicant having entered into a contract to purchase land (even subject to a pre-condition that planning permission be first obtained) is generally regarded as constituting sufficient legal estate. In the current instance, I consider that it is not necessary or appropriate for the Board to investigate the bona fides of the Contract for Sale that has been entered into by the applicant. In these circumstances I consider that subject to the provisions of Section 34(13) of the *Planning & Development Act, 2000*, as amended, the appeal before the Board relates to a valid planning application.

7.2. (2) Visual Impact

- 7.2.1. The submitted grounds of appeal argue that the proposed development will be visually incongruous on Cutlery Road given its excessive height relative to adjoining buildings which are generally one storey or one and a half storeys in height only. Furthermore, it is submitted that the height of the proposed building viz-a-viz the Whitewater Shopping Centre on the opposite side of Cutlery Road will create a tunnelling effect and shadowing effect on the street. It is submitted that the height of the proposed building exceeds recommended maximum building height stipulated in the Kildare County Development Plan and in the Newbridge Local Area Plan.
- 7.2.2. Notwithstanding the appellant’s claims that the proposed building will be excessively high and conflict with Development Plan and Local Area Plan policies in relation to building height, I note that the proposed development complies with a number of policies as set out in the Local Area Plan including policies relating to the

consolidation of Newbridge Town Centre through the regeneration of brownfield sites in the town centre (Policy 'RR2'); to secure sustainable urban expansion by prioritising the development of derelict/brownfield sites (Policy 'RR7'); to promote high quality urban expansion and improve the image of the town (Policy 'RR8') and to encourage new residential development in the town centre by encouraging mixed use developments (Policy 'RR10'). Furthermore, I consider that the proposed development is in accordance with policy (as cited by the planning authority Senior Executive Planner) set out in Section 7.6.6 of the Local Area Plan which provides a Design Brief for Cutlery Road and Bord na Mona lands and which envisages development along Cutlery Road to include new 3 and 4 storey developments setback behind the existing building line. The applicant's agent in a submission to the Board dated 22nd, May 2019 (response to the submitted grounds of appeal) highlights the fact that the proposed development will be 5m lower in height than the Whitewater Shopping Centre on the opposite side of Cutlery Road and will read from the streetscape as an even less imposing building by reason of the stepping back of the proposed building at top floor level. The applicant also argues that the proposed building will be in keeping with the general strategy in relation to building height as advocated in the strategy for a new Cultural and Civic Quarter in Newbridge recently approved by the planning authority.

- 7.2.3. The proposed building will be stepped significantly higher than existing buildings on adjoining sites on the eastern side of Cutlery Road which are predominantly one and one and a half storeys in height. These buildings are predominantly in business and commercial use. A shadow analysis submitted to the planning authority as further information has demonstrated that the impact of the proposed development in terms of overshadowing will be only marginal in nature. I consider that the juxtaposition of taller buildings beside lower buildings is not uncommon in town centre locations and that, subject to reasonable protection of the established amenities of adjoining and adjacent properties the introduction of a taller building as now being proposed on the appeal site is acceptable in terms of its visual impact and would not injure the visual amenities of the area. On balance, having regard to the town centre location of the appeal site and to the juxtaposition of the site viz-a-viz the Whitewater Shopping Centre, I consider that the appeal site can reasonably accommodate a building of the height now being proposed.

7.2.4. I note the comments and requirements of the planning authority Senior Executive Planner in relation to a requirement that the proposed sections of block and render on the elevational finishes to the proposed building be reversed. I would share the view of the Senior Executive Planner in relation to this matter for similar reasons to those stated in her report dated 25th, March 2019.

7.3. (3) Car Parking

7.3.1. The submitted grounds of appeal argue that the proposed level of car parking provision is inadequate to serve the proposed development. It is submitted that the proposed development will, therefore, generate traffic movements that will give rise to congestion along Cutlery Road.

7.3.2. Drawings submitted by the occupant indicate no off-street car parking provision within the site. However, there are 10 on street car parking spaces along the appeal site frontage onto Cutlery Road. The applicant claims control of these 10 car parking spaces.

7.3.3. Based on current Development Plan standards the proposed development would generate a car parking requirement of 44 spaces (i.e. 330 sq.m. of office space = 11 spaces, 6 apartments = 10.5 (incl. visitor parking) and retail = 22 space. TOTAL = 43.5).

7.3.4. The planning authority Senior Executive Planner and Transportation Department are satisfied that having regard to the town centre location of the site any car parking demand generated by the retail component of the proposed development can be satisfactorily catered for by existing facilities within the town. The planning authority are satisfied that any remaining shortfall in car parking provision can be dealt with by way of the imposition of a financial contribution in lieu of the shortfall.

7.3.5. I note that there will be scope for some dual occupancy of the 10 car parking spaces in front of the site by the apartment and office users insofar as peak demand for parking from residents will tend to occur in the evening and at night-time while peak demand from office users will tend to occur during the daytime.

7.3.6. On balance, I consider that the approach adopted by the planning authority is reasonable in circumstances where the appeal site occupies a town centre location in a town which does not currently suffer with a serious traffic congestion problem

and where there would appear to be adequate public car parking spaces available within the town.

- 7.3.7. Section 6(60) of the Kildare County Development Contribution Scheme 2015-2022 under the heading 'Car Parking Facilities' states:

The sum levied is a contribution towards the cost of

- (a) Shortfall in the provision of car parking facilities
- (b) The acquisition of land in respect of (a)
- (c) Any matter ancillary to (a) and (b) above.

It is unclear from the wording of this section whether or not (a) and (b) are to be interpreted as either/or options or if both (a) and (b) apply together. If the latter is the case, then I note that the planning authority have not indicated details in relation to (b) in respect of the current proposal. Thus, a financial contribution in respect of the shortfall in car parking provision to serve the proposed development in accordance with Development Plan standards would not apply under the terms of the scheme.

Normally any ambiguity or uncertainty in respect of the application of a provision of financial scheme is interpreted to the benefit of the party being levied. However, in the case of the current appeal, I note that the applicant has indicated their willingness to accept the levy applied by the planning authority. Therefore, I consider that a levy towards the shortfall in car parking provision in accordance with Development Plan requirements should be included as a S. 48 financial contribution.

7.4. (4) Overlooking

- 7.4.1. The submitted grounds of appeal have raised concerns in relation to potential overlooking of the yard attached to the appellant's property (to north-west of the appeal site/south east of appellant's property). The grounds of appeal highlight the fact that the applicant has already modified the design of the proposed development (at further information stage) in order to omit windows originally proposed that would have resulted in overlooking of the Bord na Mona site. The initial grounds of appeal suggested that windows in the north facing gable wall of the proposed development

should be omitted in order to provide similar protection from overlooking of the appellant's yard.

7.4.2. The applicant has indicated a willingness to fit all windows in the north-west facing gable walls (serving office accommodation only) with obscure glass in order to prevent overlooking of the appellant's yard. The appellant has indicated in a further submission to the Board that this solution would be generally acceptable.

7.4.3. On balance, I consider that the proposal to fit windows in the north-west facing gable wall with obscure glass represents a reasonable compromise in order to protect any potential injury to the amenities of the appellants property arising as a consequence of overlooking.

7.4.4. I note that the applicant has previously agreed (at further information stage) to omit a smoking area/balcony originally proposed above a bicycle shed proposed at the north-western end of the building in order to prevent injury to the amenities of the appellant's property by reason of overlooking.

7.5. (5) Health & Safety

7.5.1. The submitted grounds of appeal raise concerns in relation to potential adverse impact from the proposed development including noise and dust nuisance during the construction phase. Concerns are also expressed in relation to potential hazard associated with the removal of the remaining portion of a corrugated asbestos roof covering a portion of the roof of the O'Modhráin Hall.

7.5.2. I consider that some degree of noise and dust nuisance is an inevitable component of any project during the construction phase. The site of the proposed development occupies a town centre location and the vast majority of the properties in the immediate vicinity of the site are in business and commercial use and very few are in residential use. While some disruption to businesses and other commercial users in the vicinity of the site is inevitable I consider that, subject to normal construction practices and mitigation measures, the proposed development should not unduly injure the amenities of the area during the limited construction phase. Matters in relation to construction management of the site and hours of operation can be adequately controlled by way of the attachment of appropriately worded conditions to any grant of planning permission that may issue from the Board.

7.5.3. It has been pointed out on behalf of the applicant that the planning authority have attached a condition to their notification of decision to grant planning permission requiring the developer of the site to enter into agreement with the planning authority concerning the details of a Construction and Demolition Waste Management Plan prior to the commencement of development. I consider that a similar condition should be attached to any grant of planning permission for the proposed development hic may issue from the Board. In my opinion such a condition can adequately deal with concerns in relation to the appropriate method of removal of any remaining sections of corrugated asbestos roof from the building to be demolished.

8.0 Recommendation

I recommend that planning permission for the proposed development be granted for the reasons and considerations and subject to the conditions as set out below.

9.0 Reasons and Considerations

Having regard to the nature and scale of the proposed development which involves the redevelopment of a building that is in a substantially derelict and ruinous condition, to the town centre location of the site and to the Town Centre zoning of the site in the Newbridge Local Area Plan 2013-2019, to the policies and objectives contained within the Local Area Plan in relation to regeneration and urban development an redevelopment and to the established character and pattern of development in the vicinity of the site, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of adjacent properties by reason of overlooking or overshadowing, would be acceptable in terms of its visual impact on Cutlery Street and the surrounding area and in terms of its impact on the architectural and cultural heritage amenities of the town, would be acceptable in terms of traffic safety and convenience and would be in accordance with the proper planning and sustainable development of the area.

10.0 Conditions

- (1) The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars submitted on the 13th day of February 2019, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

- (2) The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities (including contribution towards a shortfall in car parking provision in accordance with Development Plan standards) benefiting development in the area of the planning authority 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. 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. Details of the application of the terms of the Scheme 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 the proper application of the terms of the Scheme.

Reason: It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

- (3) Details of the colour and materials of all external finishes to the proposed development shall be submitted to and agreed in writing with the planning authority prior to the commencement of development. In this respect (i) the proposed sections of brick and render finishes on the exterior elevations shall be swapped to provide a brick finish at ground floor level and rendered finish at first and second floor levels and (ii) all rainwater

goods shall be provided within the walls of the structure and not adhered to the external elevations.

- (4) All windows in the north-west facing façade of the proposed development shall be fitted with obscure glass.

Reason: In order to prevent overlooking of adjoining property in the interests of residential amenity.

- (5) Water supply and drainage arrangements, including the disposal of surface water, shall comply with the requirements of the planning authority for such works.

Reason: To ensure adequate servicing of the development, and to prevent pollution.

- (6) Site development and building works shall be carried out only between the hours of 0800 to 1800 Mondays to Fridays inclusive, between 0800 to 1300 hours on Saturdays and not at all on Sundays and public holidays. Deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the planning authority.

Reason: In order to safeguard the residential amenities of property in the vicinity.

- (7) Construction and demolition waste shall be managed in accordance with a construction waste and demolition management plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall be prepared in accordance with the “Best Practice Guidelines on the Preparation of Waste Management Plans for Construction and Demolition Projects”, published by the Department of the Environment, Heritage and Local Government in July 2006. The plan shall include details of waste to be generated during site clearance and construction phases, and details of the methods and locations to be employed for the prevention, minimisation, recovery and disposal of this material, including any materials containing asbestos materials in the existing structures to be demolished, in accordance with the provision of the Waste Management Plan for the Region in which the site is situated.

Reason: In the interest of sustainable waste management.

- (8) The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development, including noise management and dust suppression and management measures.

Reason: In the interest of public safety and residential amenity.

- (9) The management and maintenance of the proposed development following its completion shall be the responsibility of a legally constituted management company. A management scheme providing adequate measures for the future maintenance of public open spaces, roads and communal areas shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

Reason: To provide for the satisfactory future maintenance of the development in the interest of residential amenity.

- (10) Details of the quantity and location of swift bricks together with details of the swift calling system shall be submitted to an agreed in writing with the planning authority prior to the commencement of development.

Reason: In the interest of visual amenity.

Note: *The applicant is advised of the provision under Section 34(13) of the Planning and Development Act, 2000 which stipulates that a person shall not be entitled solely by reason of a planning permission to carry out any development.*

Paddy Keogh
Planning Inspector

12th, November 2019