



An  
Bord  
Pleanála

## Inspector's Report

### ABP-311523-21

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<b>Development</b>	Point of Detail, Dispute on Condition 2 and 10
<b>Location</b>	Kilgobbin, Sandyford, Dublin 18.
<b>Planning Authority</b>	Dun Laoghaire Rathdown County Council
<b>Planning Authority Reg. Ref.</b>	D06A/1888
<b>Applicant(s)</b>	Burke Builders Ltd.
<b>Type of Application</b>	Point of Detail, Dispute
<b>Referrer</b>	Burke Builders Ltd.
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	None
<b>Inspector</b>	Gillian Kane

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## **1.0 Introduction**

- 1.1.1. This appeal refers to a dispute between the applicant and Dun Laoghaire Rathdown County Council regarding condition no.s 2 and 10 of the decision of the Planning Authority under reg. ref. D06A/1888.
- 1.1.2. Condition no. 2 refers to the reservation of land through the subject site for a cycle route and condition no. 10 requires the payment of a financial contribution pursuant to a supplementary development contribution scheme for Luas Line B.

## **2.0 Site Location and Description**

- 2.1.1. The subject site is located on the northern side of a private lane running south-east off the Kilgobbin Road. Three detached houses are accessed from a driveway off the lane.

## **3.0 The Referral**

### **3.1. Referrers Case**

- 3.1.1. An agent for the applicant has requested the Board to determine his dispute regarding condition no.s 2 and 10 of the Planning Authority's decision to grant permission. The Referrer notes that permission was granted under Planning Authority reg. ref. D06A/1888 for three detached houses on a site of 0.48ha, subject to conditions, of which two are of note. Condition no. 2 requires a linear corridor through the site to facilitate a cycle route. Condition no. 10 refers to a financial contribution for Luas line B.
- 3.1.2. The referrer states that the financial contribution calculated under condition no. 10 was calculated on the gross site area, name 0.48ha. That part of the site required for the cycle route (condition no. 2) is 0.17ha. The applicant requested the Planning Authority to reduce the levy, for which the developer was prepared to transfer the ownership of the 0.17ha. The Council responded on the 12<sup>th</sup> July 2021.
- 3.1.3. It is submitted that the Planning Authority has used condition no. 2 to sequester private property for public use and at the same time imposing a levy on that land. It is submitted that this is in effect compulsory acquisition of land without payment of compensation, effectively removing 35% of the site.

- 3.1.4. The referrer submits that when the section 49 scheme was created, a situation such as has arisen was not envisioned.
- 3.1.5. The Board is requested to amend condition no. 10 to a site area that reflects the land acquisition required by condition no. 2.

### 3.2. **Planning Authority response**

- 3.2.1. No further comments.

## 4.0 **Planning History**

- 4.1.1. Planning Authority Reg. Ref: **D06A/1888**: Planning permission was granted for a development of three two-storey detached houses on a site of 0.42ha. On the 25<sup>th</sup> October 2007, the Planning Authority granted permission, subject to 14 no. conditions. Of relevance to the subject point of dispute are:

- 2 Prior to the commencement of development, the developer shall submit for the written agreement of the Council, detailed proposals to provide a linear corridor of appropriate width through the southern half of the subject site in order to facilitate the proposed cycle route objective, as defined in the current 2004-2010 County Development Plan.

**REASON:** In the interest of promoting and facilitating sustainable modes of transport and in the interest of the proper planning and sustainable development of the area.

- 3 That a financial contribution shall be paid by the proposer to the Council towards the cost of the extension of Luas Line B from the Sandyford Depot to Cherrywood, namely Luas Line B1. This contribution to be paid prior to the commencement of the development or in such other manner as may otherwise be agreed with the Planning Authority. The rate of contribution payable shall be that pertaining to the particular year in which implementation of the Planning Permission is commenced. The Supplementary Development Contribution Scheme provides for an annual increase in the levels of contribution payable, as outlined in the scheme, by a factor of 5% compound interest per annum. The levels of contribution will be reviewed annually on the

13th of January of each year during which the scheme is in force to take account of the aforementioned increase. The rate of contribution payable in respect of this development, at current contribution rates, is € 120,031.02, and is subject to increase as outlined above. It should be noted that contributions assessed in accordance with the Supplementary Development Contribution Scheme cannot be appealed to An Bord Pleanála unless the applicant considers the levy referred to in this condition has not been properly applied in accordance with the terms of the Scheme.

**REASONS FOR CONTRIBUTIONS:** To part finance the extension of the Luas Line B1 from Sandyford Depot to Cherrywood, as provided for in the Supplementary Development Contribution Scheme adopted by the Council of Dunlaoghaire-Rathdown on the 13th of January, 2003.

## 5.0 **Legislative Context**

### 5.1. **Planning and Development Act 2000, as amended**

#### 5.1.1. Section 34(5) of the Planning and Development Act, 2000, as amended

The relevant section of the Act states:

*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.*

### 5.2. **Section 48 Development Contributions**

#### 5.2.1. The Planning and Development Act 2000 (as amended) allows for the payment of a contribution or contributions as follows:

*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).*

*(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.*

5.3. Section **49 of the Planning and Development Act 2000**, as amended provides as follows:

49. (1) A planning authority may, when granting a permission under section 34, include conditions requiring the payment of a contribution in respect of any public infrastructure service or project—

(a) specified in a scheme made by the planning authority (in this section referred to as a ‘supplementary development contribution scheme’),

(b) provided or carried out or proposed to be provided or carried out— (i) by a planning authority,

(ii) where the provision of the infrastructure concerned is an objective in the development plan of a planning authority, or of a planning scheme of the Dublin Docklands Development Authority under section 25 of the Dublin Docklands Development Act 1997, by a public authority, or, pursuant to an agreement entered into by a public authority with any other person, by that person, or

(iii) pursuant to an agreement entered into by a local authority with any other person, by that person, and

(c) that will benefit the development to which the permission relates when carried out.

(1A) In this section, 'public authority' means any body established by or under statute which is for the time being declared, by regulations made by the Minister, to be a public authority for the purposes of this section.

(2) (a) The amount, and manner of payment, of a contribution under subsection (1) shall be determined in accordance with a supplementary development contribution scheme.

## **6.0 Policy Context**

- 6.1.1. Under section 49 of the Planning and Development Act 2000, as amended Dun Laoghaire Rathdown County Council adopted a Supplementary Development Contribution Scheme, for the extension of Luas Line B1 – Sandyford to Cherrywood on the 13<sup>th</sup> January 2006
- 6.1.2. Section 13 of the scheme provides that “The following levels of supplementary development levies are proposed Residential : A contribution rate of €250,000 per gross site hectare”.

## **7.0 Assessment**

### **7.1. Scope of the Referral/Role of Board**

- 7.1.1. This referral on a 'point of detail' is made under Section 34(5) of the Planning and Development Act, 2000, as amended. Section 34(5) states: 'The conditions under subsection (1) may provide that points of detail relating to any grant of permission may be agreed between the planning authority and the person to whom the permission is granted and that in default of agreement the matter is to be referred to the Board for determination'.
- 7.1.2. The point of detail request in this case relates to condition no.s 2 and 10 of the Dun Laoghaire Rathdown decision under D06A/1888. The Referrers case is essentially, that the financial contribution requested under condition no. 10 should be reduced to take account of the amount of land that was to form a linear corridor to facilitate the creation of a cycle route. I note that the referrers submission to the Board states that the subject site is 0.48ha. The Board will note that the application under D06A/1888 was a site of 0.42ha, not 0.48.

- 7.1.3. The Board will note that the applicant did not appeal the decision of the Planning Authority – neither the imposition of the condition regarding the linear corridor (no. 2) or the calculation of the levy due under the section 49 scheme (condition no. 10). Given that 16 no. years have elapsed since the decision of the Planning Authority and that the three permitted dwellings have been constructed, it is reasonable to assume that the applicant did not find the two conditions objectionable.
- 7.1.4. Neither the applicant nor the Planning Authority have confirmed if condition no. 2 was complied with, prior to the commencement of development. The referrer states that the section of the land through which the cycle route was conditioned is 0.17ha. No evidence to support this submission has been presented to the Board. Further, I note that correspondence between the agent and the Planning Authority refers to a linear corridor of 0.14ha. There is no explanation for the agents reference to a site area of 0.48 ha and a corridor of 0.17ha.
- 7.1.5. A letter on the file from the Bonds and Contribution Section of DLRCC to the applicant, dated 29 September 2017 refers to a request by the applicant for a reduction in the levy imposed under section 10. The letter states that the Planning Authority are satisfied that the scheme was correctly assessed and applied in accordance with the terms of the section 49 scheme. The applicant was advised that lands zoned open space are not included within the schedule of exemptions under article 13 of the scheme.
- 7.1.6. On the 5<sup>th</sup> October 2017, an agent for the developer again wrote (by email) to the Council. This letter offered to transfer ownership of the 0.14ha section of the site to the Council to allow the objective of the greenway spine to be realised. On the same date, a Council staff member of the Bonds & Contributions section of the Council responded to the agent, stating that their proposal was not acceptable or desirable to the Council and requesting that final payment be made.
- 7.1.7. On the 11<sup>th</sup> October 2017, the applicant's agent wrote to the CEO of Dun Laoghaire Rathdown CC offering to transfer the open space zoned portion of the site to the Council in return for a recalculation of the Luas levy. There is no response to this letter on the file before the Board.
- 7.1.8. The referrer acknowledges that they are not disputing the application of the s49 scheme. Nor or they disputing the benefit arising from the infrastructure arising from



the scheme, namely the Luas line extension. The scheme is clear that it is applied on gross site area (0.42ha) and the applicant has acknowledged that the scheme was correctly assessed.

- 7.1.9. There is no mechanism for the Board to request the Council to accept a transfer of land. Particularly where the Council has clearly stated that they have no desire to do so. The Stepside LAP is over twenty years old. The subject site retains its zoning in the current and draft development plan, with no cycle way or linear corridor indicated. There is no indication that the cycle way will be implemented in the near future. Therefore there is no justification for the developer to seek a reduction in levies for lands that the Council do not require, for a development that may not occur. The Referrer states that the Council are seeking to compulsorily acquire the land, however there is no evidence to support that claim.
- 7.1.10. I find no reason to reassess the calculation of the levies applied under condition no. 10, nor any mechanism to force the Council to accept land they do not require.
- 7.1.11. The Applicant has benefitted from the permission granted by the Planning Authority and has not complied with the conditions attached to the permission. I recommend that condition no. 10 be retained as attached by the Planning Authority to the final grant of permission.

## **8.0 Reasons and Considerations**

### **8.1. Having regard to:**

- a) Section 34(5) of the Planning and Development Act 2000, as amended,
- b) The provisions of the Supplementary Development Contribution Scheme, for the extension of Luas Line B1 – Sandyford to Cherrywood
- c) the location of the development within the area identified under the Section 49 LUAS Line B1 Sandyford-Cherrywood Extension Section 49 of the Planning and Development Act 2000 (as amended),
- d) the absence of any exemptions or clauses which would permit deductions from the section 49 financial contribution
- e) and the submissions on file, and the planning history of the site

8.2. The Board considered it appropriate that the development levy of €120,031.02 as stated in Condition no. 10 of the Planning Authority decision dated 25<sup>th</sup> October 2007, is correct.

## 9.0 Matters Considered

9.1.1. 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.

## 10.0 Draft Board Order

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

**WHEREAS** Condition No 10 of Dun Laoghaire Rathdown County Council decision Reg Ref D06A/1888 required that prior to the commencement of development the developer to pay to the planning authority a financial contribution 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 49 of the Planning and Development Act 2000. In the event of a default of such agreement, the matter shall be referred to the Board to determine the proper application of the terms of the Scheme.

**AND WHEREAS** the developer and the planning authority failed to agree on the amount of development contribution to be paid in accordance with Condition 10.

**AND WHEREAS** the matter was referred by the developer to An Bord Pleanála on the 5<sup>th</sup> day of August 2021 for determination:

**AND WHEREAS** the Board is satisfied that the matter at issue is the amount of development contribution to be paid

**AND WHEREAS** the Board had particular regard to the provisions of Section 34(5) of the Planning and Development Act 2000, as amended, the Development Contributions Guidelines for Planning Authorities (2013) and the Supplementary

Development Contribution Scheme, for the extension of Luas Line B1 – Sandyford to Cherrywood

**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 Condition 10 should not be altered on foot of this referral and the correct application of the Development Contribution Scheme remain a charge of **€120,031.02**

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Gillian Kane  
Senior Planning Inspector

02 March 2022