



An
Bord
Pleanála

Inspector's Report ABP-305201-19.

Development	The raising and restoration of 3.8ha of land for agricultural benefit using inert topsoil and subsoil only.
Location	Cappagh, Enfield, County Kildare.
Planning Authority	Kildare County Council.
Planning Authority Reg. Ref.	19/650.
Applicant(s)	Oliver Richardson.
Type of Application	Permission.
Planning Authority Decision	Grant with conditions.
Type of Appeal	First Party v Development Contribution
Appellant(s)	Oliver Richardson.
Observer(s)	None.
Date of Site Inspection	13 th November, 2019.
Inspector	A. Considine.

1.0 Site Location and Description

- 1.1. The subject site is located to the south of the M4 in the townland of Cappagh, Enfield, Co. Kildare. The site itself lies approximately 6km to the east of Enfield and 5km to the west of Kilcock.
- 1.2. The site has a stated area of 3.8ha and is currently a greenfield site immediately adjacent to the Motorway. The site comprises part of a larger farm holding.

2.0 Proposed Development

- 2.1. Permission is sought, as per the public notices for the raising and restoration of 3.8ha of land for agricultural benefit using inert topsoil and subsoil only on the site in Cappagh, Enfield, Co. Kildare.
- 2.2. The application included a number of supporting documents including as follows;
 - Plans, particulars and completed planning application form
 - Planning Report
- 2.3. The proposed works will restore the agricultural lands to a height which is in-keeping with the surrounding lands and constitutes a Class 10 activity under the Fourth Schedule of the Waste Management Act, as amended, which is 'land treatment resulting in benefit to agriculture or ecological improvement', and a Class 5 activity under the Third Schedule of the Waste Facility Permit Regulations, as amended. The planning application information advises that the applicant has been granted a Waste Facility Permit by Kildare County Council to carry out the waste activity, Permit Ref: WFP-KE-18-0090-01 and the permit is solely for the recovery of soil based materials to restore the site for agricultural purposes. This permit was granted on the 6th of April, 2018 and is valid until the 5th of April, 2023. The Permit can be viewed at <http://facilityregister.nwcpo.ie/attachments/4fae6a14-f50b-41af-b391-4f18c5471ad5.pdf>. Condition 10 of the permit relates to charges and financial provisions.

3.0 Planning Authority Decision

3.1. Decision

The Planning Authority decided to grant planning permission for the proposed development subject to 24 no. conditions, including condition 24 which states as follows:

The Applicant/Developer to pay to Kildare County Council the sum of €57,000.00 being the appropriate contribution to be applied to this development in accordance with the Development Contribution Scheme adopted by Kildare County Council on 5th November 2015 in accordance with Section 48 of the Planning and Development Act 2000 as amended. Payments of contributions are strictly in accordance with Section 13 of the Development Contribution Scheme adopted by Kildare County Council on the 5th November 2015.

Note: Please note water and wastewater development contribution charges now form part of the water connection agreement, if applicable, with Irish Water.

Reason: It is considered reasonable that the developer should make a contribution in respect of public infrastructure and facilities benefiting development in the area of the Planning Authority.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Planning report considered the proposed development in the context of the details submitted with the application, internal technical and prescribed bodies reports, planning history and the County Development Plan policies and objectives. The report also includes an Appropriate Assessment Screening Report.

The Planning Report concludes that the proposed development is acceptable and recommends that permission is granted subject to compliance with conditions. The Board will note that the Planning Officers report recommended Development Levies

if applicable. This Planning Report formed the basis of the Planning Authority's decision to grant planning permission.

A further report relating to Development Contributions Calculations concluded that the contribution required was €57,000.00. The development was considered to fall under Section 8(ix) of the Development Contribution Scheme.

3.2.2. Other Technical Reports

Area Engineer: No objection subject to compliance with conditions.

Roads & Transportation: No objection subject to compliance with conditions.

Water Services: No objection subject to compliance with conditions.

Environment Section: No objection subject to compliance with conditions.

3.2.3. Prescribed Bodies

Transport Infrastructure Ireland: No objections.

3.2.4. Third Party Submissions

There are no third-party objections/submissions noted on the planning authority file.

4.0 Planning History

The following is the relevant planning history pertaining to the subject site:

ABP ref PL09.232858 (PA ref: 08/78): Permission granted for the raising and restoration of 3.8ha of land for agricultural benefit using inert topsoil and subsoil only. The appeal to the Board related to the inclusion of a development contribution condition, no. 25. The Board decided that the condition should be omitted.

PA ref 14/437: Permission granted to extend the duration of planning permission ref no. 08/78.

5.0 Policy and Context

5.1. Development Plan

The Kildare County Development Plan 2017-2023 is the relevant policy document pertaining to the subject site. The site is located within the rural area.

5.2. Kildare County Development Contribution Scheme 2015-2022:

5.2.1. Kildare County Council, by resolution on the 5th of November, 2015, made the Development Contribution Scheme in order to comply with the requirements of the Planning & Development Act, 2000 (as amended).

5.2.2. Section 8 of the Scheme identifies the level of general contributions and includes as follows:

(viii) Waste Recovery Facility including the deposition of soil / stones on Lands *

Contributions will be applied at €15,000 per hectare or part thereof.
(*Classification of a recovery facility as per First Schedule of Waste Management Permit Regulations SI No.165)

(ix) Landfill Domestic Houses

Development Contributions will apply to all landfill, including landfill required for raising a site for construction of a dwelling. The rate applied for the landfill element (A) of the development shall be €15,000 per hectare or part thereof. The rate applied for the dwelling (B) shall be in addition to that for the landfill and shall be applied in accordance with this Scheme. The contribution levied (landfill + dwelling) shall be equal to (A) or (B), whichever is the greater.

(xiv) Miscellaneous Developments

Miscellaneous developments, not listed individually above, will have the following development contribution rates applied –

	Built Per sqm	Open Per hectare
Rate (€)	27.51	15,000.00

* “Built” applies to all developments involving development not specifically defined in the categories of development set out above e.g. smoking areas etc.

** “Open” development is defined as development not included in the categories set out above which involves the carrying out of any works

on, in, over or under any land or the making of any material change in the use of any land.

Examples of “open” development include but is not limited to golf courses, temporary car parking, surface storage, motor trade forecourts, etc.

5.2.3. Section 12 of the Scheme deals with Exemptions and Reduced Contributions and includes:

g) Change of Use

This scheme provides for waivers in the case of Change of Use planning permissions. Kildare County Council will grant a 100% reduction in contribution charges where the development does not lead to the need for new or upgraded infrastructure/services or significant intensification of demand placed on existing infrastructure.

5.3. **Natural Heritage Designations**

The site is not located within any designated site. The closest Natura 2000 site is the Ballynafagh Lake SAC (&pNHA) (Site Code: 001387) which is located approximately 11.5km to the south of the site. The River Boyne and River Blackwater SAC (Site Code 002299) lies 11.6km to the north west of the site while the Rye Water Valley / Carton SAC (& pNHA) (Site Code 001398) lies 12.1km to the east.

The Royal Canal pNHA, Site Code 002103, lies approximately 2.2km to the north of the site.

5.4. **EIA Screening**

5.4.1. The requirement for EIA of certain types of developments is transposed into Irish legislation under the Planning and Development Act 2000, as amended and the Planning and Development Regulations 2001 as amended. Schedule 5, Part 1 of the Regulations provides a list of projects which are subject to mandatory EIA based on, *inter alia*, their scale, nature, location and context. Part 2 of Schedule 5 includes a list of projects that require EIA where specific thresholds are breached or where it is determined that there is potential for significant environmental impact.

5.4.2. In this context, the following Schedule 5 Part 1 projects relate to waste management:

10. Waste disposal installations for the incineration or chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9, of non-hazardous waste with a capacity exceeding 100 tonnes per day.

The development does not come within the scope of the above.

5.4.3. Schedule 5 Part 2 projects

11. Other projects

- (b) Installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule.

The Board will note the figures presented by the applicant in terms of the volume of waste intake permitted by the WFP, being 55,176 tonnes over a period of 60 months, with a maximum of 25,000 per year, and therefore, the development does not require mandatory EIA.

Having regard to nature and scale of the development, together with the nature of the site and the conditions attached to the Waste Facility Permit, 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.

6.0 The Appeal

6.1. Grounds of Appeal

This is a first party appeal against the decision of the Planning Authority to include condition 24 in the grant of planning permission for the proposed development, which seeks the payment of €57,000 in development contributions. The appeal is summarised as follows:

- The works are required for agricultural activity and the levy imposed would render the works uneconomical and unjustifiable. The works are required on lands where the applicant is developing a beef producing enterprise and the lands will be used permanently for agricultural purposes.

- Given the limited scale, duration and impact of the works, it is not envisaged that any additional public infrastructure or facilities benefitting the development will be needed outside of what the developer has been made responsible for in terms of Conditions 5, 9 and 22¹.
- The Development Contribution Scheme allows for 100% reduction in contribution charges in respect of change of use applications where development does not need additional public infrastructure or facilities benefitting it.
- The PA has not applied a contribution fee that accurately reflects the costs of providing public infrastructure or facilities, in contravention of the principle that the PA should have regard to the actual estimated cost of providing public infrastructure as defined in Section 48(3)(b) of the Planning and Development Act, as amended.
- The development was previously permitted in 2008, PA ref 08/78, and extended under 14/437. The development contribution fee applied under the original planning permission was previously waived by the Board in part due to a lack of specific provision requiring payment for a development contribution for the raising and restoration of land for agricultural benefit and the misapplication of a condition with a requirement to pay a financial contribution on reckonable floor area of structures.

6.2. Planning Authority Response

The Planning Authority submitted a response to the first-party appeal. The response is summarised as follows:

- The development falls under Section 8(xiv) Miscellaneous Development – Open Development of the Development Contribution Scheme.
- The site covers 3.8ha and therefore the contribution is calculated to be €57,000.
- The Council confirms that the contribution has been correctly calculated.

¹ The Board will note that the appeal references Condition 24 on page 6 of the appeal submission where clearly the appellant is referring to condition 22.

6.3. Further Responses

The first party has responded to the PAs response to the first party appeal. The submission seeks to highlight an inconsistency with regards to the PAs determination of the development contributions levies. The response states that the development falls under Section 8(xiv) Miscellaneous Development – Open Development of the Development Contribution Scheme, while when considering the proposed development it was determined that it fell under Section 8(ix) Landfill Domestic Houses of the Development Contribution Scheme.

The response restates that the levies imposed appear misinterpreted and misapplied and would render the development uneconomic and would result in adverse consequences for the agricultural enterprise on-site.

The response also notes the need for the development and refers to the 2016 Construction Industry Federation report entitled Review of Soil Waste Management in the Greater Dublin Area Market Analysis Report (Aug 2016). This report concluded that there is a lack of licenced capacity in the GDA to meet current and forecasted growth. The imposition of the development contribution levies at the rates prescribed would mean that the proposed development will not proceed at a time when soil recovery capacity is vitally needed at a local and regional level.

The response includes a letter from Cairn Homes working in the local area advising that they have a requirement for the disposal of soil and confirming that the proposed facility would be of interest to them, if it was available.

7.0 Assessment

- 7.1. This assessment relates to a first party appeal under S48(10) of the Planning & Development Act, 2000 as amended. The first party has appealed condition no. 24 of the decision of Kildare County Council to grant permission for the proposed development. S.48(10)(b) of the Act provides that an appeal may be brought to the Board where an applicant for permission under section 34 considers that the terms of the development contribution scheme have not been properly applied in respect of any condition laid down by the planning authority.

- 7.2. Section 48(10)(c) states that where an appeal is brought in accordance with paragraph (b), and no other appeal of the decision of the planning authority is brought under Section 37, the planning authority shall make the grant of permission as soon as may be after expiration of the appeal period, provided the appellant furnishes adequate security for the payment of the full amount of the contribution as specified in the condition.
- 7.3. In considering the appeal, I note that the Board is bound by the terms of the adopted Development Contribution Scheme and cannot deviate from same. The merits or appropriateness of any adopted Development Contribution Scheme is not open for interpretation by the Board as referenced in *Cork City Council –v- An Bord Pleanala* (2006). Rather, the Board is required to assess whether the terms of the scheme, as written, have been correctly applied.
- 7.4. In terms of the current proposal, I consider it appropriate to address the planning history of the overall site. Under the previous permission, PA ref 08/78, the Board directed that the stated condition no. 25, requiring the payment of a contribution of €190,000, be removed for the following stated reasons and considerations:

The Board considered, in the absence of any specific provision for a requirement to pay a financial contribution in respect of development comprising the raising and restoration of lands for agricultural purposes, that the planning authority, by attaching a condition with a requirement to pay a financial contribution, based on the reckonable floor area of structures, improperly applied the terms of the Kildare County Council Development Contribution Scheme, as adopted on the 23rd day of February, 2004.. Furthermore, on the basis of the submissions made in connection with the application and the appeal, it was considered that condition number 25 would not be in accordance with the provisions of Section 48(2)(c) of the Planning and Development Act, 2000 with reference to the payment of a “special contribution” and that the said condition had not been justified in this case.

The Board will note that the above decision was based on the Kildare County Council Development Contribution Scheme 2004. This scheme stated that ‘quarries / landfill and similar development’ will be subject to a “special levy” towards two classes of public infrastructure and facilities i.e. ‘Recreation & Amenity’ and

'Community'. As such, the 2004 Scheme provided that developments not specifically covered by the General Scheme will be subject to Special Development Contributions. It was concluded by the Board that there was no basis for the calculation provided for within the scheme and therefore, the condition did not meet the requirements of the Planning and Development Act, 2000 as amended or Circular Letter PD 4/2003.

7.5. The subject appeal is to be considered against the current Kildare County Council Development Contribution Scheme 2015-2022. The current Scheme at Section 8, identifies the level of general contributions and includes as follows:

(viii) Waste Recovery Facility including the deposition of soil / stones on Lands *

Contributions will be applied at €15,000 per hectare or part thereof.
(*Classification of a recovery facility as per First Schedule of Waste Management Permit Regulations SI No.165)

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(xiv) Miscellaneous Developments

Miscellaneous developments, not listed individually above, will have the following development contribution rates applied –

	Built Per sqm	Open Per hectare
Rate (€)	27.51	15,000.00

* "Built" applies to all developments involving development not specifically defined in the categories of development set out above e.g. smoking areas etc.

** "Open" development is defined as development not included in the categories set out above which involves the carrying out of any works

on, in, over or under any land or the making of any material change in the use of any land.

Examples of “open” development include but is not limited to golf courses, temporary car parking, surface storage, motor trade forecourts, etc.

- 7.6. The Board will note that the appellant has raised concerns that the rate of the levy would render the proposed works uneconomical and refers to the previous decision of the Board to waive the previous development contribution sought for the development under PA ref. 08/78.
- 7.7. I also note that the appellant considers that the nature of the proposed development will not result in any need for new or upgraded infrastructure or services, or any significant intensification of demand on existing infrastructure. The appeal also notes the requirements of other conditions attached to the grant of planning permission in terms of the provision of passing bays and surface water management details. These elements of the development, as conditioned, were submitted as part of the development proposal from the applicant, in order to facilitate the development. The application identifies that the development will employ 2-3 people over the lifetime of the works.
- 7.8. In the context of the planning history, I would note that the current Kildare County Council Development Contribution Scheme 2015-2022 appears to have removed any ambiguity in terms of applying development contributions for the development proposed. The previous DCS failed to provide clear justification for the inclusion of a development contribution condition while the current Scheme, in my opinion does not. I note that the Planning Authority appears to have considered the proposed development in terms of two development types as described in Section 8 of the Scheme, being (ix) Landfill Domestic Houses and (xiv) Miscellaneous Developments. In addition to these two development types, the Board will note type (viii) Waste Recovery Facility including the deposition of soil / stones on Lands. The Board will note that the contribution required for all three development types is €15,000 per hectare or part thereof.
- 7.9. Having regard to the information presented in support of the proposed development, I am satisfied that the nature of the development proposed clearly falls within the

category of (viii) Waste Recovery Facility including the deposition of soil / stones on Lands as provided for in Section 8 of the Kildare County Council Development Contribution Scheme 2015-2022. As such, I am satisfied that a contribution of €15,000 per hectare or part thereof is applicable.

- 7.10. In this regard, I am satisfied that that the terms of the Development Contribution Scheme have been properly applied and that the condition 24 of the Planning Authority's decision to grant permission should be retained.

8.0 **Appropriate Assessment**

The site is not located within any designated site. The closest Natura 2000 site is the Ballynafagh Lake SAC (& pNHA) (Site Code: 001387) which is located approximately 11.5km to the south of the site. The River Boyne and River Blackwater SAC (Site Code 002299) lies 11.6km to the north west of the site while the Rye Water Valley / Carton SAC (& pNHA) (Site Code 001398) lies 12.1km to the east. The Royal Canal pNHA, Site Code 002103, lies approximately 2.2km to the north of the site.

Overall, I consider it is reasonable to conclude on the basis of the information available that the proposal individually or in combination with other plans or projects, would not adversely affect the integrity of a Natura 2000 site having regard to the nature and scale of the proposed development and separation distances involved to adjoining Natura 2000 sites. It is also not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European Site.

9.0 **Recommendation**

It is recommended that Condition 24 of the grant of permission be **RETAINED**, on the basis that the terms of the Development Contribution Scheme, 2015-2022 have been properly applied.

10.0 Decision

The Board, in accordance with Section 48 of the Planning and Development Act, 2000, as amended, considered, based on the reasons and considerations set out below, that the terms of the Development Contribution Scheme for the area have been properly applied in respect of condition number 24 and directs that the said Council to RETAIN condition number 24 and the reasons therefor.

11.0 Reasons and Considerations

Having regard to

- a) the provisions of the Kildare County Development Contribution Scheme 2015-2022, and
- b) the information submitted in support of this appeal,

the Board considered based on the evidence submitted, that the proposed development constitutes the importation of inert waste material in accordance with the requirements of the Waste Facility Permit granted by Kildare County Council to carry out the waste activity, Permit Ref: WFP-KE-18-0090-01 refers.

The permit is solely for the recovery of soil based materials to restore the site for agricultural purposes and these works constitute the deposition of soil / stones on the land as described in Section 8(viii) of the Kildare County Development Contribution Scheme 2015-2022.

The Board therefore considers that the terms of the Development Contribution Scheme have been properly applied.

A. Considine

Planning Inspector

14th November, 2019