



An
Bord
Pleanála

Inspector's Report ABP-304843-19

Development	Construction of a Post-Primary School
Location	The former HRI lands at Ballyogan Road, Leopardstown, Dublin 18.
Planning Authority	Dun Laoghaire Rathdown County Council
Planning Authority Reg. Ref.	D18A/1171
Applicant(s)	Minister for Education and Skills
Type of Application	Permission
Planning Authority Decision	Grant with Conditions
Type of Appeal	First Party
Appellant(s)	Minister for Education and Skills
Observer(s)	None
Date of Site Inspection	11 th October 2019.
Inspector	Mary Crowley

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1.0 Site Location and Description

- 1.1. The appeal site with a stated area of 2.5ha is located at the former HRI lands at Ballyogan Road, Leopardstown and comprises a rectangular sloping site located on lands currently used by Horse Racing Ireland (HRI) for overflow parking to the Leopardstown Race Course on the opposite side of the M50 to the north-east.
- 1.2. There is a 2 storey 24 classroom Holy Trinity School adjoining the site to the north west side of the site. The south west is partially bound by linear greenway that provides a pedestrian connection from the national school to the Leopardstown Shopping Centre with a vacant site further east towards Ballyogan Avenue where it is stated that a nursing home is proposed. The south east side of the site is bound by Ballyogan Avenue with a large open space on the opposite side.
- 1.3. The main access to the new post primary school will be off Ballyogan Avenue which is currently temporarily closed off from the roundabout to the south of the site. A new pedestrian and cycle access point will be provided off the greenway to the south west side adjacent Holy Trinity National School and there will be a planned future greenway connection via the HRI lands to the north across the M50.
- 1.4. A set of photographs of the site and its environs taken during the course of my site inspection is attached. I also refer the Board to the photos available to view on the appeal file. These serve to describe the site and location in further detail.

2.0 Proposed Development

- 2.1. Permission is sought for; the construction of a new part 1-storey; part 2-storey and part 3-storey, 11256 sqm Post-Primary School including a 4-classroom Special Needs Unit, incorporating Sports Hall; Classrooms; General Purpose Hall and all ancillary pupil and staff facilities; with all associated site works; a new sub-station; 100 number car parking spaces; ball courts; hard and soft play areas and landscaping; including an access point off Ballyogan Avenue and a new pedestrian access off the linear park in front of National School together with a future greenway extending north to the M50.
- 2.2. The application was accompanied by the following documents:
 - Planning Report

- Traffic & Transport Assessment
- School Travel Plan
- Flood Risk Assessment
- Engineering Assessment Report
- Landscape Report
- Invasive Plant Report
- Appropriate Assessment Screening Report
- Cultural Heritage Impact Assessment Report
- Arboricultural Impact Report and Assessment
- Letter of consent from the landowners Horse Racing Ireland (HRI)

2.3. Further Information was submitted on the 17th May 2019 setting out the following inter alia as summarised:

- Updated drawing showing the Greenway along the north-west boundary as requested. Stated that the Greenway beyond the school boundary has only been indicated as a potential future route as it traverses 3rd party lands that the Department of Education do not have control over and cannot therefore be implemented within the scope of this planning permission
- The implementation of the extension of the proposed Greenway from the north side of the M50 bridge through HRI lands to a public road or to an access point linking to a pedestrian route on the County Council IDA Lands is not within the scope of this planning application as the Department do not have any legal control over these lands.

3.0 Planning Authority Decision

3.1. Decision

3.1.1. DLRCC issued notification of decision to grant permission on 13th June 2019 subject to 18 no conditions. Conditions of relevance to this appeal are as follows:

Condition No 2 states - *A fully accessible public greenway for both pedestrians and cyclists from the existing greenway at the site's southwestern boundary, over the M50 bridge, to a point on the public road or to the South*

County IDA lands shall be provided prior to the opening of the school for use. Revised drawings and details shall be submitted and agreed in writing with the planning authority prior to the opening of the school for use. The entirety of this greenway shall be constructed to 'Taking in Charge' standard. If agreement cannot be reached between the developer of the land and the planning authority, the matter shall be referred to the board for determination.

Reason: *In the interests of the proper planning and sustainable development of the area and to ensure that the proposed development accords with Policy ST5 : Walking and Cycling and Policy ST6 : Footpaths and Pedestrian routes of the 2016-2022 Dún Laoghaire-Rathdown County Development Plan and the Green Infrastructure Strategy and DMURS*

Condition No 3 states - *The proposed gateways at either end of the greenway section that passes along the northwest boundary of the school site shall be omitted. Prior to the commencement of development, revised drawings to this effect shall be submitted to and agreed in writing with the planning authority.*

Reason: *To ensure maximum permeability and to accord with national and local policy*

3.2. Planning Authority Reports

3.2.1. Planning Reports

- **Case Planner** in their first report recommended that further information be requested in relation to the Greenway, Surface Water Drainage, Water Supply, Flood Risk Assessment, Transport, Noise and Landscaping. Further Information was requested on the 14th February 2019.
- **Case Planner** in their second with respect to the Greenway route outside the Red line boundary set out the following:

The applicant has submitted a plan of Greenway Routes (drawing number A1613-17-04). The route of the Greenway is located outside of current redline application. The Department of Education, do not own the current site or the wider HRI owned lands.

The current “red line” area extends over the M50. Furthermore, the extended Greenway would be through lands which are within the “blue line” site. As such it is reasonable and permissible to attach conditions pertaining to the entirety of these lands, requiring the completion of the Greenway across the M50.

It is vital that this link is delivered in tandem with the school, and a condition will be attached to this effect.

- Having considered the further information recommended that permission be granted subject to 18 no conditions. The notification of decision to grant permission issued by DLRCC reflects this recommendation.

3.2.2. Other Technical Reports

3.2.3. Planning Application

- **Parks Superintendent** – Further information requested in relation to inter alia the proposed connections to the greenway.
- **Transportation Planning** – Further information requested in relation to road safety audit, access audit, cycle audit, revised Traffic and Transportation Assessment, number of bicycle parking spaces, electric charging points, Construction Management Plan, Treatment of Noise and Vibration and proposed lighting scheme.
- **Drainage Planning** – Further information requested in relation to surface water drainage and flood risk assessment.

3.2.4. Further Information

- **Drainage Planning** - No stated objection subject to conditions as set out in the report.
- **Parks Superintendent** - No stated objection subject to conditions as set out in the report.
- **Transportation Planning** - No stated objection subject to conditions as set out in the report.

3.3. Prescribed Bodies

3.3.1. Planning Application

- **Irish Water** – Further information requested in relation to water main extension and alternative water supply.
- **Irish Water** – No stated objection.
- **Transport Infrastructure Ireland (TII)** – No stated objection.

3.3.2. Further Information

- **National Transport Authority (NTA)**
- While supportive of the inclusion of the Greenway link on the north-west boundary of the subject site in the revised site layout, the NTA submits that the full extent of the proposed greenway, from Glencairn Drive across the M50 to the HRI lands, should be designed as part of the subject application.
- In order to maximise the utility of the proposed facility adjacent to the school, the NTA recommends that the route should be available at all times, not just during school hours.

3.4. Third Party Observations

3.4.1. There are no third party observations recorded on the planning file.

4.0 Planning History

4.1. There is no evidence of any previous planning appeal on this site. The following planning history was provided with the appeal file:

- **D02A/0219** – DLRCC granted planning permission in 2002 for the retention of temporary overspill car parking to accommodate approximately 920 spaces.

5.0 Policy Context

5.1. Development Plan

- 5.1.1. The operative plan for the area is the **Dun Laoghaire Rathdown Development Plan 2016 – 2022**. The site is Zoned A where the objective is “*to protect and / or improve residential amenity*”. Educational Use is “Permitted in Principle”. Since the lodgement of the planning the **Ballyogan and Environs Local Area Plan 2019 - 2025** has been adopted (1st July 2019) which includes the entirety of the appeal site.

5.2. Natural Heritage Designations

- 5.2.1. The site is not located within a designated Natura 2000 site.

5.3. EIA Screening

- 5.3.1. Having regard to the nature and scale of the proposed development comprising construction of a post primary school in a serviced urban area there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environment impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

6.0 The Appeal

6.1. Grounds of Appeal

- 6.1.1. The first party appeal has been prepared and submitted by Tom Philips & Associates on behalf of the applicant; the Minister for Education and Skills. The issues raised may be summarised as follows:

6.2. Condition No 2

- Reference to details being referred to the Board for Agreement in the absence of agreement comprises a far more significant matter and it is unlikely that it could be resolved in this manner
- Consent was granted by HRI to the Minister for Education and Skills to submit a planning application on lands under its control for a school and related

development; this did not extend to the provision of a fully designed public greenway across lands unrelated to the school development.

- The Planning Authority is relying on the fact that the lands in question identified to deliver the public greenway referenced in Condition No 2 are within the “blue line” boundary of the application. The blue line boundary relates to lands under the control of the landowner (HRI) and not the applicant (Minister for Education and Skills). In this case the applicant is being conditioned to carry out works on adjoining lands, effectively subject to third party consent.
- Reference is made to Section 34(4)(a) of the Planning and Development Act 2000, as amended which states as follows:

Conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant, so far as appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission.

- The attachment of conditions regulating the development and use of blue-line lands that are not under the Applicants control is not, in fact, facilitated in planning legislation and is not, therefore, permissible.

6.2.1. Expedient

- The proposed school is not reliant on the provision of the extended public greenway in order to facilitate access by either students or staff. The school can operate and function safely in the absence of the greenway.
- In addition a section of the greenway is being proposed within the red-line boundary as part of the application, which ensures that a greenway that may be delivered at some future date can seamlessly link with the school and its users.

6.2.2. Development Management Guidelines (2007)

- Section 7.3 of the Guidelines identify six criteria as a guide to deciding whether to impose planning conditions as follows. Condition No 2 fails to meet any of the recommended criteria.

- **Necessary** – Whilst the extended public greenway will undoubtedly benefit the wider public community, it is not necessary or crucial piece of infrastructure to enable the proposed school to operate, function and be accessed safely.
- **Relevant to the Development to be Permitted** – The blue line lands are not under the control of the Applicant and are not “expedient” to the primary educational use of the proposed development i.e. a post primary school.
- **Enforceable** – Condition No 2 requires the completion on lands that are beyond the Applicant’s control; the works were not proposed in the planning application as clarified at the further information stage and will require the consent of the landowner to complete (HRI). The landowner consented to the provision of school and associated works only on a portion of their lands. The condition fails to meet this criterion.
- **Precise** – Condition No 2 is wholly imprecise, vague and lacks clarity. The core part of the condition fails to clearly describe the route of the proposed greenway which cumulates at a point “on the public road or to the South County IDA lands”. This is unclear and lacks the precision deemed necessary for a planning condition.
- **Reasonable** – Condition No 2 fails to adhere to the above criterion. It is evident that the requirement to deliver the extended greenway relates to development on lands outside the applicants control and consent will be required in this regard. This condition is deemed unreasonable.

6.2.3. Condition No 3

- In the event that Condition No 2 is deleted it is requested that Condition No 3 be deleted or revised as necessary to facilitate the retention of the proposed gates at the site boundaries, as these will be required for school security purposes pending the future provision of the extended greenway.

6.2.4. The appeal was accompanied by a letter from HRI dated 5th July 2019 that states inter alia that at no stage was consent given for the works associated with the extended greenway as now required by Condition No 2 and that HRI is not in a position to facilitate the works specified in Condition No 2 as part of the proposed for the post-primary school at this point in time. In addition it is stated that HRI has

sought the omission of the greenway route from the published Draft Ballyogan & Environs Draft Local Area Plan 2019 - 2025

6.3. Planning Authority Response

- Article 22(2)(b)(ii) of the Planning and Development Regulations refer to land under the “*control of the applicants or the person who owns the land which is the subject of the application*” which is in contrast to Section 34(4)(a) of the Planning and Development Act which allows for “*conditions for regulating the development or use of any lands which adjoins abuts or is adjacent to the land to be developed and which is under the control of the applicant if the impositions of such conditions appears to the planning authority*”.
- It is noted from the application form that the applicant is not the owner of the site, but that it is “subject to purchase” from Horse Racing Ireland (HRI). As such it is clearly the case that the applicant and owner are acting in concert with each other and that the applicant has as much legal title over the main portion of the site as the “panhandle” section crossing the M50. It is therefore reasonable to apply conditions to any part of the red line site.
- The question arises as to whether it is reasonable to apply conditions to the blue line site outside of the red line sight, beyond “landfall” on the northern side of the M50 crossing. It is the planning authority’s contention that by the same reasons as outlined above – that the applicant and owner are acting “in concert” on a site that is subject to purchase, that it is reasonable to do so. Furthermore it is considered prudent and to everyone’s interests to allow for the link to finish out at public road rather than remain unresolved with the HRI campus. The condition was worded as such to allow for this approach by agreement.
- In addition to support from the planning policy, assessment from first principles and support from the NTA, the provision of a pedestrian and cycle link at this location is actually incorporated in the applicants own Traffic and Transport Assessment as per Figure 9 of the report. This principle is also reflected in the School Travel Plan also, which shows a pedestrian and cycle

catchment on the north side of the M50 that could not be delivered without this link.

- This is a challenging receiving environment due to the presence of the M50. Without the delivery of this link, the catchment of the school for the sustainable transport modes of cycling and walking would be effectively halved.
- The link is necessary to ensure sustainable travel patterns in connection with the proposed school. While the link would be of benefit to the wider community, it is also necessary for the needs of the school itself.
- The delivery of this link is central to the LAP and to the requirement for school development under Section 8.2.12.4 of the County development Plan.
- As drafted the condition is enforceable. Should this link not be provided as part of the permitted scheme enforcement action could be pursued as a matter of course.
- The Board is strongly encouraged to back the principle of delivering this link in tandem with the development of this school. If the Board is so minded, there appear to be a number of options available.
 - 1) Leave the condition “as is”. The planning authority are of the firm belief that this condition is appropriate, necessary and legal.
 - 2) If the Board finds with the applicant on, the legal questions it might be preferable to reword the condition to restrict its applicability to the red line site only. While this would leave difficulties for the onward connection, and the delivery of the link on “day 1” of the schools opening, it would at least move matters forward.

6.4. Observations

6.4.1. There are no observations recorded on the appeal file.

6.5. Further Responses

6.5.1. Tom Philips & Associates on behalf of the applicant; the Minister for Education and Skills

- The landowner (HRI) did not consent to the provision of an extended Greenway on lands under its control; rather it consented to the provision of a post primary school and associated works only on a portion of its lands. Part of the Greenway will be delivered within the school boundaries proper and the applicant will co-operate fully with any future proposed extension of same as part of a separate planning process.
- The applicant does not accept the contention by the Planning Authority in these observations that the applicant and landowner are acting “in concert” such that all of the lands controlled by the landowner (as opposed to the applicant) can be conditioned for planning purposes. This is an interpretation of matters that we consider has no basis in legislation or planning practise. The landowner in this case has simply afforded consent to the applicant to make a planning application, the parties are not acting “in concert” beyond the consent issue.

6.5.2. Planning Authority

- D16A/0452 – This is not a site specific application and can be viewed on the DLRCC website
- D11A/1511 – No planning application under this reference number

7.0 Assessment

7.1. The proposed development comprises a new part 3 storey post primary school with all associated development. It also includes a portion of the proposed greenway as detailed within the boundary of the school development site (red line boundary). The principle of the school development is accepted by all parties. The first party appeal centres around the delivery of a pedestrian and cycle link from the proposed school beyond the applicants red line boundary across the M50 but within the blue line boundary and under the control of the landowner as opposed to the applicant.

7.2. Further to my examination of the planning file and the grounds of appeal that relate to two conditions only i.e. Condition No. 2 & 3 of the notification of decision of the planning authority to grant permission, and having assessed the documentation and submissions on file, I consider it is appropriate that the appeal should be confined to these two conditions. Accordingly I am satisfied that the determination by the Board

of this application as if it had made to it in the first instance would not be warranted and that it would be appropriate to use the provisions of Section 139 of the 2000 Act in this case.

7.3. Condition No 2 & 3 are related to the provision of a public greenway. The applicant requests that Condition No 2 be deleted and Condition No 3 be amended. Both conditions are set out in full in Section 3.1 above.

7.4. As set out in Section 5 above, since the lodgement of the planning application the Ballyogan and Environs Local Area Plan 2019 - 2025 has been adopted (1st July 2019) which includes the entirety of the appeal site. The bridge and greenway that is the subject of this appeal is identified in Section 4.1.4 which states as follows:

There is an over-bridge approximately half way between Junctions 14 and 15, but it is not currently publicly accessible, having being constructed for use solely in conjunction with Leopardstown Racecourse race meetings. It provides access between the Racecourse Grandstand and an occasional overflow parking area at Mimosa-Levmoss.

7.5. The existing bridge over the M50 is not open to the public at present and the planning authority is seeking to deliver this link together with a fully accessible public greenway for both pedestrians and cyclists from the existing greenway at the site's south-western boundary, over the M50 bridge, to a point on the public road or to the South County IDA lands to the north.

7.6. Under Section 4.3.5 Proposed Linkages Policy BELAP MOV12 goes on to set out a number of new linkages for the LAP area including Number 12 which is described as follows:

M50 Crossing – Racecourse Bridge to Leopardstown Valley

This Link and M50 Crossing – which is in place – would connect residential areas in the BELAP area to high density employment in South County Business Park and Sandyford Business District. This link and M50 Crossing would also connect the high density residential neighbourhoods in Sandyford Urban Framework Plan Area with schools, Samuel Beckett Campus and neighbourhood centre facilities in the BELAP area. Figure 4.11 of the LAP refers.

- 7.7. Part of the greenway will be delivered within the school development. However as pointed out by the applicant the works required on foot of Condition No 2 were not included or proposed in the planning application documentation and were not consented to by the landowner (who is not the applicant) as part of the school proposal. As stated by the applicant, the matter was clarified at further information stage. The applicant states that they are not opposed in principle to facilitating the delivery of a future greenway linking the school to the adjoining lands and will work with the relevant landowner / developer to ensure that this can operate effectively and interface with the proposed school. However the landowner (HRI) did not consent to the provision of an extended greenway on lands under its control. Rather it consented to the provision of a post-primary school and associated works only on a portion of its lands.
- 7.8. Overall I agree with the applicant that the attachment of a condition requiring the provision of a significant piece of new public infrastructure serving a wide catchment, in the context a planning application for a new school, in lands that are outside the applicants control (red line boundary) and expressly not proposed for development in the application, is wholly unreasonable and outside the spirit of the legislation.
- 7.9. The blue line boundary in this case represents lands owned by Horse Racing Ireland (HRI) and not the applicant (Minister for Education and Skills). This effectively renders the provision of the Greenway, as required in Condition No 2 as being wholly reliant and contingent on third party consent and will occur on third party lands, which does not meet several recommended criteria for appropriate planning conditions as described in the Development Management Guidelines 2007 in that it is not necessary for the delivery of the school as access is available, it is not enforceable as it relates to lands out with the red line boundary of the site and is wholly unreasonable. While the greenway would clearly comprise a complementary element of infrastructure to both the school and the wider area its delivery however is not a matter for the applicant as part of this development. While the delivery of such infrastructure may be desirable it is not a requirement of the scheme.
- 7.10. As set out by the applicant the condition is not “expedient for the purposes of or in connection with the development authorised by the permission” as the proposed post primary school who’s primary purposes is as a centre of education, does not require the proposed extended greenway in order to be operated or be accessed safely.

- 7.11. Notwithstanding the foregoing I would draw the Boards attention to Section 48(2)(c) of the Planning and Development Act (as amended) where it states that a special development contribution may be imposed where exceptional costs not covered by the Dún Laoghaire-Rathdown County Council Development Contribution Scheme, 2016 – 2020, are incurred by the Council in the provision of a specific public infrastructure or facility. Only developments that will benefit from the public infrastructure or facility in question will be liable to pay the special development contribution. Conditions imposing special contributions may be appealed to An Bord Pleanála.
- 7.12. Having regard to the Dún Laoghaire-Rathdown County Council Development Contribution Scheme 2016-2020 (adopted by Dún Laoghaire-Rathdown County Council on 14th December, 2015) and the objectives of the Ballyogan and Environs Local Area Plan 2019 – 2025 in relation to the M50 Crossing – Racecourse Bridge to Leopardstown Valley as set out in Section 4.3.5 Proposed Linkages Policy and Figure 4.11 of the LAP I am satisfied that the greenway works meet this criteria and therefore recommend that Condition No 2 be amended to require the payment of special contribution under Section 48(2) (c) of the Planning and Development Act 2000 (as amended) in respect of the M50 Crossing (pedestrian / cycle link) Racecourse Bridge to Leopardstown Valley as set out in Section 4.3.5 Proposed Linkages (Link No 12) and Figure 4.11 Movement Strategy – Planned Linkages of the Ballyogan & Environs Local Area Plan 2019 – 2025 as it is considered reasonable that the developer should contribute towards the specific exceptional costs which are incurred by the planning authority which are not covered in the Development Contribution Scheme and which will benefit the proposed development.
- 7.13. **NOTE:** Please note that the application of a special contribution under Section 48(2) (c) of the Planning and Development Act 2000 did not form part of the notification of decision to grant permission issued by DLRCC, nor was it raised as an alternative solution in any of the appeal submissions on file. Accordingly the application of a Special Contribution by way of condition is a new issue. Therefore prior to making its decision the Board may wish to cross circulate the recommended proposal to attach such a condition to the relevant parties for comment.

8.0 Recommendation

- 8.1. Having regard to the nature of Condition No 2 and 3 the subject of the appeal and based on the reasons and considerations set out below, I am satisfied that the determination by the Board of the relevant application as if it had been made to it in the first instance would not be warranted and recommend that the said Council be directed under subsection (1) of section 139 of the Planning and Development Act, 2000 to **AMEND** Condition Number 2 and **OMIT** Condition No 3 for the reason and considerations set out:

9.0 Reason & Considerations

- 9.1. Having regard to the provisions of the Dun Laoghaire Rathdown Development Plan 2016 – 2022, the Ballyogan and Environs Local Area Plan 2019 - 2025 and the Section 48, Planning & Development Act, 2000, (as amended) Dún Laoghaire-Rathdown County Council Development Contribution Scheme 2016-2020 (adopted by Dún Laoghaire-Rathdown County Council on 14th December, 2015) it is considered that, subject to compliance with the condition set out below the proposed development would accord with local policy and objectives, ensure maximum permeability, contribute towards the specific exceptional costs which are incurred by the planning authority which are not covered in the Development Contribution Scheme and which will benefit the proposed development and would therefore be generally in accordance with the proper planning and sustainable development of the area.

Condition No 2

The developer shall pay to the planning authority a financial contribution as a special contribution under Section 48(2) (c) of the Planning and Development Act 2000 (as amended) in respect of the M50 Crossing (pedestrian / cycle link) Racecourse Bridge to Leopardstown Valley as set out in Section 4.3.5 Proposed Linkages (Link No 12) and Figure 4.11 Movement Strategy – Planned Linkages of the Ballyogan & Environs Local Area Plan 2019 – 2025.

*The amount of the contribution 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 for determination. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be updated at the time of payment in accordance with changes in the ***Wholesale Price Index – Building and Construction (Capital Goods), published by the Central Statistics Office.*

Reason: *It is considered reasonable that the developer should contribute towards the specific exceptional costs which are incurred by the planning authority which are not covered in the Development Contribution Scheme and which will benefit the proposed development.*

**** For Dun Laoghaire-Rathdown Co Co refer to SCSl Price Tender Index*

Mary Crowley
Senior Planning Inspector
11th October 2019