



An
Bord
Pleanála

Inspector's Report ABP-310359-21

Development	Construction of 84 dwellings.
Location	Lands to the east and west of Rathmore Road (R127) and Lusk North Park at Clonrath Avenue, Lusk, Co. Dublin
Planning Authority	Fingal County Council
Planning Authority Reg. Ref.	F20A/0523
Applicant(s)	Rimford Developments Limited.
Type of Application	Permission.
Planning Authority Decision	To grant with conditions.
Type of Appeal	First Party v. condition.
Appellant(s)	Rimford Developments Limited.
Observer(s)	None.
Date of Site Inspection	31 st August 2021.
Inspector	Deirdre MacGabhann

Contents

1.0 Site Location and Description	3
2.0 Proposed Development	3
3.0 Planning Authority Decision	4
3.1. Decision	4
3.2. Planning Authority Reports	4
3.3. Prescribed Bodies	5
3.4. Third Party Observations	5
4.0 Planning History.....	5
5.0 Policy Context.....	5
5.1. Fingal County Development Plan 2017-2023.....	5
5.2. Development Contribution Scheme.....	6
6.0 The Appeal	6
6.1. Grounds of Appeal	6
6.2. Planning Authority Response	7
6.3. Further Responses.....	8
7.0 Assessment	8
7.3. Application of Development Contribution Scheme	9
8.0 Recommendation.....	11
9.0 Reasons and Considerations.....	12

1.0 Site Location and Description

- 1.1. The 3.5ha appeal site is situated to the east of Lusk town. It comprises land that extends largely to the east and west of Rathmore Road (R127), and a rectangular parcel to the north west of these lands at Lusk North Park (see page 5 Planning Report). Land to the east and west of the Rathmore Road is currently in agricultural use. At the time of site inspection, construction activities were taking place on land at Lusk North Park.

2.0 Proposed Development

- 2.1. The proposed development, as revised by way of significant further information submitted on the 7th of April 2021, comprises the construction of 93 no. dwellings across the two plots of land, to the east and west of Rathmore Road. The development incorporates a small section of Tyrellstown Road and Raheny Roundabout to facilitate connections to municipal services and at Lusk North Park for Class 1 Open Space. The residential development comprises a mix of 1 and 2 bedroom apartments, 3 bedroom duplex units and 2, 3 and 4 bedroom houses. The development will provide a total area of 7,562.5sqm of landscaped open space, based on a requirement of 25sqm per bedspace and provision of 302.5 bedspaces ($25 \times 302.5 = 7562.5\text{sqm}$).
- 2.2. Of the total area, 3,073sqm of Class 2 public open space will be provided within the Rathmore East and Rathmore West (Figure 2, FI response), with Open Space Areas 1 to 4 providing 10.9% of the net development area (Table 1 FI response). An additional area of 231sqm will be provided to the north east of the site (Open Space Area 5). It comprises a SuDS and biodiversity area and is excluded from the 10% calculation. Drawing no. 2000038-DBFL=CS-SP-DR-C-1001 Site Services Layout indicates all SuDS features included in the development. The remaining 4,489.5sqm will comprise Class I Open Space at Lusk Park North.

3.0 Planning Authority Decision

3.1. Decision

- 3.1.1. On the 30th of April 2021, the planning authority decided to grant permission for the development subject to 30 conditions. Condition no. 28 requires payment of €11,739 in lieu of 0.02ha of public open space provision. Condition no. 29 requires payment of a bond or cash sum to facilitate the completion of the development. Condition no. 30 requires payment of a development contribution.

3.2. Planning Authority Reports

3.2.1. Planning Reports

- 14th December 2020 – Alongside other matters, the report recommends further information on an identified shortfall in public open space provision to comply with DMS57B.
- 30th April 2021 – Considers that Open Space Area 4, located to the north of a turning head, constitutes residual open space given its location and size and should be excluded from the open space calculation for the site. Similarly, Area 5 is excluded by virtue of its use solely for SuDS. Remaining open space provision within the site is considered to meet the Development Plan objective of 10% of site development area for open space provision (Objectives DMS57 and 73). However, as the number of units on the site has increased, (94no.), total public open space requirement is 7,562.5sqm. This area is in excess of the total public open space provided by the applicant i.e. 2,873sqm of Class 2 open space on site and 4,489.5 sqm of Class 1 open space at Lusk North Park, resulting in a shortfall of 200sqm open space provision. The report recommends a financial contribution in lieu of this provision. The report states that the applicant has adequately provided clarity regarding the location of SuDS within the open space areas and that no area is taken up with more than 10% SuDS.

3.2.2. Other Technical Reports

- Parks and Green Infrastructure (1st December 2020) – Amongst other things require clarity regarding open space provision in relation to proposed SuDS. No subsequent report.
- Water Services (27th November 2020) – Recommends further information, to include proposals for surface water drainage following the principles of SuDS. Subsequent report (21st April 2020), no objections in respect of surface water drainage, subject to conditions.

3.3. Prescribed Bodies

- No issues raised by prescribed bodies that are relevant to the subject appeal.

3.4. Third Party Observations

- No issues raised by third parties that are relevant to the subject appeal.

4.0 Planning History

- No relevant planning history for the subject appeal.

5.0 Policy Context

5.1. Fingal County Development Plan 2017-2023

- 5.1.1. Section 12.7 of the current CDP deals with open space provision and in Table 12.5 sets out details of the open space hierarchy and accessibility standards to provide for the open space needs of residents (see attachments). These include pocket and small parks (Class 2 open space), and local parks (Class I open space) with increasing size and distance from dwellings.
- 5.1.2. The overall standard for open space provision is 2.5ha per 1000 population, based on an occupancy rate of 3.5 persons in dwellings with three or more bedrooms and 1.5 persons in dwellings with two or fewer bedrooms (Objective DMS57). In all cases, policy Objective DMS57A and DMS57B require a minimum of 10% of a proposed development site area be designated for use as public open space. Policy

DMS57A also gives the Council discretion for the remaining open space, required under Table 12.5, to be provided or upgraded outside of the development site area.

5.1.3. Policy DMS57B gives the Council discretion to accept a financial contribution in lieu of remaining open space requirement required under Table 12.5. Where such a contribution is accepted, it is stated that the contribution will be calculated on the basis of 25% Class 2 and 75% Class 1.

5.1.4. Policy DMS73 seeks to ensure that as far as practical Sustainable urban Drainage Systems enhance the quality of open spaces, but that such spaces do not form part of the public open space provision, except where it contributes in a significant and positive way to the design and quality of the open space. In instances where it is determined that SuDS make a significant and positive contribution to open space, it is stated that a maximum 10% of open space provision shall be taken up by SuDS.

5.2. Development Contribution Scheme

5.2.1. Fingal County Council's Development Contribution Scheme 2021-2025 sets out, in Note 5, development contributions to be levied in lieu of open space provision. These comprises:

- Class 1 Open Space - €100,000 per acre to purchase land based on the value of amenity land, Plus €100,000 per acre for development costs. 2.
- Class II Open Space - €250,000 per acre to purchase land in residential areas, Plus €100,000 per acre for development costs.

6.0 The Appeal

6.1. Grounds of Appeal

6.1.1. First party grounds of appeal in respect of condition no. 28 of the permission are:

- The PA have not properly applied the terms of the Development Contribution Scheme. The financial contribution has been applied despite the compliance with Objective DMS57B and DMS73. With the omission of Open Space Areas 4 and 5, open space as calculated by the PA is 2,873sqm (289sqm + 1227sq + 1357sqm), representing c.10% of site area.

- No opportunity has been afforded to the applicant to provide additional open space, for the perceived shortfall, despite being in a position to do so. Additional open space land could be provided at Lusk North if required.
- The PA have failed to recognise the substantial quantity of land afforded to the planning authority for provision of open space as part of previous planning applications. The development must be considered as part of a masterplan area, as referred to in item no. 1 of the applicant's response to the request for FI, and the quantity of open space already provided at Lusk North Park.
- Condition no. 28 includes no reference to section 48 financial contributions or to the Development Contribution Scheme.

6.2. Planning Authority Response

6.2.1. The planning authority's responds to the appeal as follows:

- Total public open space requirement is **7,562.5sqm** (i.e. $8 \times 1.5 \times 25 + 83 \times 3.5 \times 25$).
- The development complies with the requirements of Objective DMS57B. 10% of site area is provided as public open space across the site (Rathmore East and Rathmore West) i.e. 2,873sqm after Open Space Areas 4 and 5 are omitted, on a developable area of 2.817ha ($2873/28170 \times 100$).
- With the Class 1 public open space proposed at Lusk Park North (4,489.5sqm), a total of **7,362.5sqm** open space is provided (2,873sqm + 4489.5sqm). There is therefore a shortfall of 200sqm and a financial contribution in lieu of this is attached to the permission.
- Whilst the applicant owns/controls land in the vicinity and may be willing to provide additional land to make up the shortfall, a condition requiring same would be ambiguous and could affect other permissions where the areas of land within the applicant's landbank have already been committed to serve other developments attributable to the applicant.
- In the event that the appeal is successful, request the Board to apply a condition in respect of the section 48 Development Contribution Scheme,

open space shortfall, and a condition in respect of Bond/Cash Security to ensure provision of services are built to Taking in Charge Standards.

6.3. Further Responses

- 6.3.1. The applicant responds to the planning authority's comments on the appeal. It reiterates arguments made in the appeal and includes information on public open space provided by the developer at Lusk Park North and the land within the applicant's ownership at Lusk Park North, which is to be allocated to future development. It does not dispute the planning authority's conclusion that additional open space is required but considers that it would be more beneficial to the area to provide this directly at Lusk North, rather than by payment of a development contribution. It is stated that the applicant would be willing to submit a revised layout that includes the increase in open space.

7.0 Assessment

- 7.1. Condition no. 28 of the permission does not refer to Fingal County Council's Development Contribution Scheme (DCS). However, it is stated by the planning authority to be levied in accordance with policy objective DMS57B, as a financial contribution in lieu of a shortfall in open space provision. Further, the planning authority's DCS provides for the payment of a financial contribution in lieu of a shortfall in open space provision. The appeal is also made by the applicant on the grounds that the terms of the Development Contribution Scheme have not been properly applied. This assessment is, therefore, solely confined to whether or not the terms of the planning authority's development contribution scheme have been properly applied.
- 7.2. (I have considered whether or not the condition could be deemed a special development contribution. However, there are no details on file with regard to the specific exceptional costs that would be incurred as a result of the development or to facilitate it, as required under section 48(2)(c) of the Act, or therefore any justification for the attachment of a special contribution condition).

7.3. Application of Development Contribution Scheme

7.3.1. Policies of the County Development Plan require:

- a. A minimum public open space provision of 2.5ha per 1000 population, based on occupancy of 3.5 persons in a three or more bedroom house and 1.5 persons in a two or fewer bedroom property (DMS57),
- b. A minimum of 10% of site area for public open space in residential developments, with financial contributions accepted in lieu of open space provision calculated on the basis of 25% Class 2 and 75% Class 1 (DMS57B),
- c. A maximum of 10% of open space provision to be taken up by SuDS (DMS73), and
- d. That areas of public open space of less than 500sqm shall not be taken in charge for maintenance purposes (DMS62).

7.3.2. Having regard to the requirements of policy DMS57B and DMS73 and a net developable area of 2.817ha, the planning authority require 2,817sqm of public open space within the subject site. This is not disputed by the appellant. In response to the FI the applicant provides five areas of Class 2 public open space (Figure 2, response to FI) comprising 3,304sqm. Area 5 is excluded by the applicant from this calculation as it is provided solely as a SuDS and biodiversity feature. In the Planning Report subsequent to FI, Area 2 to the north of a turning head is excluded as it measures 200sqm and will not be taken in charge. The removal of the two areas of open space (Area 2 and Area 5) leaves a Class 2 provision of 2,873sqm. It is acknowledged in the Planning Report that this represents c.10% of site area ($2,873/28,170 = 10.2\%$ of site area). Having regard to the foregoing I am satisfied that the applicant has met the requirement of a minimum of 10% of site area as public open space provision, as required by policy DMS57B of the County Development Plan.

7.3.3. Objective DMS57 requires a minimum open space provision of 2.5ha per 1000 population. For the proposed development, with the proposed mix of units, there is a total requirement for 7,562.5sqm of open space provision (Table 2 of FI response and page 22 of Planning Report post FI). The proposed development includes provision of Class 1 public open space to the north of the appeal site at Lusk North Park totalling 4,489.5sqm. This area, with the Class 2 open space provided in the

development site, 2,873sqm, results in a provision of 7,362.5sqm i.e. a shortfall of 200sqm.

- 7.3.4. As stated, policy objective DMS57B allows for a financial contribution in lieu of open space provision. In principle, a financial contribution for the shortfall of 200sqm in Class 1 open space provision would be consistent with this policy objective. A condition to this effect would be precise and unambiguous and directly related to the permission granted and in accordance with the provisions of the County Development Plan. Any alternative mechanism, for example, by way of provision of lands in Lusk North, as proposed by the appellant would apply to lands outside of the area of the planning application and could not be readily accommodated within the scope of the appeal, which is confined to the matter of whether the development contribution scheme has been properly applied.
- 7.3.5. The applicant also refers to the substantial quantity of land afforded to the planning authority for the provision of open space as part of previous planning applications and the context for the development as part of the master plan area for the development of Lusk. Whilst this may be correct, I do not consider it appropriate to address under provision of public open space in the proposed development in a wider and unspecified context and one which is not plan led.
- 7.3.6. Section 48 of the Planning and Development Act, 2000 (as amended), enables the planning authority, when granting permission under section 34, to require payment in respect of infrastructure and facilities benefiting development in the area of the planning authority, with the basis for the determination set out in a development contribution scheme (section 48(2)(a)).
- 7.3.7. Fingal County Council's Development Contribution Scheme 2021-2025 sets out in Note 5 that the contribution in lieu of open space will be levied at the following rates:
- Class 1 Open Space - €100,000 per acre to purchase land based on the value of amenity land, Plus €100,000 per acre for development costs. 2.
 - Class II Open Space - €250,000 per acre to purchase land in residential areas, Plus €100,000 per acre for development costs.
- 7.3.8. Policy Objective DMS57B requires that where the Council accepts financial contributions in lieu of open space provision, the contribution shall be calculated on the basis of 25% Class 2 and 75% Class 1.

- 7.3.9. As stated the proposed development requires a total public open space provision of 7,562.5sqm. This would equate to 1,890.6sqm of Class 2 open space and 5,671.9 of Class 1 open space, which compares to actual provision of 2,873sqm Class 2 public open space within the site and 4,489.5sqm Class 1 open space at Lusk North. This would indicate that the shortfall of 200sqm would arise with regard to Class 1 open space.
- 7.3.10. The application of the development charge of €100,000 to purchase land plus €100,000 for development costs, for Class 1 open space, equates to €200,000 per acre or c.€80,940 per hectare (10,000sqm). In this instance, the shortfall is 200sqm or $200/10000 \times 80,940 = €1,618.80$. The amount levied under condition no. 28, €11,739, would appear to be in excess of the amount due via application of Note 5 of the Development Contribution Scheme.
- 7.3.11. Having regard to the foregoing, I am not satisfied that the planning authority have properly applied the terms of the Development Contribution Scheme. However, given the undisputed shortfall in public open space, policies of the County Development Plan which enable a financial contribution in lieu of a shortfall and the clear basis set out in the Development Contribution Scheme for calculating the contribution due in the event of shortfall, I consider, that the condition no. 28 of the permission should be amended to reflect the proper application of the Development Contribution Scheme.
- 7.3.12. The planning authority request the Board attach a condition in respect of a bond/cash security. However, this appeal is restricted to consideration of whether the terms of the development contribution scheme has been properly applied. Other conditions associated with the planning authority's grant of permission remain, including condition no. 29 which requires payment of a bond/cash security.

8.0 Recommendation

- 8.1. Having regard to the foregoing I recommend that the Board AMEND condition no. 28 of the permission:
28. The developer shall pay to the planning authority a financial contribution of €1,618 (one thousand, six hundred and eighteen euro) in respect of the shortfall in public open space provision (Class 1) 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.

9.0 Reasons and Considerations

Having regard to the shortfall in Class 1 public open space provision, policies of the Fingal County Development Plan 2017-2023 which facilitate financial contributions in lieu of public open space provision and the Fingal County Council Development Contribution Scheme 2021-2025 which provides for the payment of a contribution in lieu of public open space provision, it is considered that condition no. 28, as amended to reflect the provisions of the Development Contribution Scheme, is necessary in order to ensure that the development complies with the standards for public open space provision, in the interest of residential amenity and in accordance with the proper planning and sustainable development of the area.

Deirdre MacGabhann
Planning Inspector

21st September 2021