



An
Bord
Pleanála

Inspector's Report

ABP-309778-21

Development

Change of use of land and building to allow for the storage, distribution and direct trade/retail sale of gas and gear products, customer engineering services workshop, shutters, vehicle gates, security screens, storage container, parking, and associated works.

Location

Unit 10, John F. Kennedy Drive, John F. Kennedy Industrial Estate, Dublin 12

Planning Authority

South Dublin County Council

Planning Authority Reg. Ref.

SD20A/0350

Applicant(s)

NCF Partnership

Type of Application

Permission

Planning Authority Decision

Grant Permission

Type of Appeal

S.48 against contribution

Appellant(s)

NCF Partnership

Observer(s)

None

Date of Site Inspection

30th June, 2021

Inspector

Stephen Kay

1.0 Site Location and Description

- 1.1. The appeal site comprises a corner site at the junction of John F Kennedy Avenue and John F Kennedy Drive in the JFK Industrial Estate. The site is currently unoccupied but is stated to have most recently been used for the storage , distribution and hire of plant and machinery.
- 1.2. The site contains a single storey industrial building with ancillary office space. The area to the rear (west) of the building is enclosed within a yard area. To the front (east) of the building there is an area of parking / circulation space.
- 1.3. The general environs of the site are characterised by industrial and warehousing uses.
- 1.4. The site has a stated area of 0.5 ha. and the stated floor area of the existing buildings on the site is 1,151 sq. metres.

2.0 Proposed Development

- 2.1. The development proposed under the application comprises the change of use of the existing building on the site to allow for the storage (internal and external) distribution, and direct trade / retail sale of gas and gas related products, construction of new customer engineering workshop, new roller shutter, new vehicle gates, new security screens along the existing southern boundary fencing, new 63 sq. metre single storey external storage container, external open storage areas, vehicular parking and all associated works.

3.0 Planning Authority Decision

3.1. Decision

The Planning Authority issued a Notification of Decision to Grant Permission subject to 8 no. conditions, of which the following are of relevance in the context of this appeal:

Condition No. 8 requires the payment of a financial contribution of €105,441.54 in accordance with the terms of the development contribution scheme 2021-2025 made under s.48 of the Planning and Development Acts, 2000 (as amended).

The stated reason for the attachment of this condition is as follows:

The provision of such facilities will facilitate the proposed development. It is considered reasonable that the payment of a contribution be required, in respect of public infrastructure and facilities benefitting the development in the area of the planning authority and that is provided or is intended will be provided by or on behalf of the local authority.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The report of the planning officer notes the planning history of the site, the internal and external reports received and the planning history and relevant development plan policy. The form of development proposed is considered to be such that it would not seriously injure the amenities of the area or property in the vicinity and includes a recommendation to grant permission that is consistent with the Notification of Decision which issued.

Under the heading of **Development Contributions**, the report states as follows:

- *The proposed development consists of the change of use of land and buildings to allow for the storage (internal and external) distribution and direct trade / retail sale of gas and gear products (1,151 sq. metres)*
- *The proposed development consists of the development of a single storey external storage container (63 sq. metres).*

Development contribution will apply accordingly.

3.2.2. Other Technical Reports

Drainage – No objection.

Roads – No objection.

3.3. Prescribed Bodies

Health and Safety Authority (HSA) – Report states that the proposed development is covered by SI 209 of 20156 (the COMAH Regulations) and that on the basis of the information presented that the HAS does not advise against the proposed development.

Irish water – No objection.

3.4. Third Party Observations

None received.

4.0 Planning History

South Dublin County Council Ref. ED 20/0030 – Change of use of the site to facilitate the use by BOC gasses would constitute development that is not exempted development.

South Dublin Co. Co. Ref. SD17A/0414 – Permission granted for the demolition of existing single storey office building to the side and front of the existing building on the appeal site and replacement single storey office extension to the side and front, service bay extension and other ancillary works. It appears that the works permitted under this permission have been implemented.

South Dublin County Council Ref. SD04A/0824 – Permission granted to ECI Limited for the extension of the enclosed yard area and replacement of low boundary wall and fence along JFK Avenue. No financial contribution condition attached to this grant of permission.

South Dublin County Council Ref. S00A/0414 – Permission granted to the Equipment Company of Ireland for extension to industrial unit. Condition No.11 requires the payment of a development contribution of €13,092 towards the costs of roads improvements and traffic management in the vicinity of the site.

Dublin County Council Ref. 90A/0200 – Permission granted to Earthmover Commercial Industrial Limited for side extension, alterations to front elevation, revised access to JFK Drive and illuminated signage. Condition No. 12 attached to that permission requires the payment of a contribution of £2,225 towards the cost of provision of public services in the area of the development.

5.0 Policy Context

5.1. Development Plan

The site is located in an area that is zoned Objective ‘REGEN’ ‘to facilitate enterprise and / or residential led regeneration’ under the *South Dublin County Development Plan, 2016-2022*.

5.2. Development Contribution Scheme

The applicable scheme is the *South Dublin County Council Development Contribution Scheme 2021-2025* which came into effect on 1st January, 2021.

5.3. Natural Heritage Designations

The site is not located within or close to any European sites.

6.0 The Appeal

6.1. Grounds of Appeal

The following is a summary of the main issues raised in the first party grounds of appeal submitted:

- That the appeal is submitted under s.48(10)(b) of the Planning and development Act, 2000 (as amended) and therefore relates solely to Condition No.8 attached to the Notification of Decision to Grant Permission which requires the payment of a development contribution.

Issue 1 – Requirement to Identify Previous Contributions

- That the 2021-2025 Development Contribution Scheme allows for the full offset of contributions in respect of change of use applications if contributions were previously paid, Paragraph 11(xxvii).
- That the applicant has exhausted all routes available to confirm that development contributions were paid in respect of the parent permission.
- Submitted that in the absence of certainty, it is unreasonable to levy such a significant contribution on the application.
- That in circumstances where the planning history / payment of contributions is unclear, it is submitted that the onus lies with the Planning Authority to demonstrate whether development contributions have or have not previously been paid. Submitted that this was the approach taken by the Board in the case of a similar appeal for Westlink House in Lucan.
- A copy of the Westlink House appeal (ABP Ref. ABP-302460-18) is attached with the appeal submission. This appeal is of direct relevance to the current case as the site was located within South Dublin Co Co area, it relates to a s.48 appeal, the development proposed was a change of use and there was uncertainty as regards the previous payment of development contributions.
- That the parent permission on the appeal site was granted prior to the ownership of the site by the current first party. Stated that the first party has been unable to identify the original / parent permission for development on the site. A formal planning search showed the following permissions:
 - S00A/0414 – Grant of permission for the extension of an industrial unit where conditions Nos. 10 and 11 require the payment of a contribution in respect of an extension to the building. It is not clear whether this extension was undertaken.
 - 90A/200 – permission granted for side extension and alterations to front elevation and revised access to JFK Drive. This permission included a condition relating to a development contribution for 276 sq. metres of new floorspace. Copies of the relevant drawings have not been found and so it is not possible to determine if these works were undertaken.

- That discussions with the Planning Authority indicates that they have not been able to verify the parent permission for the Unit 10 site.
- That the proposal involves the development of an additional 63 sq. metres of new floorspace and it is acknowledged that this part of the permitted development is liable to development contributions.

Issue 2 – Compliance with National Guidance and requirement to Consider Infrastructure Demand

- That the Guidelines for Planning Authorities on Development Contributions (January 2013) states in section 2 that planning authorities are required to include in their development contribution schemes waivers for change of use applications where the change of use does not result in the need for new or upgraded infrastructure or significant intensification of demand on existing infrastructure. No such provision is made in the adopted 2021-2025 scheme and there is no comment on this issue provided in the report of the Planning Officer.
- Submitted that the proposed operation of Unit 10 will have no material effect on existing or new infrastructure and that the proposed development contribution on the existing floorspace is disproportionate and does not achieve the balance required by the development contribution guidelines.

Issue 3 – Consistency of Land Use and Lack of a Change of Use Class

- Submitted that a development contribution should only be applied when there is a change in the class of use of a site as set out in the classes of use in Part 4 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended).
- Submitted that the proposed change in the nature of products stored, distributed, and hired out are not such that they would trigger a development contribution on the existing floorspace.
- Stated that the previous use of the site was for the storage, distribution, hire and sale of plant / machinery and parts (JCB). The use also included trade counter, customer parking and customer counter. Details of the nature of the

previous use of the site is attached with the appeal – letter from Plant Master Hire.

- The planning history of the site also supports the use of the site for storage and supply of trade machinery and parts.
- Submitted that the proposed use of the site would be very similar to the above previous uses of the site. The proposed use by BOC gases would involve a trade sales counter, internal and external storage of gases, gas and gear sales facility and a customer engineering workshop.
- While the site has been the subject of a s.5 referral regarding the proposed change of use, submitted that the determination of the PA on this case was finely balanced and that there was a limit on the information available to inform the decision. There was also some ambiguity regarding the potential for EIA which has since been clarified.
- Submitted that a change in the nature of the products stored, distributed, and hired out are not sufficient to trigger a material change in infrastructure demand.

6.2. **Planning Authority Response**

Response states that having reviewed the planning file, the Planning Authority has no further details to add regarding the calculation and levying of the contributions on this application.

7.0 **Assessment**

7.1. The following are considered to be the main issues in the assessment of this case:

- Consideration of the Case Under S.48(10)
- Payment of Previous Contributions
- Infrastructure Demand Implications of Proposed Development
- Consistency of land Use

7.2. Consideration of the case Under S.48(10)

- 7.2.1. The appeal has been submitted under the provisions of s.48(10) of the Planning and Development Act, 2000 (as amended) which 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. No other third party appeals have been received in respect of the proposed development and therefore in accordance with s.48(10) of the Act, the appeal is restricted to consideration of the application of the terms of the adopted development contribution scheme.
- 7.2.2. The current development contribution scheme in effect at the date of writing this report is the South Dublin County Council Development Contribution Scheme 2021-2025. It is noted that Condition No.8 attached to the Notification of Decision to Grant Permission issued by the Planning Authority, requires the payment of a financial contribution in accordance with the requirements of the 2021-2025 scheme.

7.3. Payment of Previous Contributions

- 7.3.1. The primary grounds on which the first party contend that the terms of the adopted 2021-2025 development contribution scheme have not been properly applied in this case relates to the fact that the proposed development primarily relates to a change of use of the site, and that under the provisions of the adopted scheme there is a specific exemption for change of use applications. It is accepted by the first party that the proposal does involve a small quantum of new floorspace (c.63 sq. metres) and that a contribution in accordance with the adopted scheme is payable for this part of the permitted development.
- 7.3.2. Paragraph 11 of the adopted 2021-2025 Development Contribution Scheme sets out a series of categories of development which will be exempt from the requirement to pay development contributions or which may pay a reduced rate. Paragraph 11(xxvi) relates to change of use and states as follows:

In respect of a permission for change of use, where development contributions were paid in respect of the former use the contribution payable on the new use will be net of the quantum of development previously paid for. Where a contribution was not previously paid, or the original development was carried out before 1963 it shall be treated in its entirety as new development and assessed accordingly. The Development Contribution Scheme does not provide for any rebate or refund in this regard. Agents/applicants should provide evidence of prior payment at application stage to expedite assessment and avail of this exemption.

- 7.3.3. The circumstances of the proposed development are in my opinion such that the proposed development constitutes a change of use application, albeit one where the proposed use would appear to be very similar to that which existed on the site up until 2019. Specifically, as highlighted by the first party and supported by the letter on file from the previous occupant of the site (Plant Hire Master) contained at Appendix 6 of the appeal submission, the proposed use of the site would be very similar to the previous in that it incorporates elements of storage, distribution, hire and sale of plant / machinery and parts including a trade or customer counter, customer parking and customer counter. The planning history of the site and the previous applicants Earthmover Commercials Industrial Ltd (90A/200) and Equipment Company of Ireland Ltd (S00A/0414) indicates to me that the established use of the site has been very similar to the proposed use for a significant period of time. The proposed development was however the subject of a s.5 referral to the Planning Authority who determined that the proposed development was not exempt and hence a change of use application has been made.
- 7.3.4. The issue arising in terms of compliance with the exemptions set out in paragraph 11 of the adopted development contribution scheme is whether development contributions were previously paid in respect of the previous use of the site. The situation in the subject case is that the only permissions which can be sourced relating to the site are those referenced above from 1990 (90A/200) and 2000 (S00A/0414) which are both for extensions to existing industrial unit. In both of these cases a condition requiring the payment of a financial contribution is attached. There is no record available of a parent permission relating to the original construction of

the industrial unit on the site and the first party have submitted the results of a search undertaken by Allied Legal Services which does not indicate any original permission for the building on the site. I also note that the Planning Officer report on file does not identify any specific application relating to the original permission on site and that the response to the grounds of appeal received from the Planning Authority states that *'having reviewed the planning file, South Dublin County Council has no further details to add regarding the calculation and levying of the financial contributions on planning application Ref. SD20A/0350'*.

7.3.5. Given the apparent attempt by the first party to identify the planning history of the site and specifically the original permission for development on the site, the fact that the current first party did not own the site at the time that the original permission was granted, and to the absence of any information or documentary evidence from the Planning Authority regarding the planning history of the site or the absence of previous payment of financial contributions, I am in agreement with the first party that it is unreasonable of the Planning Authority to levy such a significant contribution (€105,441.54) on the application. On the basis of the information presented, I am satisfied that the applicant has exhausted all routes available to confirm that development contributions were paid in respect of the parent permission. I also note the references of the first party to ABP Ref. ABP-302460-18 which relates to a s.48 appeal against a financial contribution attached to a permitted change of use application at Westlink House Lucan. I agree with the first party that the circumstances of this case are very similar to the subject case being within the administrative area of South Dublin County Council, involving a proposed change of use and a situation where it was not clear whether financial contributions in respect of the parent permission had or had not been paid. I also note the fact that while the Westlink case was determined under the provisions of the 2016-2020 development contribution scheme, the wording of the paragraph relating to exemptions and reductions in the case of Change of Use Applications is identical to that in the current 2021-2025 scheme. Copies of both schemes are attached with this report.

7.3.6. The Board Direction in the Westlink case specifically noted the section of the contribution scheme relating to change of use and stated that the Board was not satisfied that the planning authority had adequately demonstrated that the financial contribution in respect of the parent permission, namely the existing commercial

building on the site, had not been paid either partially or in full. A copy of the Board Direction and the Inspector's report relating to Ref. ABP-302460-18 is attached as Appendix 1 to the first party appeal.

- 7.3.7. For the reasons set out above, I consider that the first party in this case has undertaken all reasonable steps to determine the payment status of the existing building on the appeal site. It is evident that a number of extensions have been undertaken to the original building over the years and financial contributions have been attached to the permissions relevant to these permissions. There is nothing to indicate that these contribution conditions have not been complied with and the Planning Authority submission on file does not present any clear evidence that contributions have not been paid either in respect of the permission relating to the original building on the site or in respect of subsequent extensions. In view of this, I consider that there is no clear basis under which contributions in respect of the 1,151 sq. metres of existing building which are proposed to be the subject of a change of use is justified and it is recommended that the wording of condition No.8 attached to the Grant of Permission would be revised to require the payment of a contribution of €5,739.93 to reflect the additional 63 sq. metres of floorspace permitted.
- 7.3.8. This figure of €5,739.93 is calculated on the basis of 63 sq. metres at a rate of €91.11 per sq. m as per Paragraph 9 of the 2021-2025 Development Contribution Scheme. With regard to the contribution required under Condition No.8 of the Notification of Decision, it is not clear how the figure of €105,441.54 was calculated as using a per sq. m rate of €91.11 the rate levied would appear to be too low to be on the basis of the total floor area (1,214 sq. m) which would require a contribution of €110,607.54.
- 7.3.9. In addition to the case made regarding the prior payment of contributions relating to the existing floor area, the first party appeal also raises issues relating to the infrastructure demand implications of the proposed development and the fact that the proposal does not in fact comprise a change of use at all. These grounds of appeal are considered in the sections below.

7.4. Infrastructure Demand Implications of Proposed Development

- 7.4.1. Under s.48(10) an appeal can only be made on the basis that the terms of the adopted scheme have not been properly applied. The scheme as adopted provides for the payment of a development contribution per sq. metre of industrial / commercial floorspace with specific exemptions provided for in paragraph 11 of the scheme. There is therefore no specific assessment of the likely infrastructure requirements of the proposed development that is relevant to an assessment of the contribution payable under a development contribution scheme adopted under s.48. Such considerations may be relevant in the case of assessment of special development contributions levied in accordance with s.48(c), however this is not relevant to the circumstances of the current case.
- 7.4.2. The specific case made by the first party that the Guidelines for Planning Authorities on Development Contributions (January 2013) requires Planning Authorities to include in their development contribution schemes waivers for change of use applications where the change of use does not result in the need for new or upgraded infrastructure or significant intensification of demand on existing infrastructure is noted. On the basis of the information presented with the application and the description of the previous use of the site provided, it is in my opinion unlikely that there would be any additional infrastructure demands arising from the proposed development. As noted by the first party however there is no such explicit provision contained in the 2021-2025 contribution scheme and therefore it is not a case that the terms of the scheme have not been properly applied on this issue. In any event, as discussed at 7.3 above, the application as submitted is for a change of use and the scheme provides for an exemption for such applications where contributions have previously been paid.

7.5. Consistency of Land Use

- 7.5.1. The final case put forward by the first party is that a development contribution should only be applied when there is a change in the class of use of a site as set out in the classes of use in Part 4 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended), that the subject application is such that no change

of use will occur and that the proposed development is not such as to trigger a material change in infrastructure demand.

- 7.5.2. As noted above, the information available on file regarding the previous and proposed new use of the site is such that it would not appear that a change in infrastructure demand is likely to arise. On the basis of the information presented however it is not possible to make an accurate assessment as to whether a change of use is likely to arise. In any event, the first party has submitted an application for a change of use and the application has to be assessed as such including with regard to the assessment under the provisions of the adopted development contribution scheme.

8.0 Recommendation

- 8.1. Having regard to the above, based on the following reasons and considerations, it is recommended that the Planning Authority be directed to amend Condition No.8 as set out below.

9.0 Reasons and Considerations

Having regard to:

- (a) Section 34(5) of the Planning and Development Act 2000 as amended,
- (b) The provisions of the South Dublin County Council Development Contribution Scheme 2021-2025
- (c) The provisions of s.48 of the Planning and Development Act, 2000 (as amended),
- (d) The submissions on file and the available information relating to the planning history of the site,

The Board considered paragraph 11(xxvi) of the South Dublin County Council Development Contribution Scheme 2021-2025 which specifies that *in respect of a permission for change of use, where development contributions were paid in respect of the former use the contribution payable on the new use will be net of the quantum of development previously paid for. Where a contribution was not previously paid or the original development was carried out before 1963 it shall be treated in its entirety as new development and assessed accordingly* and was not satisfied that the Planning Authority, South Dublin County Council had adequately demonstrated that the financial contribution in respect of the parent permission, namely the original commercial building on the site, or subsequent permissions for the extension and modification of this parent permission had not been paid either partially or in full.

10.0 Conditions

8. The developer shall pay to the planning authority a financial contribution of €5,739.93 (five thousand seven hundred and thirty nine euro and 93 cent) 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 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. The application of any 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 An Bord Pleanála to determine.

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.

Stephen Kay
Planning Inspector

5th July, 2021