



An
Bord
Pleanála

Inspector's Report

ABP-307688-20

Development	For the erection of a portal frame inspection shed and prefabricated unit comprising office space, canteen and sanitary facilities and all associated site works.
Location	Leggetsrath West, Kilkenny.
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	20175
Applicant(s)	City Direct Bus Ltd
Type of Application	Permission
Planning Authority Decision	Grant Permission with Conditions
Type of Appeal	First Party V Development Contribution only
Appellant(s)	City Direct Bus Ltd
Observer(s)	None
Date of Site Inspection	19 th November 2020
Inspector	Phillippa Joyce

1.0 Site Location and Description

- 1.1. The appeal site is located at Leggetsrath West, approximately 1km east of Kilkenny city centre. The site is located at the northeastern end of a cul de sac, which is accessed off the Dublin Road, R-712. The site is part of a wider complex that accommodates a number of structures and commercial operations, including SSE Airtricity, sharing a vehicular access.
- 1.2. The site comprises the lands and structures associated with the City Direct Bus Ltd operation, including portacabins, hardstanding and parking areas. As noted at the time of site inspection, construction works have commenced on the portal frame inspection shed and the storage shed structure, subject of this appeal, has been demolished. The remnants of the walls of the storage shed structure were identifiable.
- 1.3. The site is rectangular in configuration with a stated area of 0.1597 hectares.

2.0 Proposed Development

- 2.1. The proposed development comprises the erection of a portal frame inspection shed, indicated as measuring 168.28 sqm, and a prefabricated unit comprising office space, canteen and sanitary facilities, measuring 24 sqm, and all associated site works.
- 2.2. The applicant, City Direct Bus Ltd, is leasing the site (letter of consent included in the planning application particulars) and operating Kilkenny City bus service since November 2019. The applicant indicates that the site has a history of motor vehicle storage and the inspection shed is required for quarterly safety inspections of public service vehicles.
- 2.3. With regard to services, the proposed development will be accessed via the existing entrance, and connected to the public water supply and sewer systems.

3.0 Planning Authority Decision

3.1. Summary of Decision

On 2nd July 2020, the Planning Authority issued a Notification of Decision to Grant Permission subject to 6 no. conditions. Of relevance to this appeal is Condition 2, as follows:

2. The developer shall pay to the Planning Authority a financial contribution in respect of public infrastructure and facilities benefiting development in Kilkenny County Council's administrative area that is provided or intended to be provided by or on behalf of the Local Authority in accordance with the terms of the Development Contribution Scheme made under Section 48 of the Planning and Development Acts 2000-2019.

The amount of the financial contribution shall be paid upon commencement of development, with the amount of the contribution being the rate of contribution in existence on commencement of development. In accordance with the current scheme the amount of the contribution is calculated at €4,800.00 (Four thousand, eight hundred Euro), however this amount may be recalculated in accordance with any newly adopted Development Contribution Scheme that may supercede the current scheme prior to commencement of development. Any applicable amount is subject to revision with reference to the Wholesale Price Index and to penalty interest in accordance with the terms of Kilkenny County Council's Development Contribution Scheme.

Reason: *It is a requirement of the Planning and Development Acts 2000-2019 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.*

4.0 Planning Authority Reports

4.1. Planning Report

The planner's report is the basis of the Planning Authority decision. The report notes, inter alia:

- Refers to planning history P.20/61, in the 'overall holding' whereby retention permission was granted to SSE Airtricity for prefabricated units for office space and staff facilities (the owner of the wider landholding is the same as for the current appeal site);

- Refers to enforcement history, ENF19071, whereby a warning letter was issued on the use of *'this site and the portacabins'* that is stated to have been rectified by the retention permission granted on foot of P.20/61. The planner's report also states that *'the other issues raised in the Warning Letter were addressed subsequentlyand deemed not applicable due to an established use of this site being demonstrated by the owner'*;
- Notes that the new structures are proposed in a southerly location where *'an existing prefab unit was removed and the existing shed will be demolished'*; and
- In respect of the development contribution, Class 4 is indicated as being applicable and calculated as 192 sqm x €25.00 = €4,800.00 (note: there is a handwritten amendment to the typed report rounding down the total floor area from 192.28 sqm to 192 sqm for contribution calculation purposes).

4.2. Other Technical Reports

Roads Section: no objection.

4.3. Prescribed Bodies

Irish Water: no objection subject to standard conditions.

4.4. Third Party Observations

None received by the Planning Authority.

5.0 Planning History

Appeal Site:

No planning history at the appeal site.

Adjacent Site to Northwest:

PA Ref P.20/61: Retention permission granted to SSE Airtricity Utility Solutions for 3 no. existing prefabricated units comprising of office spaces, canteen and sanitary facilities and all associated siteworks for the duration of ten years.

6.0 Policy Context

6.1. Development Plan

6.1.1. The applicable development plan is the Kilkenny City and Environs Development Plan 2014-2020.

6.2. Development Contribution Scheme

6.2.1. The applicable scheme is the Kilkenny County Council Development Contribution Scheme 2016-2017 which, of relevance to this appeal, refers to the basis for determination of contributions, categories of development and rates of charge, and guidance for developments comprising demolition and rebuild.

6.2.2. The Scheme outlines that the following contributions are payable with regard to 'Non Residential development including Open Storage Yards'.

Section	Description of Development	Unit	Rate of Charge
4	Non Residential development including Open Storage Yards	M ²	€25.00

6.2.3. In respect of demolition and rebuild proposals the Scheme states: *'Where an applicant applies to either demolish an existing serviced and habitable residential or commercial building and replace with another, or extend an existing building, then the development charge payable is to be calculated on the increased floor area of the new build over the old. Demolition of a habitable building shall be certified by the Planning Authority prior to any allowance being availed of.'*

6.2.4. While the Scheme includes exemptions from and reductions to the development contribution calculated as payable, none of these are applicable to the proposed development.

7.0 The Appeal

7.1. Grounds of Appeal

7.1.1. The first party appeal, made to An Bord Pleanála on the 23rd July 2020, relates to Condition 2 of the Planning Authority's decision to grant planning permission which includes the payment of a sum of €4,800.00. The appeal was lodged by Califa Ltd on behalf of the applicant and was accompanied by the following:

- Notification of Decision to Grant Permission Planning Reference Number 20/175 dated the 2nd July 2020;
- Copies of the Existing and Proposed Site Layout Plans indicating the existing storage shed to be demolished and the proposed inspection shed;
- Email thread with the Planning Authority, last entry of correspondence dated the 15th July 2020; and
- *Kilkenny County Council Development Scheme 2016-2017* with relevant text highlighted.

7.1.2. The grounds of the appeal are summarised as follow:

- The plans submitted under PA Ref. 20/175 clearly show that an existing single storey storage shed was due to be demolished as part of the proposal;
- It is confirmed that the building was constructed prior to the introduction of the 1963 Planning Act;
- There is no reference in the Development Contribution Scheme to the demolition and rebuild section not applying to the demolition of pre-1963 structures;
- The Planning Authority has calculated the development contribution for the proposed development on the full area of the new building without subtracting the existing floor space to be demolished; and
- The existing building to be demolished has an area of 73.2 sqm, which equates to a Section 4 Non Residential development contribution of €1,830. The allowance of the existing building floorspace to be demolished reduces the contribution for the proposed development to a total of €2,970.

7.2. Planning Authority Response

7.2.1. The Planning Authority, in correspondence dated the 30th July 2020, responded to the appeal stating the following:

- The demolition of an existing building was *'not mentioned or applied for'* as part of the planning application;
- The applicability for the proposed development of an extract of the Scheme is highlighted: *'Demolition of a habitable building shall be certified by the Planning Authority prior to any allowance being availed of'*;
- Category 4, Non-residential development including open storage yards with an associated charge of €25 per M² was used to calculate the contribution;
- This was applied to a floor area of 192 sqm resulting in a total of €4,800.00; and
- The Planning Authority considers the terms of the Scheme have been applied correctly.

7.2.2. The Planning Authority, in correspondence dated 1st September 2020, provided further plans and documentation from the planning application file including the Development Contribution Scheme: Calculation Sheet for the proposed development.

7.2.3. The Sheet confirms the Planning Authority's previous response regarding the manner in which the contribution was calculated: that being, the Class 4 Non Residential Development charge of €25 per M² applied to a total area of 192 sqm (shed 168 sqm on dwg PL104 and office 24 sqm on dwg PL 105), yielding a total amount payable of €4,800.00.

7.3. Further First Party Response

7.3.1. The applicant, in correspondence date stamped by An Bord Pleanála on the 24th September 2020, responded as follows:

- The demolition of the existing building was clearly outlined in the drawings;

- The demolition of the building is implicit in the permission as the inspection shed is located on the site occupied by the existing storage shed;
- Rejects the Planning Authority's position that the demolition was not mentioned or applied for;
- The Development Contribution Scheme is clear and unambiguous that where a building is to be demolished, the area is allowable against the newly constructed area; and
- States that the demolition was applied for, granted and the calculation of the contribution should reflect this.

8.0 **Assessment**

8.1. **Nature of the Appeal**

8.1.1. This appeal has been brought to the Board in accordance with Section 48(10)(b) of the Planning and Development Act 2000, as amended, where the applicant for permission under Section 34 considers the terms of the Development Contribution Scheme have not been properly applied in respect to a condition laid down by the Planning Authority. The Board therefore will not determine the application as if it was made to it in the first instance and will only determine the matters under appeal.

8.1.2. I consider the main issues in determining this appeal relate to the Development Contribution Scheme and its application, as follows:

- Terms of the Demolition and Rebuild Provision
- Pre-1963 Status of the Building
- Compliance with the Terms of the Demolition and Rebuild Provision
- Permission Applied For
- Serviced, Habitable and Commercial Building
- Certified by the Planning Authority

8.2. **Terms of the Demolition and Rebuild Provision**

- 8.2.1. The relevant demolition and rebuild provision in the Development Contribution Scheme is as follows: *‘Where an applicant applies to either demolish an existing serviced and habitable residential or commercial building and replace with another, or extend an existing building, then the development charge payable is to be calculated on the increased floor area of the new build over the old. Demolition of a habitable building shall be certified by the Planning Authority prior to any allowance being availed of’.*
- 8.2.2. I have reviewed the Scheme and note that there are no further caveats to the terms of the provision enabling a more definitive interpretation, nor precise instruction on its implementation. Therefore, of relevance to this appeal and discussed below, notwithstanding the explicit terms of the provision, in my opinion there are some considerations that are open to interpretation.

8.3. **Pre-1963 Status of the Building**

- 8.3.1. In the grounds of the appeal, the main issue raised by the applicant relates to the pre-1963 status of the building to be demolished. The applicant states the building is a storage shed and confirms that it is a pre-1963 structure. The applicant refers to, and provides a copy of, email correspondence had with the Planning Authority prior to the making of the appeal.
- 8.3.2. The correspondence appears to indicate that the basis of the Planning Authority’s decision to not apply the demolished floorspace allowance in calculating the development contribution for the proposed development is due to the structure being *‘built pre 1963’*. The applicant submits that the Scheme makes no reference to pre-1963 structures, does not exclude such structures from benefitting from the provision and therefore, in effect, the Planning Authority has incorrectly applied the terms of the Scheme.
- 8.3.3. In the formal response to the appeal, the Planning Authority makes no reference to or comment on the pre-1963 status of the building. Instead, the Planning Authority’s response focusses on the fact that the applicant had not applied for permission for the demolition of the existing building, that being, it *‘was not mentioned or applied*

for'. It is the Planning Authority's position that the demolition of the building was not certified and that is the reason the proposed development cannot avail of the demolished floorspace allowance.

- 8.3.4. I note that the Scheme does not include any reference to pre-1963 structures and whether their demolition would or would not be included in the allowance. Had this approach been cited as the Planning Authority's formal position, I consider that it would be unreasonable to make such a differentiation and to determine to not apply the allowance on that basis. However, as the Planning Authority has not responded to this issue directly, nor cited the pre-1963 status of the building as the reason for not applying the allowance, I consider the issue is no longer relevant to the determination of the appeal and can be dismissed at this point.

8.4. Compliance with the Terms of the Demolition and Rebuild Provision

- 8.4.1. Instead, having regard to the response of the Planning Authority, the substantive issue for determination in the appeal is the extent to which the proposed development complies with the explicit terms of the demolition and rebuild provision in the Scheme, which includes the certification process by the Planning Authority.
- 8.4.2. To avail of the demolished floorspace allowance, the proposed development would, in my opinion, be required to comply with three criteria stipulated in the provision: firstly, the applicant has applied to demolish the existing building and replace with the new building; secondly, the building to be demolished was serviced, habitable and in commercial use, and thirdly, the demolition of the building was certified by the Planning Authority.

8.5. Permission Applied For

- 8.5.1. The first criterion to consider relates to whether permission was sought for the demolition of the building and its replacement with the new building. I have reviewed the planning application and, in acknowledgment of the Planning Authority's position, I note the following discrepancies/ omissions by the applicant: there is no reference

to the demolition of the building in the description of development or the public notices; in Question 12(a) of the application form, the applicant states 'N/A' to the gross floor space of building(s) to be demolished; in Question 17 of the form, the applicant indicates 'NO' to whether the proposed development involves the demolition of a structure and if so to give the extent and nature of same; and there are no floor plans, elevations or section drawings of the building to be demolished.

8.5.2. However, due to the Planning Authority's position being that the allowance cannot be availed of as demolition of the building was *'not mentioned or applied for'*, it is necessary to highlight that, potentially, the demolition of the building may have been exempted development. That being, Class 50(a)(iii) of the Planning and Development Regulations 2001, as amended, states that the demolition of a building within the curtilage of a business premises is exempted development subject to the building not abutting another in separate ownership and the cumulative floor area of the building shall not exceed 100 sqm. These are limitations on the Class that the proposed development appears to meet.

8.5.3. In this regard, while I note that the applicant did not apply for a Section 5 Declaration on the matter, it may not have been a legal requirement for the applicant to have applied for permission to demolish the building. Furthermore, in the absence of an explicit definition, it could be argued that the *'certified by the Planning Authority'* process stipulated in the demolition and rebuild provision could include the Section 5 process. As such, the position of the Planning Authority that permission had to be applied for to avail of the demolished floorspace allowance is not considered to be reasonable due to the potential for the demolition of the structure to have been exempted development and in the absence of an explicit definition of the required certification process required by the Planning Authority.

8.5.4. With regard to the planning application and its determination by the Planning Authority, the application was validated, and the proposed development was assessed and granted subject to conditions. The applicant had submitted an existing site layout plan and a proposed site layout plan which do unequivocally identify the existing building, indicate its planned demolition, and its replacement with the proposed inspection shed in the same location. The assessment section of the

planner's report notes that *'the existing shed will be demolished'*. As such, I am of the opinion that the demolition of the existing building was clearly apparent, and understood as being intentional and necessary to allow for the implementation of the proposed development.

- 8.5.5. In summary, on balance I consider that while permission for the demolition of the existing building was not explicitly applied for (though, as noted above, I consider there to be potential for the works to be exempted development), I consider that the demolition of the building is implicit in the proposed development, was understood and assessed, and consented to subject to conditions.

8.6. Serviced, Habitable and Commercial Building

- 8.6.1. The second criterion to consider relates to whether the building was serviced habitable and in commercial use. I note that the planner's report does not expressly state the use of the existing building, save to refer to the building as a *'shed'* and to note the City Direct Ltd operation at the site. The planner's report does refer to enforcement proceedings at the site and wider landholding which were concluded through a subsequent retention permission for office use and an established use (through association considered to be a commercial use) being demonstrated by the landowner.
- 8.6.2. In the absence of evidence indicating otherwise from the Planning Authority, I consider it reasonable to accept applicant's position that there is a history of storage use at the site and that the shed structure was used for same and therefore was a serviced and habitable commercial building.

8.7. Certified by the Planning Authority

- 8.7.1. The third criterion to consider relates to whether the demolition and rebuild was certified by the Planning Authority. As discussed previously, notwithstanding the explicit terms of the provision, some items are open to interpretation. For example,

the Scheme does not expressly state what the certification process by the Planning Authority entails and whether that is only the planning consent process.

- 8.7.2. In the absence of an explicit definition in the Scheme, any elaboration of same in the planner's report when outlining the development contribution calculation, or explanation in the Planning Authority's response to the appeal, I consider it reasonable that the assessment of the proposed development undertaken by the Planning Authority through the development management process satisfies the certification process.
- 8.7.3. As such, on balance from a review of the information in the planning application and the appeal documentation, I am satisfied that it was apparent that the building would be required to be demolished and would be replaced, that the demolition of the building was potentially exempted development and did not necessarily need to have been applied for, that the building to be demolished was a serviced, habitable building being used for commercial purposes and its demolition and replacement were understood, assessed, and granted with conditions through the development management process and that this satisfies the certification process.
- 8.7.4. In conclusion, I consider that the proposed development meets the terms of the demolition and rebuild provision included in the Development Contribution Scheme and an allowance for the demolished floor space of the existing structure measuring 73.2 sqm should be included for in the development contribution calculation associated with the proposed development.

9.0 Recommendation

- 9.1. I recommend that Kilkenny County Council be directed to amend Condition 2 on the grounds that the terms of the Development Contribution Scheme 2016-2017 have not been properly applied.

10.0 Reasons and Considerations

Having regard to:

(a) The provisions of the Kilkenny County Council Development Contribution Scheme 2016- 2017, and

(b) the submissions made in this appeal,

the Board considers that the terms of the Kilkenny County Development Contribution Scheme 2016-2017 have not been properly applied, and the amendment of Condition 2 is therefore appropriate.

11.0 Condition

2.	<p>The developer shall pay to the Planning Authority a financial contribution in respect of public infrastructure and facilities benefiting development in Kilkenny County Council’s administrative area that is provided or intended to be provided by or on behalf of the Local Authority in accordance with the terms of the Development Contribution Scheme made under Section 48 of the Planning and Development Act 2000, as amended.</p> <p>The amount of the financial contribution shall be paid upon the final grant of permission, with the amount of the contribution being the rate of contribution in existence on the date of such grant. In accordance with the current scheme the amount of the contribution is calculated at €2,970.00 (two thousand nine hundred and seventy euro). Any applicable amount is subject to revision with reference to the Wholesale Price Index and to penalty interest in accordance with the terms of Kilkenny County Council’s Development Contribution Scheme.</p> <p>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.</p>
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Phillippa Joyce
Senior Planning Inspector

27th November 2020