



An
Bord
Pleanála

Inspector's Report

ABP-306254-19

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| Development | Construction of 7 storey/4 storey building, consisting of 23 no. apartments with balconies |
| Location | 40-41, Stoneybatter, & 1-3 Blackhall Place, Dublin 7 |
| Planning Authority | Dublin City Council North |
| Planning Authority Reg. Ref. | 3538/17 |
| Applicant(s) | Bartra Real Estate Limited |
| Type of Application | Permission |
| Type of Appeal | Point of Detail |
| Inspector | Gillian Kane |

1.0 Site Location and Description

- 1.1. The subject site is located in northwest Dublin inner city, approx. 350m north of the River Liffey, at the intersection with Blackhall Place and Stoneybatter, opposite the junction with North King Street. It comprises Nos. 1-3 Blackhall Place and Nos. 40/41 Stoneybatter. The site, which has a stated area of 670sqm, comprises an east facing, vacant brownfield site. It is bounded at the street edge to the north by a single storey building occupied by a pharmacy, a two-storey building occupied by a hairdressers and along the northern boundary away from the street frontage are the rear gardens of single and two storey dwellings which front onto Arbour Hill. To the west is the angled rear garden of a dwelling on Arbour Hill and to the southwest and south is an existing five storey apartment development.

2.0 Permitted Development

- 2.1. Under **ABP-300466-17** planning permission was granted to Bartra Real Estate Limited for a development comprising the construction of a part seven, part four storey building of 23 no. apartments on the subject site.
- 2.2. Condition no.s 15 and 16 of the Boards decision are as follows:
15. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities 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 the 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.

16. The developer shall pay to the planning authority a financial contribution in respect of Luas Cross City in accordance with the terms of the Supplementary Development Contribution Scheme made by the planning authority under section 49 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to the 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 Supplementary Development Contribution Scheme made under section 49 of the Act be applied to the permission.

2.3. Point of Detail Referral

- 2.3.1. An agent for the applicant Bartra Real Estate Limited has submitted a point of detail referral, the ground of which can be summarised as follows:

- Following the grant of permission, the applicant entered into an agreement with Dublin City Council under the Enhanced Long Term Social Housing Lease Scheme, to provide the permitted apartments for use as social housing.
- It is submitted that as per the above, the subject apartments constitute social housing units.
- Section 12 of the DCC Development Contribution Scheme provides that “social housing units, including those which are provided in accordance with an agreement made under Part V of the Planning and Development Act 2000, as amended, or which are provided by a voluntary or co-operative housing body, which is recognised as such by the Council” are exempt from the contributions.

- Section 11 of the DCC Supplementary Development Contribution Scheme Luas Cross City provides for the same exemption.
- The applicant requested a “zero contribution” under the scheme in July 2019. The Council responded in August 2019 stating that the applicant was not exempt from the levies as the “development is being leased under the Enhanced Long Term Social Housing Leasing Scheme”.
- In September 2019, having lodged a commencement notice with the Council, the applicant received an invoice requesting payment of the monies due under condition no. 15 and 16.
- It is submitted that the subject apartments are classifiable as social housing for the purposes of the contribution scheme and the supplementary development contribution scheme and are therefore explicitly exempt under the terms of the scheme.
- It is submitted that the Council has failed to apply the terms of the scheme and refer the matter to the Board under section 34(5) of the Planning and Development Act 2000, as amended.
- The applicants do not accept the position of the City Council that the subject development does not constitute social housing.
- Appendix 11 of the submission of an Opinion prepared by a Senior Counsel. In brief, it finds that
 - the interpretation of a development contribution scheme draws on the same principles as apply to the interpretation of a development plan – namely being understood by a reasonably intelligent person. The interpretation of a scheme is a matter of law and not planning judgement.
 - The scheme does not define social housing but it is clear that it is not limited to units provided in accordance with Part V. The term is not defined in the Planning and Development Act 2000, as amended, the agreement between the applicant and the City Council or the draft leases attached to the agreement.

- It follows therefore that a person would understand that the units in the agreement are social housing unless there is some compelling reason to conclude otherwise.
- The agreement makes it clear that the units are social housing. The scheme provides that the sum payable is determined when the condition becomes operative.
- The position of the City Council is that there is no exemption in the scheme for social housing units being leased.
- There is no basis for the Council's interpretation that the exemption that applies to social housing units excludes those social housing units acquired by other means. The definitions listed in the scheme are not exhaustive. The definition specifically refers to approved housing organisations, which would include houses acquired by them through leasing. This inclusion supports the contention that there is no general de-exemption for social housing unit from leasing.
- The opinion concludes that the units are social housing and should be exempt from contributions.
- The opinion applies to condition no.s 15 and 16. It is submitted that the subject units are not excluded from the exemptions in the scheme and that they constitute social housing units.
- The Board's attention is drawn to the July 2014 National & Economic Social Housing Provision Paper no. 10 which states "Property rented or leased from the private sector by local authorities or voluntary housing bodies is now included in Ireland's social housing sector".
- The Department of Housing, Planning and Local Government clearly see leasing as a delivery stream for the provision of social housing. Leasing is a category in the 'Social Housing Output Overview – 2016 to Q.2. 2019' in Rebuilding Ireland – Progress against targets.
- It is accepted that in practice residential units are accepted as social housing.

- The Board is requested to determine that the residential units under construction constitute social housing for the purposes of the Dublin City Development Contribution Scheme and Supplementary Development Contribution Scheme and that the exemptions applicable in the scheme are applied to the subject development.

2.3.2. The submission is accompanied by the following appendices:

- 1 An Bord Pleanála decision ABP-300466-17
- 2 Extract from lease agreement between Bartra Real Estate and Dublin City Council for apartment no.s 1-23, Colmcille House
- 3 Extract DCC Section 48 Development Contribution Scheme
- 4 Extract DCC Section 49 Supplementary Development Contribution Scheme
- 5 Email correspondence from Bartra Capital to DCC
- 6 Email correspondence from Bartra Capital to DCC
- 7 Email correspondence from Bartra Capital to DCC
- 8 Email correspondence between Bartra Capital and DCC
- 9 DCC Levy contribution calculation sheets for condition no.s 15 & 16
- 10 Email correspondence from DCC to Bartra Capital
- 11 Opinion Rory Mulcahy SC
- 12 Extract NESC Paper 10
- 13 Extract Rebuilding Ireland Progress Against Targets

2.4. **Planning Authority Response**

2.4.1. The application has been reviewed and it can be confirmed that the development contribution has been applied correctly and in compliance with the Dublin City Councils 2016-2020 current section 48 and 49 schemes. There is no exemption under either development contribution scheme for developments that are the subject of an Enhanced Long Term Social Housing Scheme agreement.

3.0 Policy Context

3.1. Development Contributions - Guidelines for Planning Authorities 2013

- 3.1.1. The Minister for the Environment, Community and Local Government has issued these guidelines under section 28 of the Planning and Development Act 2000 (as amended). Planning authorities and An Bord Pleanála are required to have regard to the guidelines in performance of their functions under the Planning Acts.
- 3.1.2. The primary objective of the development contribution mechanism is to partly fund the provision of essential public infrastructure, without which development could not proceed. Development contributions have enabled much essential public infrastructure to be funded since 2000 in combination with other sources of, mainly exchequer, funding.

3.2. Planning and Development Act 2000, as amended

- 3.2.1. Section 34(5) of the Planning and Development Act 2000, as amended states that “The conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development; if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination.”

3.3. DCC Section 48 Development Contribution Scheme

Exemptions and Reductions

12. The following categories of development will be exempted from the requirement to pay development contributions under the Scheme:

- Social housing units, including those which are provided in accordance with an agreement made under Part V of the Planning and Development Act (as amended) or which are provided by a voluntary or co-operative housing body, which is recognised as such by the Council;

3.4. **DCC Section 49 Supplementary Development Contribution Scheme Luas Cross City**

Exemptions and Reductions

11. The following categories of development will be exempted from the requirement to pay development contributions under the Scheme:

- Social housing units, including those which are provided in accordance with an agreement made under Part V of the Planning and Development Act (as amended) or which are provided by a voluntary or co-operative housing body, which is recognised as such by the Council;

4.0 **Assessment**

- 4.1.1. As provided for in section 34(5) of the Planning and Development Act 2000, as amended, the Board has been requested to determine a point of detail, as agreement has not been reached between the Planning Authority and the applicant.
- 4.1.2. I note that the legal opinion provided to the applicant accepts that there is a dispute resolution mechanism in relation to the proper interpretation of a development contribution scheme. The opinion correctly notes that the Board is constrained in their interpretation of the schemes in law rather than planning judgement. Due to the intended use of the subject units at the time of the Planning Authority decision, the applicant did not appeal the imposition of condition no.s 15 and 16 when they appealed the decision of the Planning Authority to the Board in early 2018. The scheme was correctly applied to the development when permission was granted and the applicant found no fault with that application at the time.
- 4.1.3. I draw the Boards attention to section 48(10)(a) of the Act which provides that subject to paragraph (b) no appeal shall lie to the Board in relation to a condition requiring a contribution to be paid in accordance with a scheme made under the section. In effect, that is what the applicant is seeking in this instance – the removal of the conditions requiring the payment of a contribution. It is not within the remit of the Board to make such a decision and I acknowledge that the applicant did not lodge an appeal under section 48.
- 4.1.4. The conditions attached by the Board were correct at the date of the decision. That the applicant has now changed the use of the units, does not change the decision of

the Board on that date. The applicant could change the intended use of the use again – notwithstanding the agreement reached between the two parties and any legal consequences that would arise– and the Board would be none the wiser. The detail of the conditions were correct on the date of the Boards order.

4.1.5. It is the submission of the Applicant that as the residential units under construction are the subject of a long-term leasing agreement with the City Council that they constitute social housing and as such are exempt from both the s48 and s49 development contribution schemes. The Applicant submits that the subject units already under construction constitute social housing as the City Council has agreed to lease them on a long-term basis. The applicant notes that the units were intended to be “built-to-let” and that initial correspondence with the City Council proceeded on that basis. The applicant subsequently changed their intention and entered into an agreement under the Enhanced Long-Term Social Housing Leasing Scheme. Appendix 2 of the Applicants submission is an extract from the agreement, signed by the Director of Bartra Real Estate and the Chairperson of the Local Authority. Part 1 of that section of the lease titled ‘Background’ states that “The lessor wishes to enter into a long-term leasing agreement to provide residential properties for social housing use”. That the City Council signed the agreement, wherein it clearly states that the units will be used for social housing purposes, clearly demonstrates that the City Council were agreeable to the units being used for social housing. There is nothing however to commit that use in perpetuity however, – as noted above, a legal agreement does not change the planning status of the units. While the units may be in use for social housing for a defined period of time, they will revert to the applicant for commercial use for as long as they are in existence.

4.1.6. The applicants agent states that following the Boards decision (8th October 2018), the applicant indicated to the City Council on the 8th April 2019 that development would commence “in the next few months”. The leasing agreement with the City Council was signed on the 12th June 2019. A commencement notice was submitted to the City Council at some point before 18th September 2019. It is not known if the commencement notice was submitted before or after the leasing agreement was signed. Both condition no.s 15 and 16 require the payment of the applicable contribution “prior to the commencement of development” or in phased payments as agreed by the Planning Authority. The applicants argument about the operation

dates of the scheme cannot be definitively assessed therefore, as insufficient evidence has been submitted with regard to the date of commencement, namely the date the condition came into operation.

- 4.1.7. As noted in the Development Contribution Guidelines, the primary objective of the development contribution mechanism is to partly fund the provision of essential public infrastructure, without which development could not proceed. The applicant will benefit from that infrastructure – just at a later date.
- 4.1.8. In summary, and noting the provisions of section 34(5) of the Planning and Development Act 2000, as amended, it is considered that the details of conditions no. 15 and 16 are correct, are reasonable and are an accurate application of the section 48 Dublin City Development Contribution Scheme and the Section 49 Dublin City Supplementary Development Contribution Scheme Luas Cross City.

5.0 Recommendation

WHEREAS by Order dated the 8th day of May, 2018 An Bord Pleanála, under planning register reference number ABP-300466-17, granted subject to conditions a permission to Bartra Real Estate Limited care of Coady Architects of Mount Pleasant Business Centre, Mount Pleasant Avenue, Ranelagh, Dublin for a development comprising the construction of a seven-storey/four-storey building consisting of a total of 23 number apartments, (six number one bedroom units, 14 number two bedroom units and three number three bedroom units) with balconies (two number) at first floor level, balconies (three number) at second and third floor levels, balconies (two number) at fourth, fifth and sixth floor levels, all on the eastern elevation, ground floor terraces (three number), balconies (three number) at first, second and third floor levels, and balconies (two number) at fourth, fifth and sixth floor levels, all on the western elevation, a total of 24 number bicycle spaces, a bin store, an area of communal open space (175 square metres), including a play space and associated site development works at numbers 40-41 Stoneybatter and numbers 1-3 Blackhall Place, Dublin

AND WHEREAS condition numbers 15 and 16 attached to this permission required the developer to pay to the planning authority financial contributions, being the

appropriate contribution to be applied to this development in accordance with the Dublin City Council Development Contribution Scheme 2016-2020 as adopted by Dublin City Council on the 7th day of December, 2015 in accordance with section 48 of the Planning and Development Act, 2000, as amended and the Dublin City Supplementary Development Contribution Scheme Luas Cross City St Stephens Green to Broombridge Line, as adopted by Dublin City Council on the 18th April 2017, in accordance with section 49 of the Planning and Development Act 2000, as amended

AND WHEREAS the developer and the planning authority failed to agree on the amount of the contribution to be paid pursuant to condition numbers 15 and 16, and on the application of the terms of the relevant Development Contribution Scheme in compliance with the terms of this condition and the matter was referred by the developer to An Bord Pleanála on the 20th day of December, 2019 for determination:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 34(5) of the Planning and Development Act, 2000, as amended, and based on the Reasons and Considerations set out below, hereby determines that the development contribution condition cannot be removed retrospectively. The amount payable under condition numbers 15 and 16 of planning register reference number ABP-300466-19 is as determined by Dublin City Council in respect of public infrastructure benefiting the development that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act, 2000, as amended and the terms of the Supplementary Development Contribution Scheme Luas Cross City made under section 49 of the Planning and Development Act 2000, as amended

Reasons and Considerations

Having regard to:

- (a) sections 34(5) and 48 of the Planning and Development Act, 2000, as amended,
- (b) the Dublin City Council Development Contributions Schemes 2016-2020 and Supplementary Development Contribution Scheme Luas Cross City,
- (c) the submissions on file, and the planning history of the site,

the Board considered it appropriate that the development contributions be retained as stated in the Board Order of the 8th day of October 2019.

Matters Considered

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

Gillian Kane
Senior Planning Inspector

25 March 2020