



An  
Bord  
Pleanála

## Inspector's Report

### ABP-309708-21

---

<b>Development</b>	Point of detail regarding the payment of development contribution.
<b>Location</b>	3, Poplar Row with a service access on Annesley Place, Ballybough, Dublin 3.
<b>Planning Authority</b>	Dublin City Council North
<b>Planning Authority Reg. Ref.</b>	3900/18
<b>Applicant</b>	Bartra Property (Poplar Row) Limited
<b>Referral Type</b>	Point of Detail Referral
<b>Referred by</b>	Bartra Property (Poplar Row) Limited
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	29 <sup>th</sup> July 2021
<b>Inspector</b>	Máire Daly

## 1.0 Introduction

- 1.1. This case is a referral under section 34(5) of the Planning and Development Act 2000, as amended. This provision provides for matters to be referred to the Board where a point of detail is in dispute between the applicant and planning authority. It was received by the Board from Bartra Property (Poplar Row) Limited and concerns a point of detail relative to the payment of the development contributions as per Condition 2 and Condition 3 which were attached to a grant of planning permission issued by Dublin City Council (Reg. Ref. 3900/18 refers).

## 2.0 Site Location and Description

- 2.1. The subject site which has an area of 1360sq m is located on the southern side of Poplar Row, approximately 20m west of the junction with North Strand Road and Annesley Bridge in the north inner city. The site is located c. 1.7km north east of O'Connell Street in Dublin City centre. The River Tolka and Fairview are located to the site's north.
- 2.2. The previously permitted development (Reg. Ref. 3900/18 refers) is currently under construction on the site, with the main structural elements complete up to the 6<sup>th</sup> storey. The site is flanked on the western side by existing warehouse structures and to the south by residential two storey terraced properties (Austin's Cottages). The adjoining site to the east is in use as a site compound for the current works. Poplar Row runs along the northern boundary of the site. About halfway across the frontage of the site and to the west is the 1930s block of flats designed by Herbert Simms which are included in the Record of Protected Structures (RPS Ref. 6837) as an exceptional example of early twentieth century 'Modernist' social housing.

## 3.0 Background

- 3.1. Dublin City Council (DCC) granted permission subject to conditions under Reg. Ref. 3900/18 in March 2019 for the redevelopment of a former car dealers to provide for a 'build to rent' residential apartment development which was described as intended for use as a long-term rental housing scheme.

3.2. Under the original application to DCC (Reg. Ref. 3900/18) permission was sought for a total of 52 no. apartments in a 7-storey building and ancillary development, however, the development was modified by plans and particulars to include the removal of one typical storey (resulting in a five-storey building with an additional set-back 6<sup>th</sup> storey) and a reduction in the number of residential units to 39 no. apartments. In addition, an increase in the proportion of brick on the front elevation was also included for the stated reason related to visual amenity and to reduce the impact on the setting of the protected structure opposite (RPS Ref. 6837). An appeal was made on same application but was later withdrawn. A Notification of Grant of Permission was issued by DCC on 23<sup>rd</sup> May 2019 subject to 21 no. conditions. Condition No. 2 and Condition No.3, the subject of this referral, set out the following:

*2. The developer shall pay the sum of €93,458.88 to the Planning Authority as a contribution towards expenditure that was and/ or is proposed to be incurred by the Planning Authority in respect of public infrastructure and facilities benefitting development in the administrative area of the Authority as provided for in the approved Section 48 (Planning and Development Act 2000 as amended) Contribution scheme for Dublin City Council. The amount due is payable on commencement of development. Phased payment of the contribution will be considered only with the agreement of Dublin City Council Planning Department. Applicants are advised that any phasing agreement must be finalised and signed prior to the commencement of development.*

**Reason:** *It is considered reasonable that the payment of a development contribution should be made in respect of the public infrastructure and facilities benefitting development in the administrative area of the Local Authority.*

*3. The developer shall pay the sum of €4,000.00 per residential unit (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), to the planning authority as a special contribution under section 48 (2) (c) of the Planning and Development Act 2000, as amended, in respect of public open space, to be used for the upgrading of public open space in the area as determined by Parks and Landscape Services Division. This contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate. The application of indexation required by this condition shall be agreed between the*

*planning authority and the developer or, in default of such agreement, the matter shall be referred to the Board to determine.*

**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*

3.3. Subsequent to the grant of permission under DCC Reg. Ref. 3900/18, the applicant applied for permission for amendments to the permitted scheme which would have involved the omission of condition no.4 of the original permission. The proposed amendments the subject of the new application under DCC Reg. Ref. 3541/19 comprised of the construction of an additional floor of residential accommodation comprising 7 no. dwelling units and the provision of the same proposed area of brick finish to the front elevation as was originally proposed prior to any amendment by the planning authority under the original application DCC Reg. Ref. 3900/18. DCC refused permission and the decision was appealed to the Board under Ref. ABP 305603-19. The Board decided in a split decision issued in March 2020 to refuse permission for the additional storey and grant permission for the proposed revised elevational treatment. No contribution conditions were attached to the Board's decision. Development on foot of the above-mentioned permissions has now commenced on site at no.3 Poplar Row.

## 4.0 Referral

### 4.1. Referrers Case

4.1.1. This can be summarised as follows:

- Following the grant of permission (under DCC Ref. 3900/18 and ABP Ref. 305603-19), the referrer states that on 25<sup>th</sup> August 2020 they entered into an agreement with DCC to develop a total of 39 no. apartments, authorised under the above-mentioned grant of permission, for which the City Council would enter into a long term lease (25 years) under the Enhanced Long Term Social Housing Lease Scheme to provide the apartments for use as social housing (Appendix 4 of applicant's submission provides details).

- In September 2020, the applicant notified DCC that development had commenced for the 39 no. apartment units at 3-4 Poplar Row as authorised by grants of permission under DCC Reg. Ref. 3900/18 and ABP Ref. 305603-19.
- It was submitted to DCC that the City Council's Development Contribution Scheme 2020-2023 specifically exempts units used for social housing purposes from the requirement under the Scheme to pay Development Contributions and therefore that the requirement to pay contributions on foot of conditions no.2 and no.3 attached to the grant of permission under Reg. Ref. 3900/18 were 'therefore voided' and not applicable in this case, given that, as per the above, the subject apartments constitute social housing units.
- DCC disagreed and then queried why the applicant had not made an appeal to ABP concerning these conditions.
- In response to the above, in correspondence with DCC in October 2020 (see Appendix 8 of applicant's submission) the applicant highlighted the referral case was a replica of a previous case which had been decided by the Board i.e. ABP Ref. 306254-19 for the development of 23 no. apartments in Stoneybatter, which was also lodged by the current applicant (ABP Ref. 300466-17 refers). In this previous referral decision (ABP 306254-19) the Board determined that the subject residential units did constitute social housing units, by reason of the Agreement for Lease signed by the applicant and Dublin City Council, and that, therefore, the social housing units were exempt from the requirements to pay development contributions on foot of the applicable Development Contributions Scheme, which was the Dublin City Council Development Contribution Scheme 2016-2020 and Item 11 (Exemptions) of the Supplementary Development Contributions Scheme, Luas Cross City. In the case of ABP Ref. 300466-17 this related to conditions no. 15 (Development Contribution made under Section 48 of the P&D Act, 200 as amended) and no. 16. (Development Contribution made under Section 49 of the P&D Act, 200 as amended).

- Further correspondence between the applicant and DCC (Appendix 8 of applicant's submission refers) highlighted to the City Council that the subject proposal was a replica of the Stoneybatter case.
- In response to the applicant's correspondence DCC responded stating that they were aware of the previous representations made by the applicant on the 'Stoneybatter case' and attached the original Opinion received from the Council's Senior Counsel on this case, accompanied by a rider stating to the effect that the Council intended to submit this Opinion to ABP in 'the case of any future appeals in similar matters' (see Appendix 9).
- The referrer does not accept the position of the City Council that the subject development does not constitute social housing.
- The referrer states that it should be noted that there was no reference in any of the emails received from DCC to the Referral decision by Board under ABP 306254-19, which determined that residential units, the subject of an Enhanced Long Term Social Housing Lease, constitute social housing and accordingly would be exempt from the payment of contributions in the case of the 2016-2020 Development Contributions Scheme.
- The referrer submits that the Council has failed to apply the terms of the Scheme (2020-2023) and have therefore referred the matter to the Board under section 34(5) of the Planning and Development Act 2000, as amended.
- The applicant had an Opinion drawn up by their Senior Counsel (dated 18<sup>th</sup> January 2020) in response to DCC's Senior Counsel's Opinion (dated 20<sup>th</sup> November 2019), which includes a review as to whether or not the exemption provided for in the Section 48 DCC Development Contributions Scheme 2020-2023 applicable in this case, is in substance, the same as that under the previous Scheme (2016-2020) which was in effect when the above-mentioned Referral on the 'Stoneybatter case' was determined by the Board (Refer: Appendix 12). The applicant's Senior Counsel concluded that it did not appear to him that the adoption of the 2020 Scheme materially affected the previous position in relation to the 2016 Scheme.

- In relation to the previous relevant case ABP-306254-19 (Stoneybatter Case) the following points were noted in the applicant's Senior Counsel's response to the City Council:

**Condition no. 2:**

In brief in relation to Condition no. 2, this Opinion found:

- Section 48(3)(c) of the P&D Act 2000, as amended, provides that “A *scheme may allow for the payment of a reduced contribution or no contribution in certain circumstances in accordance with the provisions of the scheme*”. The issue of the applicability of ‘circumstances’ where no contribution may be payable, as provided for in the Scheme, falls to be considered when the condition becomes operative.
- Regarding the argument that an agreement for a social housing lease is not subject to any form of public consultation or notice, the subject Development Contribution Scheme is subject to public consultation.
- The residential units are being built and constructed as social housing units under the provisions of an Enhanced Leasing Agreement.
- There is no interpretation in the 2016 Scheme, which applied in the ‘Stoneybatter case’ presented in the Opinion which aligns with the view originally expressed by the City Council that it doesn’t apply where the social housing is being provided on a long lease.
- With regard to the 2020-2023 Development Contribution Scheme, the applicant’s SC opinion states that it is noted that it refers in the context of Clause 11 of the Scheme, which itemises the classes of development for which “reduced or no contributions are payable, to “social and affordable housing units” instead of “social housing units” as provided in the 2016 Scheme. There is no explicit reference in Clause 11 to the list of houses which fall within that definition being under an enhanced long term leasing scheme, but, as in that Scheme, the use of the word “including” in the definition means the list given must be interpreted as non-exhaustive. As in the 2016 Scheme, there is nothing in the 2020 Scheme which excludes units provided on this basis from the terms of the Scheme.

- Regarding the issue of the social housing lease not being subject to any form of public consultation, the submission states that the Enhanced Leasing Agreement is an administrative Act which is undertaken on foot of the Council's responsibility as a Housing Authority to provide housing for those on the housing lists. The opinion submits that the residential units, the subject of such an agreement, are classified as social housing and accordingly qualify for the dispensation provided in the 2020 Scheme, which fact has already been accepted by ABP in its determination of Referral Ref. ABP 306254-19.
- It is clear that the inclusion of the word "affordable" in the definition of the exemption under the 2020 Scheme is intended to extend the exemption to residential units which are classified as affordable units made available under the Council's Scheme for Affordable Dwelling Purchase Arrangements.
- The Boards 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.
- The only matter change in the circumstances applicable in the subject case from that of the previous referral determination under ABP 306254-19 is that the development contributions scheme to be applied is the Dublin City Development Contributions Scheme 2020-2023. Article 11 of the current scheme provides that social and affordable housing units will not be required to pay development contributions under the scheme. There is nothing in the current Scheme which precludes the inclusion of residential units leased under an 'Enhanced Long Term Social Housing Leasing Scheme' from being included as a social housing for the purposes of the exemption.



- 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 2020-2023 and that the exemption is applicable with regard to Condition no. 2 attached to the grant of permission for DCC Reg. Ref. 3900/18.

### **Condition No. 3**

This Condition relates to the payment of €4,000 per residential unit to the planning authority as a special contribution under Section 48(2)(c) of the P&D Act 2000, as amended, in respect of public open space. A total contribution of €184,000 is sought under this condition. The referrer presents the following argument:

- It is noted that Article 10 of the Dublin City Development Contribution Scheme 2020-2023 headed “CONTRIBUTION IN LIEU OF PUBLIC OPEN SPACE” outlines the details of the contributions payable in relation to open space i.e. €4,000 per unit. However, Article 11 of same Scheme, which immediately follows Article 10 identifies as stated previously above (in relation the argument made for Condition no.2) the classes of development which “*will not be required to pay development contributions under the Scheme*”, which includes “*Social and Affordable housing units*”. The residential units being developed on foot of the grant of permission DCC Reg. Ref. 3900/18 to which condition no. 3 is attached, are social housing units. The exemption provided for in Article 11 is therefore applicable to Condition no.3.
- 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 2020-2023 and that the exemption is applicable with regard to Condition no. 3 attached to the grant of permission for DCC Reg. Ref. 3900/18.
- The referrer also highlights, without prejudice to the above request, that it should be noted that the amount of the contribution being sought is incorrect. The contribution amount sought should read €156,000 based on 39 no. apartments and not €184,000 as was based on 46 no. apartments.

- The applicant also highlights inconsistencies in the Council's application of Development Contributions i.e. no contributions in lieu of public open space were sought in the case of DCC Reg. Ref. 3601/18 and 2213/20.

4.1.2. The submission is accompanied by the following appendices:

1. Grant of Permission issued by DCC Re: Planning Register Reference No: 3900/18,
2. An Bord Pleanála decision ABP-305603-19,
3. Extract – Article 11 DCC Development Contribution Scheme 2020-2023 (under Section 48 – P&D Act 2000, as amended),
4. Extract – ‘Agreement for Lease’,
5. Opinion – Mr. Rory Mulcahy S.C. in relation to ABP-Ref. 300466-17,
6. Order of ABP re: Referral – Ref No. ABP-306254-19,
7. Email correspondence from Bartra Capital Property to DCC,
8. Email correspondences from Bartra Capital Property to DCC and DCC to Bartra Capital Property,
9. Email correspondence from DCC to Bartra Capital Property with Opinion – Mr Steohen Dodd S.C. attached,
10. Email correspondence from Bartra Capital Property to DCC,
11. Email correspondence from DCC to Bartra Capital Property,
12. Opinion Rory Mulcahy S.C.,
13. Extract NESC Paper 10,
14. Extract Rebuilding Ireland Progress Against Targets,
15. Grant of Permission – DCC Reg. Ref. 3601/18,
16. Grant of Permission – DCC Reg. Ref. 2213/20.

## 4.2. Planning Authority Response

- 4.2.1. DCC refer the Board to the copies of correspondence provided within the referral submission, in appendices 7-11 and state that they have no additional information relevant to the referral on record.

As per Appendix 10 received with the referral submission, the copy of the email from DCC states “*in relation to planning permission 3900/18 that the development contributions (conditions 2) and special contribution in respect of public open space (condition 3) are due on commencement of development or in such phased payments as agreed with the Council. The amounts under the current scheme (copy attached) are €99,624.57 (condition 2) and €184,000 (condition 3)*”.

## 5.0 Planning History

### Subject Site:

- **ABP Ref. 305603-19** (DCC Reg. Ref. 3541/19) – Split Decision issued in March 2020 – for amendments to the 'Build to Rent' residential apartment development, authorised by Planning Register Reference No. 3900/18.  
Permission refused for additional storey and increase of unit numbers from 39 to 46 no. apartments.  
Permission granted for the provision of the same proportion of brick on the front elevation of the aforementioned building, with its increased height, as provided for in the original application, as modified by the additional information submitted to the planning authority in relation to planning register reference number 3900/18.
- **P.A. - DCC Reg. Ref: 3900/18** permission was granted in March 2019 for redevelopment of the former car dealers to provide for a 'build to rent' residential apartment development of 39 no. apartments which was described as intended for use as a long term rental housing scheme. A first party appeal under ABP 304256-19 was withdrawn.

### Adjacent lands:

- **ABP-305293-19** (DCC Reg. Ref.3228/19) Permission refused by the Board in Dec 2019 – which related to a first party appeal against the decision of the planning authority to refuse permission for the following development at the site of the former bank at the corner of Poplar Row and North Strand Road:
  - An amendment to planning reg. ref 3601/18.

- An increase in height from the previously approved 5 storey (14 apartments and ground floor commercial development) for an increase in height to 8 storeys (20 no. apartments) and to include balconies and other development.

## 6.0 Policy Context

### 6.1. Development Plan

- 6.1.1. The operative development plan is the Dublin City Development Plan 2016-2022. The site is zoned Z4 the objective of which is '*to provide for and improve mixed service facilities*'. In the immediate vicinity the zonings relate to residential amenity. Poplar Row Flats are identified as a protected structure (RPS Ref. 6837).

The Tolka River corridor to the north is a Conservation Area.

### 6.2. Dublin City Council - Development Contribution Scheme 2020-2023 (under Section 48, Planning & Development Act, 2000 as amended)

Note 1 states the following: This Scheme is effective in respect of Planning Applications lodged with Dublin City Council from the 1st of April 2020, where a development contribution is applicable under this Scheme. This Scheme is also effective in respect of existing permissions granted before this date which have not yet commenced.

Items 10 and 11 are relevant, as follows:

#### 6.2.1. CONTRIBUTION IN LIEU OF PUBLIC OPEN SPACE

*10. The Dublin City Development Plan provides the discretion to the Council to determine a financial contribution in lieu of all or part of the public open space requirement for a particular development. The Plan provides that in the event of the planning authority considering a site to be too small or inappropriate to fulfil Dublin City Development Plan requirements for public open space provision a financial contribution of €4,000 per unit towards provision of or improvements to a park and/or enhancement of amenities in the area in line with the City's Park Strategy shall be required.*

6.2.2. *CIRCUMSTANCES WHERE NO CONTRIBUTION OR A REDUCED CONTRIBUTION APPLY:*

11. *The following development will not be required to pay development contributions under the Scheme:*

- *Social & Affordable housing units, including;*
  - *those which are provided in accordance with an agreement made under Part V of the Planning and Development Act (as amended)*
  - *those which are provided by a voluntary or co-operative housing body, which is recognised as such by the Council*
  - *those made available under the Council's Scheme of Priority for Affordable Dwelling Purchase Arrangements under Section 85 of the Housing (Miscellaneous Provisions) Act 2009 as amended and Housing (Miscellaneous Provisions) Act 2009 (Part 5) Regulations 2019 (S.I. No.81 of 2019);*

**6.3. Rebuilding Ireland – Action Plan for Housing and Homelessness**

6.3.1. Pillar 2 of 'Rebuilding Ireland: An Action Plan for Housing and Homelessness' aimed at private investment in order to deliver social housing at scale. 'Enhanced Long-Term Social Housing Leasing Scheme' was introduced by the Department of Housing, Planning and Local Government under this pillar.

6.3.2. Key Action - NTMA/Private Sector Housing Fund to deliver increased housing supply. Aim to acquire properties for onward leasing to local authorities and approved housing bodies under long-term leasing arrangements.

**6.4. Development Contributions - Guidelines for Planning Authorities 2013**

6.4.1. 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.

6.4.2. 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.

## 7.0 Statutory Provision

### 7.1. Planning and Development Act 2000, as amended

7.1.1. 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.”*

### 7.2. Section 48 Development Contributions

7.2.1. Section 48 of the Planning and Development Act 2000, (as amended) details the methodology and guiding principles by which Development Contributions Schemes should be arrived at. This includes:

7.2.2. Section 48(1) - *A planning authority may, when granting a permission under section 34, include conditions for requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority and that is provided, or that it is intended will be provided, by or on behalf of a local authority (regardless of other sources of funding for the infrastructure and facilities).*

7.2.3. Section 48(2)(a) - *Subject to paragraph (c), the basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section, and a planning authority may make one or more schemes in respect of different parts of its functional area.*

*(b) A scheme may make provision for payment of different contributions in respect of different classes or descriptions of development.*

*(c) A planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development.*

7.2.4. Section 48(3)(a) - *A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme.*

*(b) In stating the basis for determining the contributions in accordance with paragraph (a), the scheme shall indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities which are provided or to be provided by any local authority and the planning authority shall have regard to the actual estimated cost of providing the classes of public infrastructure and facilities, except that any benefit which accrues in respect of existing development may not be included in any such determination.*

*(c) A scheme may allow for the payment of a reduced contribution or no contribution in certain circumstances, in accordance with the provisions of the scheme.*

Regard is had to the insertion of subsections (3A – 3C) - Inserted by Urban Regeneration and Housing Act 2015 (33/2015), s. 29, S.I. No. 364 of 2015.

## **8.0 Assessment**

### **8.1. Regard to Point of Detail Referral**

8.1.1. Prior to addressing the issues arising, I note that this case is a point of detail referral under section 34(5) of the Planning and Development Act 2000, as amended, and not an appeal under section 48(10). The wording of S.48(10)(b) of the 2000 Act states that *'an appeal may be brought to the Board where an applicant for permission under section 34 considers that the terms of the scheme have not been properly applied in respect of any condition laid down by the planning authority'*. The wording of this section is restrictive in so far as it limits consideration of such appeals to the application of the terms of the adopted development contribution scheme and the powers of the Board to consider other matters.

8.1.2. 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"*.

8.1.3. 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 2 and 3 at the time of grant of permission in 2019. The scheme was correctly applied to the development when permission was granted and the applicant found no fault with that application at the time. The point of detail arising from conditions no. 2 and no. 3 of permission Reg. Ref. 3900/18 relates to the application of the terms of the development contribution scheme. The applicant now states that the use of the units has changed by virtue of the Enhanced Long Term Social Housing Lease Scheme (25 years) which they entered into with Dublin City Council, which now sees the apartments for use as social housing. The City Council and the applicant are now in disagreement as to how the Development Contributions Scheme should be applied in this case. In default of such agreement, the matter of the proper application of the terms of the scheme has therefore been referred to the Board for determination. Accordingly, the Board, in this case, is limited solely to determining the issues arising in the of the point of detail and relative to the payment of financial contribution Conditions no.2 and no.3.

8.1.4. I also note the more recent planning decision on the subject site under ABP 305603-19 which resulted in a Split Decision issued by the Board in March 2020 – for amendments to Reg. Ref. 3900/18. The Board in this case decided to refuse permission for an additional storey (and an increase in unit numbers from 39 to 46 no. apartments) and grant permission for amendments to the amount of brick finish to be provided on the front elevation of the proposed building. I am satisfied that this subsequent permission on site does not impact on the current Referral case as no development contribution conditions were included in the grant of permission, therefore this appeal does not form part of the considerations in the following sections.

## 8.2. Precedent Cases

8.2.1. The Board has dealt with a number of cases concerning points of detail relative to development contributions cases. I would refer the Board to a previous decision made under ABP Ref. 306254-19 which concerns a referral made by the same applicant querying a similar point of detail in relation to development contributions on a scheme comprising 23 no. apartments in Stoneybatter, & 1-3 Blackhall Place, Dublin 7 (DCC Ref. 3538/17). This referral case focussed on two development



contribution conditions attached to the original permission granted under ABP-30466-17, Condition No. 15 (Development Contribution Scheme made under section 48 of the Act) and Condition No.16 (Supplementary Development Contribution Scheme made under section 49 of the Act).

8.2.2. 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. The applicant then submitted that as per the above, the subject apartments constitute social housing units and therefore in accordance with item 12 of the Dublin City Council Development Contribution Schemes 2016-2020 and item 11 of the Supplementary Development Contribution Scheme 2016-2020, Luas Cross City the development would be exempt from the payment of contributions.

8.2.3. The Board in this case noted that the signed agreement for lease between the developer and Dublin City Council provided these residential properties for social housing use and noted the confirmation from Dublin City Council that this agreement is under the 'Enhanced Long Term Social Housing Scheme'. The Board acknowledged that this scheme is derived from Government Policy under Rebuilding Ireland. It was therefore the opinion of the Board that the units in question therefore fall to be considered within the description 'social housing units', which are exempt from the requirement to pay development contributions, for the purposes of the applicable Development Contribution Scheme 2016-2020 (Item 12 Exemptions and Reductions) 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 (Item 11 Exemptions) made under section 49 of the Planning and Development Act 2000, as amended.

### 8.3. **Application of the Dublin City Development Contribution Scheme 2020-2023**

8.3.1. The referrer in the current case submits that the development contribution scheme which is in effect for the purposes of the subject Conditions no.2 and no.3 is the Dublin City Council Development Contributions Scheme 2020-2023. 'Note 1' of this scheme states the following '*This Scheme is effective in respect of Planning Applications lodged with Dublin City Council from the 1st of April 2020, where a development contribution is applicable under this Scheme. This Scheme is also*

*effective in respect of existing permissions granted before this date which have not yet commenced*'. While I note that permission for the subject development was granted in March 2019, the applicant states in their submission that the subject development at Poplar Row did not commence before 1<sup>st</sup> April 2020. I also note that a subsequent application on site was made under Reg. Ref. 3541/19 and appealed under ABP 305603-19, decided in March 2020 (see planning history in Section 5 above). A commencement notice was submitted to the City Council at some point before 11<sup>th</sup> September 2020, as detailed in an email of same date from the applicant to the City Council (see Appendix 7). I am therefore satisfied that the DCC Development Contributions Scheme 2020-2023 is the effective Scheme with regard to the above-mentioned conditions. The applicant states in same email that "*since commencement Bartra Property (Poplar Row) Ltd. have now finalised negotiations with Dublin City Council and have now entered into an Agreement for Lease with the Council under the Enhanced Lease Scheme (Copy attached 25/08/2020) and has leased the entire block of 39 units to DCC for the purposes of the new supply of social housing*".

- 8.3.2. It is the submission of the referrer 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 s48 development contribution schemes. Appendix 4 of the referrer's submission is an extract from the agreement, dated 25<sup>th</sup> August 2020, signed by representatives of the Lessor - Bartra Real Estate and the Lessee the Chief Executive of the DCC and an approved officer.
- 8.3.3. The referrer states that on foot of the provisions set out under Item 11 of the subject Development Contributions Scheme 2020-2023 and given that the residential units to be developed at Poplar Row are to be used as social housing units, then the developer should be exempt from any liability to pay the development contributions required under conditions no.2 and no.3 attached to the grant of permission for DCC Reg. Ref. 3900/18. In support of their submission, they refer the Board to the opinions prepared by Senior Counsel (SC) on their behalf as contained in Appendices 5 and 12. In the case of Appendix 5, the opinion provided refers to the Referral Ref. ABP 306254-19, which has been discussed in Section 8.2 of this report above. The applicant relies heavily on this precedent to support their argument under the current referral case.

8.3.4. In respect of this previous referral determination made by the Board on ABP 306254-19, I note that this was made under the old Scheme 2016-2020. The referrer, in the submitted opinion from their SC (see Appendix 12) has provided a comparison of the relevant exemptions listed under the old 2016-2020 Scheme and the current Scheme 2020-2023. The SC notes under para. 27 and 28 that Clause 11 of the 2020 Scheme provides the list of developments in respect of which “reduced or no contributions” are payable. Instead of “social housing units” as per the 2016 Scheme, it refers to “social and affordable housing units” and then provides a list of what falls within that definition. The SC acknowledges that although units provided under the enhanced long term lease scheme are not referenced therein, the use of the word “including” in the definition of social and affordable units means that the list must be regarded as non-exhaustive. The SC then states that as with the 2016-2020 Scheme, there is nothing in the 2020-2023 Scheme which expressly excludes units provided on this basis from the terms of the Scheme.

8.3.5. Having reviewed all the information submitted and opinions of Senior Counsels submitted both on behalf of the City Council and the referrer on the previous related case ABP 306254-19, as well as the previous decision issued by the Board under ABP 306254-19, I would concur with the referrer that the current referral case is similar in its details and the application of Item 11 of the current Development Contributions Scheme 2020. Item 11 outlines “Circumstances where no contribution or a reduced contribution apply” and goes on to identify developments that “will not be required to pay development contributions under the Scheme” stating: “*Social & Affordable housing units, including;*

- *those which are provided in accordance with an agreement made under Part V of the Planning and Development Act (as amended)*
- *those which are provided by a voluntary or co-operative housing body, which is recognised as such by the Council*
- *those made available under the Council’s Scheme of Priority for Affordable Dwelling Purchase Arrangements under Section 85 of the Housing (Miscellaneous Provisions) Act 2009 as amended and Housing (Miscellaneous Provisions) Act 2009 (Part 5) Regulations 2019 (S.I. No.81 of 2019)”;*

- 8.3.6. I would agree with the applicant that the inclusion of the word “including” in this case would suggest a non-exhaustive list. In my opinion the signed agreement for lease between the developer and Dublin City Council, provides these residential properties for social housing use in the future (25 year lease period). The attached extract from the lease agreement (Appendix 4) is made under the Housing Acts 1966-2015 for the Long-Term Leasing of Privately-Owned Property, and in this case is detailed for “social housing use”. The specific provisions of the ‘Enhanced Long-Term Social Housing Leasing Scheme’ introduced by the Department of Housing, Planning and Local Government, under Pillar 2 of ‘Rebuilding Ireland: An Action Plan for Housing and Homelessness’ is aimed at private investment, in order to deliver social housing at scale, which would be the case for the development under the current referral. I note the Board’s determination on the previous similar case under ABP 306254-19, which recognised that the development of 23 no. apartments units in Stoneybatter and the associated lease agreement with Dublin City Council under the “Enhanced Long Term Housing Scheme” fell to be considered within the description of “social housing units” as set out under Items 11 and 12 of the previous 2016 Scheme and therefore qualified for an exemption from development contribution payment under that scheme.
- 8.3.7. In the case of the current referral, I note that condition no.3 which relates to a special contribution under Section 48(2)(c) of the P&D Act 2000, as amended, in respect of public open space. Item 10 of the current Development Contributions Scheme 2020-2023 outlines that the Dublin City Development Plan provides the discretion to the Council to determine a financial contribution in lieu of all or part of the public open space requirement for a particular development and that a financial contribution of €4,000 per unit towards provision of or improvements to a park and/or enhancement of amenities in the area in line with the City’s Park Strategy shall be required. I note the applicant’s comments regarding the Council’s miscalculation of same contribution (as detailed under email correspondence dated 30<sup>th</sup> October 2020 and titled “Enhanced Lease Poplar Row” in submitted Appendix 10). I would concur that the amount calculated at €184,000 (€4,000 X 46 no. apartments) is incorrect and should if correctly applied be €156,000 (€4,000 X 39 no. apartments). However, notwithstanding the error in calculations, I would consider that the applicant would also on foot of the above-mentioned provision set out under Item 11 in the subject

Scheme 2020-2023 be exempt from any liability to pay development contributions under condition no.3.

- 8.3.8. In the case of the current referral case, I consider it appropriate that the residential units be deemed social housing units, for the purposes of the respective Development Contributions Scheme (2020-2023) described above, and that development contributions under condition numbers 2 and 3 be determined on this basis.

### **Conclusion**

- 8.3.9. In summary and noting the provisions of section 34(5) of the Planning and Development Act 2000, as amended, regard has been had to the documentation submitted, precedent cases, to the provisions of the legislation and guidelines including the Council's Development Contributions Schemes 2016-2020 and 2020-2023 and the 2013 Guidelines on Development Contributions. Taking all of the above into consideration, I consider it appropriate that the residential units be deemed social housing units, for the purposes of the respective Development Contributions Scheme 2020-2023 described above, and that development contributions under condition numbers 2 and 3 attached to grant of permission DCC Reg. Ref. 3900/18 be determined on this basis and that these units fall to be considered as social housing units which are exempt from the requirement to pay development contributions, for the purposes of the applicable Development Contribution Scheme 2020-2023 made under section 48 of the Planning and Development Act, 2000, as amended.

## **9.0 Recommendation**

- 9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** by Order dated the 22<sup>nd</sup> day of March, 2019 Dublin City Council, under planning register reference number 3900/18, granted subject to conditions a permission to Bartra Property (Poplar Row) Limited care of Sean Harrington Architects, 3rd floor, 121-122 Capel Street, Dublin 1, for a development comprising the demolition of an existing commercial building, formerly used as a car dealers and the development of a 'Build to Rent' residential apartment development, intended for

use as a long-term rental housing scheme comprising of a seven storey building to accommodate a total of 52 no. apartments consisting of 10 no. studio apartments; 16 no. 1 bedroom units; 12 no. 2 bedroom (3 person) units; 13 no. 2 bedroom (4 person) units 1 no. 3 bedroom unit with balconies (2 no.) at each level from first to fifth floor levels and terraces (2 no.) at sixth floor level on the front (north) elevation and balconies (6 no.) at each level from the first to sixth floor levels on the rear (south) elevation; a communal facility/meeting room and an ESB substation/switch room at ground floor level; bicycle lock-up parking facilities with 78 no. spaces; a secure bin storage facility; 2 no. areas of communal open space, including a children's play space; and associated site development works. Primary access to the development would be from Poplar Row with service access from Annesley Place.

**AND WHEREAS** condition numbers 2 and 3 attached to this permission required the developer to pay to the planning authority financial contributions, taking account the date of commencement of development, being the appropriate contribution to be applied to this development in accordance with the Dublin City Council Development Contribution Scheme 2020-2023 as adopted by Dublin City Council on the 2<sup>nd</sup> day of March, 2020 in accordance with section 48 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 2 and 3, and on the application of the terms of the relevant Development Contribution Scheme in compliance with the terms of these conditions and the matter was referred by the developer to An Bord Pleanála on the 12<sup>th</sup> day of March 2021 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 residential units under construction at 3, Poplar Row with a service access on Annesley Place, Ballybough, Dublin 3, on foot of planning permission Register Reference 3900/18, constitute units for social housing use, by reason of the

Agreement for Lease made on the 25<sup>th</sup> August, 2020, signed by the developer and Dublin City Council, and that these units therefore fall to be considered as social housing units which are exempt from the requirement to pay development contributions, for the purposes of the applicable Development Contribution Scheme 2016-2020 made under section 48 of the Planning and Development Act, 2000, as amended.

## 10.0 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 Contribution Schemes 2020-2023,
  - (c) the specific provisions of the 'Enhanced Long-Term Social Housing Leasing Scheme' introduced by the Department of Housing, Planning and Local Government, under Pillar 2 of 'Rebuilding Ireland: An Action Plan for Housing and Homelessness' aimed at private investment in order to deliver social housing at scale,
  - (d) the submissions on file, precedent cases and the planning history of the site,
- the Board considered it appropriate that the residential units be deemed social housing units, for the purposes of the respective Development Contributions Schemes described above, and that development contributions under Condition nos. 2 and 3 be determined on this basis.

### **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.

---

Máire Daly

Planning Inspector

11<sup>th</sup> August 2021