



An
Bord
Pleanála

Inspector's Report ABP-310016-21

Development	Manufacturing Facility
Location	Millennium Business Park, Naas, Co. Kildare
Planning Authority	Kildare County Council
Planning Authority Reg. Ref.	20840
Applicants	Boran Plastic Packaging Ltd
Type of Application	Permission
Planning Authority Decision	Grant permission subject to conditions
Type of Appeal	First Party vs. s48 contribution
Appellants	Boran Plastic Packaging Ltd
Observers	None
Inspector	Stephen J. O'Sullivan

1.0 Site Location and Description

- 1.1. The site is on the northern outskirts of Naas. It has a stated area of 2.6ha. The site itself is greenfield, but it is part of an area that has been provided with the roads and services to support extensive industrial and similar commercial development at the Millennium Business Park.

2.0 Proposed Development

- 2.1. It is proposed to build a facility to manufacture packaging. It would have a stated floor area of 5,627m².

3.0 Planning Authority Decision

3.1. Decision

The planning authority decided to grant permission subject to 19 conditions, none of which significantly altered the proposed development .

Condition no. 19 required the payment of €346,341.85 under the development contribution scheme adopted by the council in November 2015.

3.2. Planning Authority Reports

3.2.1. Planning Reports

Under the heading of “Development Contributions” the report states that the floor area of the proposed development is 5,627m². However the planning report does not include a recommendation as to the appropriate financial contribution.

3.3. Third Party Observations

None.

4.0 Planning History

None cited by the parties

5.0 Policy Context

5.1. Development Plan

The Kildare County Development Plan 2017-2023 applies.

5.2. Local Area Plan

The site is zoned for enterprise and employment under objective Q of the Naas Local Area Plan 2011-2017 (as extended to 2021).

5.3. Natural Heritage Designations

None

6.0 The Appeal

6.1. Grounds of Appeal

- The appeal is against the application of the terms of the development contribution scheme in the planning authority's decision.
- The rate of contribution for commercial developments, such as the current proposal, is set out in section 8(iii) of the scheme adopted in November 2015. It is based on the gross floor area as follows –

0-250 sqm: €43.46

251-3,000sqm: €54.31

>3,000sqm: €61.55

- The floor area of the proposed development is 5,627m². The proper application of the terms of the scheme to it would therefore be –
 $(250 \times 43.66) + (2,749 \times 54.31) + (2,626 \times 61.55) = 321,843.49$
- The correct contribution would therefore be €24,498.36 less than the amount of €346,341.85 required by condition 19 of the council's decision. The board should direct the council to amend its decision accordingly.

- The top contribution rate should not be applied to the entirety of the floor area of the development. .

6.2. **Planning Authority Response**

The planning authority's response stated that the rate in section 8(iii) is not apportioned across each of the floor area bands but is charged in its entirety in accordance with the rate for whatever band the particular development is in. In this case the development would be 5,627m² so the applicable rate is €61.55 per square metre that applies to all of its 5,627 square metres. The intention of the scheme, the practice to date and the interpretation of the board on previous appeals has been to charge the development in its entirety within the relevant band. It would make the scheme unworkable if the board were to determine that the contribution should be apportioned as proposed by the applicant. It would not be in the spirit or intention of the scheme.

6.3. **Further response**

The applicant responded to the council's response and said that the scheme does not state that the relevant rate must be charged in its entirety. It would be reasonable and logical to interpret the scheme as apportioning the rates. There is no evidence to support the council's assertion that this apportionment would render the scheme unworkable.

7.0 **Assessment**

- 7.1. The gross floor area of 5,627m² and the applicability of the rates at section 8(iii) of the adopted scheme to this floor area are not disputed.
- 7.2. The relevant provision at section 8(iii) of the contribution scheme adopted by the council is ambiguous. It could support the interpretation put forward by the council, whereby any particular proposed development was allocated to a category based on its floor area and a single rate would be applied over its entire number of square

metres. However it would also support the interpretation put forward by the appellant, whereby graduated bands are applied.

- 7.3. I would advise the board to follow the interpretation put forward by the appellant, for several reasons. Firstly, it is the more obvious interpretation. On my first reading of section 8(iii) of the contribution scheme I understood it to mean that graduated rates would apply because it is set out in a similar way to common statements of the rates of various taxes and other charges where graduated rates are applied. I would imagine more people would take this meaning from the written provisions than the one advanced by the council.
- 7.4. Secondly, the council wrote the scheme. Any ambiguity should be resolved against the party that was responsible for creating that ambiguity in the first place.
- 7.5. Thirdly, contributions under an adopted scheme have an effect similar to a tax. There is no requirement for the funds raised under a scheme to be spent in a way that provides a benefit to the person who paid them. So contributions under a scheme are not a payment for services, they are a general levy on private property to serve the public good. This means the basis for the imposition should be very clearly stated by the public authority in the first place, and such statements should be subject to strict interpretation in favour of the person who would otherwise get to keep their own money.
- 7.6. Fourthly, the interpretation offered by the council would mean that a small increase in the floor area of a project that brought it from one class to the next could result in a disproportionately large increase in the contribution that was due. This would be an unjustified and avoidable anomaly.
- 7.7. The council has argued that the appellant's interpretation of the scheme's provisions would be unworkable. This assertion has no reasonable basis. The council also argue that it would be contrary to the intention or spirit of the scheme. Again, this is not considered a supportable position. The scheme means what it says. It does not have a separate spirit or intention. The appellant's interpretation of section 8(iii) is not contradicted by any other part of the adopted scheme.
- 7.8. The council's response to the appeal says that the board have previously applied the scheme in the manner advocated by the council, although it did not provide any citation to support this assertion. I have reviewed the board's records of the

contribution appeals from Co. Kildare, although I do not claim that this review was comprehensive. The board's decision on ABP-307312-20 did levy a contribution under section 8(iii) of the scheme in the way sought by the council, i.e. a commercial development on 415m² was made subject to a levy of €22,538.65 based on a calculation 415*54.31. However the board in this case were agreeing with the appellant's request to reduce a higher levy sought by the council that was made on other grounds. The current question as to whether a graduated rate should be applied was not raised by the parties in the previous case, so I would not regard it as establishing a useful precedent on which to assess the current appeal.

- 7.9. The proper application of the terms of the adopted scheme would therefore result in a contribution of in respect of the proposed development calculated as follows-

$$(250*43.46) + (2,750*54.31) + (2,627*61.55) = €321,909.35.$$

This figure is slightly different from that proposed by the appellant due to differences in arithmetic rather than in the application of the terms of the scheme.

8.0 Recommendation

- 8.1. I recommend that the board direct the planning authority to amend condition 19 of its decision to the following –

The developer shall pay to the planning authority a financial contribution of €321,909.35 (three hundred and twenty-one thousand, nine hundred and nine euro and thirty five cents) 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. The contribution shall be paid prior to the commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. 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 the Board to determine.

Reason: It is a requirement of the Planning and Development Act 2000 that a condition requiring a contribution in accordance with the Development

9.0 Reasons and Considerations

The proper application of the terms of the contribution scheme adopted by the planning authority in November 2015 would involve the application of a graduated rate to the floor area of commercial developments as set out in section 8(iii).

Stephen J. O'Sullivan

Planning Inspector

7th November 2021