



An  
Bord  
Pleanála

## Inspector's Report

### ABP-309855-21

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<b>Development</b>	The development will comprise the provision of 4 No. warehouses with marshalling offices, ancillary office space, staff facilities and associated development.
<b>Location</b>	Newtown, Kilshane Cross, Co. Dublin.
<b>Planning Authority</b>	Fingal County Council
<b>Planning Authority Reg. Ref.</b>	FW20A/0126
<b>Applicant(s)</b>	IPUT plc.
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Grant permission
<b>Type of Appeal</b>	First Party against conditions (s.48 appeal)
<b>Observer(s)</b>	Dublin Airport Authority, Transport Infrastructure Ireland.
<b>Date of Site Inspection</b>	11 <sup>th</sup> August 2021.
<b>Inspector</b>	Barry O'Donnell

## 1.0 Site Location and Description

- 1.1. The subject site has a stated area of 14.06ha and is situated to the west of Dublin Airport, at the junction of the R135 and the L3125, Kilshane Cross. The site is greenfield in nature and consists of 2 parcels, separated by a hedgerow boundary. Access to the site is taken from the L3125, towards the north-east end of the site.
- 1.2. The site is in an area of a mix of commercial and agricultural uses. The site itself and lands to the east are agricultural, whilst the Dublin Airport Logistics Park lies to the south and there is a hardware store to the north, on the opposite side of the L3125. Northwest Business Park lies to the west.

## 2.0 Proposed Development

- 2.1. The proposed development as described in the public notices entailed: -
  - Construction of 4 no. warehouses with marshalling offices, ancillary office space, staff facilities and associated development. The buildings would have a maximum principal height of 17.07m above ground floor level and would occupy the following areas: -

Unit 1: GFA 21,578sqm (comprised of 20,252sqm warehouse, 66sqm marshalling office, 1,216sqm ancillary office space and 44sqm plant).

Unit 2: GFA 9,206sqm (comprised of 8,347sqm warehouse, 66sqm marshalling office, 757sqm ancillary office space and 36sqm plant).

Unit 3: GFA 16,525sqm (comprised of 15,478sqm warehouse, 66sqm marshalling office, 944sqm ancillary office space and 37sqm plant).

Unit 4: GFA 7,342sqm (comprised of 6,648sqm warehouse, 66sqm marshalling office, 589sqm ancillary office space and 39sqm plant).

Total GFA is 54,763sqm.
  - A 14sqm gate house at the south-west corner of the site.
  - Repositioning of site access from the L3125, to provide a new entrance and second vehicular access from the R135/Elm Road.

- Road upgrade works are proposed along the L3125 to the north of the site, to the north of the site, including upgrade of Kilshane Cross signalised junction to incorporate a left turning lane and upgraded signals on the L3125 eastern approach arm and the provision of cycle paths and pedestrian footpaths.
- The development also includes internal roadways, pedestrian access, 502 car parking spaces, bicycle parking, HGV parking and yards, level access goods doors, landscaping and boundary treatments, ESB substations, signage, PV panels, lighting and associated works.

### 3.0 Planning Authority Decision

#### 3.1. Decision

3.1.1. The Planning Authority granted permission on 8<sup>th</sup> March 2021, subject to 24 No. conditions. In the context of the subject appeal, the following condition is of note:

'24. Prior to the commencement of development the developer shall pay the sum of €3,757,580 (updated at date of commencement of development, in accordance with changes in the Tender Price Index) to the Planning Authority as a contribution towards expenditure that was and/or that is proposed to be incurred by the planning authority in respect of public infrastructure and facilities benefitting development in the area of the Authority, as provided for in the Contribution Scheme for Fingal County made by the Council. The phasing of payments shall be agreed in writing with the planning authority prior to the commencement of development.

**Reason:** It is considered reasonable that the payment of a contribution be required in respect of the public infrastructure and facilities benefitting development in the area of the Planning Authority and which is provided, or which is intended to be provided by, or on behalf of the Local Authority.'

#### 3.2. Planning Authority Reports

3.2.1. Planning Reports dated 21<sup>st</sup> September 2020, 16<sup>th</sup> December 2020 and 8<sup>th</sup> March 2021 have been provided. The first report stated that the development constituted a permitted use under the WD zoning, but expressed concern regarding the scale of development on the site, in the context of constraints. Concerns were also

expressed regarding a number of aspects of the site layout and building designs.

Additional information was sought in relation to the following: -

- Further consideration of the proposed layout was required, in the context of development plan table 12.7.
- Revised elevation designs for proposed buildings were requested.
- An assessment of Kilshane Cross junction was requested.
- A draft mobility management plan was requested.
- The applicant was requested to confirm that the lighting plan had taken account of potential impacts on residential amenity.
- The applicant was requested to respond to concerns expressed by the DAA, in relation to building heights.
- A phasing plan was requested, which should address concerns expressed by TII.
- The applicant was requested to respond to concerns expressed by the NTA regarding access to the site for employees by sustainable transport options.
- The applicant was requested to consult with ERVIA, where the site was identified as being on the northern pipeline corridor of the Greater Dublin Drainage Project.

3.2.2. The second report followed receipt of the AI response. It summarised the responses to the individual AI items and concluded that there were outstanding issues, arising from the response. It was recommended that Clarification of AI should be sought in relation to the following: -

- Items 1 and 2 of the AI request, which were not considered to have been adequately addressed.
- Proposed phasing.
- Footpath extension along the L3125.

3.2.3. The third report followed the CAI response and recommended that permission should be granted, subject to 27 No. conditions. Recommended condition Nos. 3, 26 and 27 were identified to be omitted from the decision.

3.2.4. Other Technical Reports

An **Archaeology Department** report dated 26<sup>th</sup> August 2020 has been provided, which recommended that mitigation measures outlined within the Archaeological Impact Assessment Report submitted with the application should be required to be implemented, by condition.

An **Environmental Health Air & Noise Unit** report dated 30<sup>th</sup> August 2020 has been provided, which recommended a number of planning conditions.

A Water Services report dated 28<sup>th</sup> August 2020 has been provided , which outlined no objection to the development, subject to a number of recommended planning conditions.

Two undated **Transportation Planning Section** reports have been provided. The first report requested additional information in relation to (a) an assessment of the Kilshane Cross junction (b) a draft mobility management plan. The second report followed the additional information response, outlining no objection to the development subject to a number of planning conditions.

A Parks and Green Infrastructure Division report dated 15<sup>th</sup> September 2020 has been provided, which recommended a number of planning conditions.

### 3.3. **Prescribed Bodies**

3.3.1. Irish Water made a submission dated 7<sup>th</sup> September 2020, which outlined no objection to the development, subject to a recommended planning condition.

3.3.2. The National Transport Authority made a submission dated 27<sup>th</sup> August 2020, which made a number of recommendations. Of relevance to this appeal, the submission recommended that a grant of permission should be linked to the upgrade of R135/L3125 junction.

3.3.3. Transport Infrastructure Ireland made submissions dated 28<sup>th</sup> August 2020 and 3<sup>rd</sup> December 2020. TII expressed the opinion the proposed development was premature pending upgrade of the R135/N2 junction.

3.3.4. The Dublin Airport Authority made submissions dated 30<sup>th</sup> August 2020 and 2<sup>nd</sup> December 2020. The first submission advised that the site is within the Outer Public Safety Zone of Dublin Airport and is within Noise Zone A for the Airport. The Planning Authority was requested to give consideration to recommendations

contained within the Public Safety Zones Report (ERM, 2005) and a full assessment of noise issues, including appropriate mitigation, was also requested. Regarding solar panels, it was requested that should any glint or glare issues arise, a condition should be included to require alteration of the on-site layout. The Planning Authority was also requested to consult the IAA in respect of proposed building heights, given the location of the site within the Obstacle Limitation Surface for the airport. The second submission requested a number of conditions.

3.3.5. The Irish Aviation Authority made a submission on 9<sup>th</sup> December 2020, which requested that a Nav aids Assessment should be undertaken, to determine whether adverse effects for Dublin Airport Nav aids Signal will arise.

#### **3.4. Third Party Observations**

3.4.1. A single third party submission was received, the issues raised within which can be summarised as follows:-

- Improvements to pedestrian and cycling facilities at and near Kilshane Cross should be provided.

3.4.2. A further single submission was received following the additional information response, which questioned the adequacy of the responses to items 4, 7 and 8 of the AI request. Upgrades to Kilshane Cross were again requested.

### **4.0 Planning History**

F18A/0146 - Permission granted on 9<sup>th</sup> April 2019 for a storage and distribution centre for new imported vehicles with a total capacity for 5,951 no. vehicles and including associated facilities. The development also includes a vehicle inspection and fit out building (approx. 2656 sq.m. and 9.14m high) incorporating operation control room, offices, meeting room, canteen, toilets, plant area and building signage. Other site development works include: 1 no. security hut (11 sq.m); staff car parking (28 no. spaces) and staff bicycle parking spaces (14 no. spaces); boundary treatments, new primary gated vehicular entrance onto the R135; emergency gated vehicular entrance onto Kilshane

Road (L3125); lighting and CCTV poles (approx. 12m high); on-site substation (24.6 sq.m); external plant area (76 sq.m.); underground drainage and electricity infrastructure; the removal of existing vegetation and new landscaping works. The development also includes road improvement works to the Kilshane Road (L3125) comprising the reconfiguration of the existing roadway (including extending existing culvert); provision of a left turn lane at the junction with the R135; and dedicated cycle and pedestrian facilities.

## 5.0 Policy Context

### 5.1. Ministerial Guidelines

#### *Development Contributions Guidelines for Planning Authorities (2013)*

5.1.1. The Guidelines provide guidance on the drawing up of development contributions. Under section 48 of the Act, planning authorities must draw up a development contribution scheme (a general development contribution scheme) in respect of certain public infrastructure and facilities provided by, or on behalf of, the local authority that generally benefit development in the area. All planning permissions granted are subject to the conditions of the development contribution scheme.

5.1.2. Section 2 'Supporting Economic Development' discusses the issue of double charging, advising that it is inconsistent with both the primary objective of levying development contributions and with the spirit of capturing planning gain in an equitable manner.

#### *Development Management Guidelines (2007)*

5.1.3. Section 7.12 refers to conditions requiring development contributions (sections 48 and 49 of the Planning Act), advising that Development contribution conditions may only be attached if they accord with the provisions of either section 48 or section 49 of the Planning Act and these are based on the application of the terms of one or more development contribution schemes which have been formulated and adopted in accordance with those sections of the Act, or on the need for a special financial contribution.

Although there is no entitlement to appeal against the principle of attaching a condition formulated in accordance with a general or supplementary scheme, the contribution requirements of any such scheme may be the subject of a valid appeal where the applicant considers that the terms of the scheme in question were not properly applied. The planning decision should clearly set out how the relevant terms were interpreted and applied to the proposed development; as well as being best practice this will help to minimise unnecessary appeals.

## 5.2. Fingal County Council Development Contribution Scheme 2021-2025

5.2.1. Section 9 'Level of Contribution' identifies the following contribution rates, per square metre of development: -

- Industrial/Commercial Development - €76.69.
  - Class 1: Transportation Infrastructure & Facilities €42.18
  - Class 2: Surface Water Infrastructure & Facilities (incl. Flood Relief) €3.83
  - Class 3: Community & Parks facilities & Amenities €30.68.

5.2.2. Appendix 11 contains a list of projects. It advises that the list is indicative and that other projects may be added and funded as they arise. The junction at Kilshane Cross is not identified on the list.

## 5.3. Development Plan

5.4. The subject site is zoned 'WD – Warehousing and Distribution', with an objective to *'Provide for distribution, warehouse, storage and logistics facilities which require good access to a major road network within a good quality environment.'*

5.5. The zoning map identifies that Local Objective 75 applies to the site, with the objective stating: -

*'Widen road from St. Margaret's By Pass at the Kilshane Junction to provide an extended left turning lane.'*

## 5.6. Natural Heritage Designations

5.6.1. The site is not within or adjacent to any Natura 2000 sites. The closest Natura 2000 sites are:



- Malahide Estuary SAC (Site Code 000205) and SPA (Site Code 004025), which are approx. 8.9km north-east.

## 6.0 The Appeal

### 6.1. Grounds of Appeal

6.1.1. The grounds of appeal are set out against the relevant condition and can be summarised as follows:

- It is accepted that as the decision to grant permission was issued after 1<sup>st</sup> January 2021, the Fingal County Council Development Contribution Scheme is the operative contribution scheme under which a charge will be levied.
- The Section 48 contribution payable is €3,757,580, as calculated in accordance with the new DCS. This equates to 48,997sqm of floorspace.
- This appeal seeks to offset the contribution amount payable, to take account of works proposed to be undertaken to provide public infrastructure in the form of widening and upgrade to the north of the site.
  - Road upgrades were incorporated as part of the proposed development, in line with local objective 75 of the development plan.
  - The objective does not state that the road upgrade shall be delivered as a condition of the development of the lands or that it is linked in any way to the development of the site.
  - The reason the upgrade has been proposed is because the development can provide the land needed to facilitate the works.
  - The lands to be ceded for the road upgrade are identified on the application drawings. They occupy an area of 4,827sqm and have a land value of €673,714.
- The applicant is happy to undertake the road upgrade works as part of the development, but had not expected to bear the cost of the works. It was clarified in pre-planning meetings with the Planning Authority's Roads department that a rebate from the S48 contribution would be required to fund the works.

- The upgrade of the junction at Kilshane Cross was identified as a project which would be funded by monies from the Development Contribution Scheme 2016-2020. This was the operative DCS at the time of lodgement of the application. The project has been omitted from the 2021-2025 DCS and it is assumed this is because the contributions needed have been collected.
- KSN Construction Consultants have provided a detailed cost plan for the upgrade works, demonstrating a cost of €2,751,080.
- The Planning Authority's approach is considered to constitute double charging, which is contrary to fairness and natural justice.
- The upgrade works are not required for the development and are in excess of the immediate needs of the development. Section 34(4)(m) of the Act states that conditions requiring the provision of facilities in excess of the immediate needs of the local authority can be attached subject to the local authority paying for the cost of the additional works and taking them in charge or otherwise entering into an agreement with the applicant with respect to the provision of those public facilities. It is argued that the Planning Authority should pay for the costs of the public road and it is only fair that as the applicant is completing the works, the cost should be offset against the full amount of the S48 contribution.
- Section 59(5) of the 2021 Planning and Development Act states that a planning authority shall not require the payment of a contribution in respect of a public infrastructure project or service where the person concerned has made a contribution under S48 in respect of public infrastructure and facilities of which the said public infrastructure project or service formed part. It is clear that the applicant should not be required to pay the costs of a public infrastructure project when they are making a S48 contribution towards its cost.
- If an offset in contribution was not provided for, the applicant would be required to cede approx. 0.5ha, pay a S48 contribution towards the cost of public infrastructure and separately pay the cost of substantial public infrastructure upgrades in the area.

## 6.2. Planning Authority Response

6.2.1. The Planning Authority made a submission dated 4<sup>th</sup> May 2021, the contents of which can be summarised as follows: -

- Condition No. 24 stipulated that a financial contribution shall be paid to the PA as a contribution towards expenditure that was/or that is proposed to be incurred by the planning authority in respect of public infrastructure and facilities benefitting development in the area of the Authority, in accordance with adopted development contribution scheme.
- The development contribution was assessed in accordance with the 2021-2025 DCS, which came into effect on 1<sup>st</sup> January 2021. The amount payable has been calculated as €3,757,580.
- The Board is requested to retain condition No. 24 of the Planning Authority's decision.

## 6.3. Observations

6.3.1. The Dublin Aviation Authority made a submission dated 15<sup>th</sup> April 2021, the contents of which can be summarised as follows: -

- Should the Board uphold the grant of permission, conditions 10, 21 and 23 should be retained.

6.3.2. Transport Infrastructure Ireland made a submission dated 20<sup>th</sup> April 2021, the contents of which can be summarised as follows: -

- Having regard to the site's nature, location in proximity to the N2, the cumulative impact of existing and permitted development and also the provisions of the Spatial Planning and National Roads Guidelines for Planning Authorities (2012), it is submitted that cumulative and/or incremental traffic increases at this location would impact the national road at this location.
- There is limited public transport in the area, with the result that trip generation is likely to be car borne. Traffic is likely to present on the N2 in the vicinity.
- It is submitted that the proposal is premature pending confirmation of the upgrade of the R135/N2 junction and a timeframe for its delivery.

## 6.4. Further Responses

6.4.1. A further submission was made by the first party on 22<sup>nd</sup> June 2021, in response to the Planning Authority's submission, the contents of which can be summarised as follows: -

- The Planning Authority has not addressed many of the pertinent points raised in the first party contribution appeal.
- A number of these points are reiterated:
  - The road objective identified in the development does not state that the road upgrade shall be delivered as a condition of the development of the subject lands. The reason the upgrade is proposed is that the development can provide the land needed to facilitate the works.
  - The road upgrade works have been continually envisaged as a public infrastructural project, funded by monies secured from the development contribution scheme over the period 2016-2020. The proposed development was predicated on this basis.
  - If the applicant was required to pay a full S48 development contribution of €3,757,580 and is then separately required to pay the envisaged €2,750,000 cost to upgrade the adjacent road network, this would constitute a double charge. This is contrary to fairness and natural justice.
- The applicant is seeking an offset of €2,751,080, which is the envisaged cost of upgrade of the road as proposed. This would reduce the S48 contribution payable to €1,006,500.

## 7.0 Assessment

7.1. Section 48(10) (b) of the Planning and Development Act 2000, as amended, makes provision for an appeal to be brought to the Board where an applicant for permission under section 34 considers that the terms of the relevant development contribution scheme have not been properly applied in respect of any condition laid down by the planning authority.

7.2. As this is an appeal in relation to the application of a development contribution only, the Board will not determine the application as if it were made to it in the first instance and will only determine the matters under appeal. The condition the subject of this appeal is No. 24.

#### **Condition 24**

7.3. Condition No. 24 of the Planning Authority's decision required payment of a financial contribution of €3,757,580, in accordance with the Fingal County Council Development Contribution Scheme 2021-2025

7.4. The applicant seeks to offset €2,751,080 from the total development contribution payable, as this is the envisaged cost of road upgrades incorporated as part of the proposed development. The proposed development includes the following road upgrades along the L3125 at Kilshane Cross: -

- Partial upgrade of Kilshane Cross signalised junction, to incorporate a left turning lane and upgraded signals on the L3125 eastern approach arm,
- Provision of 2m cycle paths on both sides of the L3125 from Kilshane Cross along the frontage of the development, with cycle paths transitioning to on-road cycle tracks at Kilshane Cross,
- Provision of 2m pedestrian footpaths from Kilshane Cross along the frontage of the development.

7.5. The Grounds of Appeal state that, in requiring a full S48 development contribution, together with a requirement for the applicant to deliver the specified road upgrades, a situation of double charging arises. I note in this respect that both the Planning Report and Traffic and Transport Assessment (TTA) submitted with the application stated that a rebate against the S48 contribution was being sought on the basis of the provision of these road upgrades as part of the development.

7.6. In its response to the appeal, the Planning Authority's states that the development contribution was assessed in accordance with the DCS and that a contribution of €3,757,580 is due.

7.7. A key aspect of the Grounds of Appeal is that the road upgrades are not required for the development but this statement is contradicted by the TTA, Section 9 of which states: -

*'The analysis contained within this TTA demonstrates that the existing road network has sufficient capacity to accommodate the proposed development...with the exception of the junction at Site 2 (Kilshane Cross), Site 5 (R135/N2 off slip junction) and Site 7 (R122/R108 junction) which will be at capacity for the future year's scenario.'*

- 7.8. The Junction Impact Analysis for Kilshane Cross indicated that following construction of the development and the road upgrades, the junction is still predicted to operate at 90% of its design capacity for both AM and PM peak periods in the opening year (2021) and above capacity in the Opening Year +5 and Opening Year +15 scenarios.
- 7.9. I am aware that local objective 75 of the development plan seeks to have the road widened at Kilshane Cross and, whilst I agree with the applicant that there is nothing within the development plan to link or condition the development of the subject lands to the delivery of its road upgrade, I am nevertheless satisfied that the upgrade of the junction, which is proposed as part of the development, has been demonstrated as necessary infrastructure, to ensure that the local road network can accommodate the development.
- 7.10. Regarding the other proposed upgrades along the L3125, the footpath and cycle path extensions are part of a larger widening and alteration of the road layout along this section of the L3125, a key aspect of which is the provision of a right turning lane into the site. I am unclear from the documentation available to me whether the infrastructure and layout proposed (i.e. footpath and cycle path extensions on both sides of the L3125) were required by the Planning Authority or were proposed by the applicant. They are not expressly identified as part of local objective 75.
- 7.11. Regardless, in my opinion these are infrastructural upgrades which are required as an essential element of a development of this scale. The footpath and cycle path extensions along the northern perimeter of the site are a proportional contribution to sustainable transport options in the area and serve to increase the site's accessibility by means other than the private car. I note, in this regard, that Section 7.1 of the Development Plan includes a section on 'Road Construction and Improvement Measures', which states that *'any works undertaken will include as an aim, enhanced provision for public transportation, cyclists and pedestrians, as appropriate...'* In incorporating such infrastructure, the development contributes to enhanced provision

for cyclists and pedestrians, to the benefit of the proposed development, and with the development of the lands to the east in time, will connect to existing cycling and pedestrian paths further east on the L3125.

## **Conclusion**

- 7.12. The upgrade of Kilshane Cross junction has been demonstrated as necessary infrastructure as part of the proposed development and the proposed footpath and cycle path extensions along the L3125 are considered to be an essential part of a development of this scale, serving to increase the site's accessibility by means other than the private car.
- 7.13. There is no provision within the DCS to offset the specific costs of necessary infrastructure provided as part of a development, against the requirement to make a financial contribution under the terms of the DCS.
- 7.14. In these circumstances, I consider it would be inappropriate to seek to offset the cost of these works against the applicant's obligation to make a financial contribution under the terms of the DCS.

## **8.0 Recommendation**

- 8.1. I recommend that condition No. 24 be retained.

## **9.0 Reasons and Considerations**

- 9.1. The Board considered the Fingal County Council Development Contribution Scheme 2021-2025 is the applicable development contribution scheme in this case and that it had been properly applied by the planning authority.

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Barry O'Donnell  
Planning Inspector

20<sup>th</sup> August 2021.