



An
Bord
Pleanála

Inspector's Report

ABP-311641-21

Development	Change of use of existing ground floor retail unit to Montessori/pre-school/creche.
Location	Unit 4, Parkside, Navan Road, Mulhuddart, Dublin 15, D15 AV84
Planning Authority	Fingal County Council
Planning Authority Reg. Ref.	FW21A/0115
Applicant(s)	Endotron Limited
Type of Application	Permission
Planning Authority Decision	Grant with Conditions
Type of Appeal	First Party vs Financial Contribution
Appellant(s)	Endotron Limited
Observer(s)	None
Date of Site Inspection	20 th of February 2022
Inspector	Adrian Ormsby

1.0 Site Location and Description

- 1.1. The site is c. 11km north west of Dublin City centre and is a recently developed building known as 'Parkside' and is located centrally in the village of Mulhuddart. The site is a ground floor premises in a terrace of three storey buildings fronting on to the Old Navan Road and is c. 70m west of the junction with the Blakestown Road.
- 1.2. The terrace of buildings is a mix of mainly commercial uses ranging from health and fitness, butchers, office, takeaway, retail, snooker and pool hall and a private members card club and casino. The application unit is currently vacant.
- 1.3. The stated site area is 0.03958 ha with a total floor area of 4,750 sq.m. The subject change of use application relates to a stated 250 sq.m.

2.0 Proposed Development

- 2.1. The application comprises-
 - change of use of existing ground floor retail unit to Montessori/pre-school/creche (250 sq.m)
- 2.2. The Planning Authority sought Further information on the 12/04/21 in relation to-
 1. Nature of the facility, hours of operation, employees & children numbers and outdoor play area
 2. Pedestrian and vehicular access, staff parking and vehicular set down areas
 3. Access arrangements and routes to the creche for users
- 2.3. Following the submission of Further Information on the 23/08/21 the applicants detailed-
 - The facility is full day care, will operate 7.30 am to 6 pm, 6 employees, 53 children and a designated outdoor play area
 - Four basement car parking spaces for staff, 4 set down only spaces to front of building for creche users
 - Access arrangement routes

3.0 Planning Authority Decision

3.1. Decision

The Planning Authority decided to grant permission on the 16/09/21, subject to nine conditions.

- Condition 2 relates to designated creche parking and two staff parking spaces.
- Condition 9 relates to the development contribution and states-
 - *Prior to Commencement of development the developer shall pay the sum of €19,173 (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 benefiting 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 benefiting 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.

4.0 Planning Authority Reports

4.1. Planning Reports

The 'Record of Executive Business and Chief Executives Order' or the report of the Planning Officer (16/09/21) generally reflects the decision of the Planning Authority. The following is noted-

- The proposed facility does not impact unduly in a negative manner on the amenities and character of the area and accords with proper planning and sustainable development of the same area.
- There is no reference to Development Contributions in the first planning report (12/08/21).
- The second report (16/09/21) also makes no reference to the calculation of Development Contributions save for condition 9.

4.2. Other Technical Reports

- Transportation-
 - 28/07/21- Additional Information required
 - 08/09/21- Acceptable subject to condition

4.3. Prescribed Bodies

- None

4.4. Third Party Observations

- None

5.0 Planning History

- FW19A/0026, ABP-305089-19- Change of use from retail to public house. Grant 25/11/19
- F07A/0527- Demolition of existing habitable dwelling and outbuildings and construction of a 3 storey over basement car park commercial building. Grant 05/09/07-
 - *Condition 2- That the proposed ground floor retail use shall be omitted from the development. This unit shall instead be for an office/professional services use.*

REASON: In the interests of the proper planning and development of the area.

6.0 Policy Context

6.1. Legislation

6.1.1. Planning and Development Act 2000 (as amended)

- Section 48 Development Contributions states-
 - *(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).*
 - *(3)*
 - (a) A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme.*
 - (b) In stating the basis for determining the contributions in accordance with paragraph (a), the scheme shall indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities which are provided or to be provided by any local authority and the planning authority*
 - (c) A scheme may allow for the payment of a reduced contribution or no contribution in certain circumstances, in accordance with the provisions of the scheme.*
 - *(10)*

(a) Subject to paragraph (b), no appeal shall lie to the Board in relation to a condition requiring a contribution to be paid in accordance with a scheme made under this section.

(b) 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.....

6.2. Ministerial Guidelines

6.2.1. Development Contribution Scheme for Planning Authorities - Circular PD4/2003

- *Level of Contributions*

The purpose of introducing the development contribution scheme is to introduce transparency into the way in which development contributions are levied and applied. Planning authorities must ensure that, when a prospective developer examines a scheme, he or she will be able to clearly see the level of contribution they are expected to pay, as well as the basis for levying the contribution. Therefore a development contribution scheme must state clearly the level of contributions to be payable under the scheme, including any different levels of contributions in respect of different classes or descriptions of developments.

- *Appealing Development Contributions*

A developer can only appeal a general development contribution on the basis that the terms of the scheme were not properly applied. In order to minimise this type of appeal the planning authority should ensure that the terms of scheme are clearly stated and that planners and administrative staff implement the scheme in a way that is consistent and equitable.

6.2.2. Development Contribution Scheme for Planning Authorities - Circular PD 5/2007

- *This circular sets out revised guidance agreed on foot of the deliberations of the Interdepartmental Committee. It is intended to supplement, not replace, circular letter PD 4/2003. It should be noted that no legislative changes are*

proposed at this time, and the general terms of sections 48 and 49 will therefore continue to apply.

- *.....Authorities are reminded that one of the primary objectives in introducing the current schemes was to bring greater transparency the way in which development contributions are levied and applied. It is essential therefore that all prospective developers can clearly identify from a scheme the level of payment required in addition to the basis for the levy in the first instance.*
- ***Transparency in the drawing up of schemes and in the application of revenues collected are essential elements in achieving cross community, and cross sectoral support. It is essential that all stakeholders are provided with good quality information on the levels of charges, and the means by which such charges are calculated. It is equally important that clear linkages be demonstrated between the charges levied and infrastructure provided.***

6.2.3. Development Contributions - Guidelines for Planning Authorities (January 2013)

- 'Status of the Guidelines'- Page 2-
This guidance updates and supplements non-statutory guidance previously issued in Departmental Circulars PD 4/2003 and PD 5/2007
- These Guidelines aim to assist planning authorities in achieving a balance between the costs of services provided and the need to support economic activity via Development Contribution Schemes. Planning authorities are required to include specific exemptions and waivers in their Development Contribution Schemes outlined under Section 2, including those that should not apply to change of use applications.
- Section 2- '*Supporting Economic Development*' outlines a number of 'key messages' including-
 - *Development contributions are not cash-cows: there is an important balance to be struck between the funding of public infrastructure and the need to encourage economic activity and promote sustainable development patterns. It is essential that development contribution*

schemes do not impede job creation or facilitate unsustainable development patterns.....

- *.... While it is expected that planning authorities will ensure that developers make an appropriate contribution towards the costs of public infrastructure and facilities, the local authority must ensure that it avoids levying development contributions that are excessively high – development contributions are ultimately designed to offset only a portion of the costs of public infrastructure and facilities.*

- Section 2 (P. 10&11) states-
 - *.....planning authorities are required to include the following in their development contribution schemes:*
 - *reduced rates of development contributions or waivers for development in town centres to support town centre development;*
 - *.....*
 - *waivers in the case of change-of-use permissions, where change-of-use does not lead to the need for new or upgraded infrastructure / services or significant intensification of demand placed on existing infrastructure (including, for example, transport infrastructure);*

- Transparency (Page 21)
 - *A development contribution scheme must state clearly the level of contributions to be payable under the scheme, including any different levels of contributions in respect of different classes or descriptions of developments, the percentage of reduction to be applied to development attracting such reductions and development deemed to be exempt from the payment of development contributions .*

6.2.4. Development Management – Guidelines for Planning Authorities (2007)

- Section 7.12 of the Guidelines provides guidance on planning conditions relating to development contributions.
- Section 8.12 of these Guidelines refers to appeals regarding development contribution conditions.

6.3. Development Plan

6.3.1. The operative Development Plan for the area is the Fingal County Development Plan 2017-2023. The site is zoned as LC 'Local Centre' with an objective to *'Protect, provide for and/or improve local centre facilities'*

6.4. The Fingal County Council Development Contribution Scheme 2021-2025

- Section 9 deals with 'Level of Contribution'
 - *a) Under the Scheme, the contributions to be paid (except where an Exemption or Reduction applies, see Section 11 below) in respect of the different classes of public infrastructure and facilities are as follows:-*
 - Total of Contributions Payable, € per square metre of Industrial / Commercial class of Development= €76.69
- Section 11 deals with 'Exemptions and Reductions'. Paragraph (v) states-
 - *Change of use applications are exempt, unless the revised usage constitutes a substantial intensification of use of the building or service.*
- Section 16 sets out that an appeal may be brought to An Bord Pleanála under Section 34 of the Act where the applicant considers that the terms of the Scheme have not been properly applied in respect of any conditions laid down by the Council.

6.5. Natural Heritage Designations

- None relevant to this appeal

7.0 The Appeal

7.1. Grounds of Appeal

7.1.1. This first party appeal relates solely to Condition no. 9 of Fingal County Council's decision, which requires the payment of a Section 48 Development Contribution of €19,173.

7.1.2. The appellants contend-

- that the non-residential rate in the Contribution scheme is €76.69 per square metre. This works out at the sum being claimed under Condition 9.
- No intensification occurs in that this application was for a change of use.
- There are no new connections in respect of water or drainage.
- The proposed change of use from retail to Montessori/preschool/creche does not constitute substantial intensification and accordingly the condition should not exist.

7.2. Planning Authority Response

The Planning Authority's response to the grounds of appeal (18/11/21) can be summarised as follows-

- Condition 2 of the permission granted under F07/0527 stated that *"the proposed ground floor retail use shall be omitted from the development. This unit shall instead be for an office/professional services use"*
- There is no record of permission having being granted to change of use of the unit from office/professional services to retail use.
- Having regard to the nature of the permitted use compared to the use as proposed for a childcare facility; the opening hours, number of staff, number of children to be accommodated and nature of the traffic movements associated with same, the development is considered to represent a substantial intensification of the use

- The Board is respectfully requested to uphold the decision of the Planning Authority.

7.3. Further Responses

The applicants have submitted a response to the Planning Authority's submission of the 18/100/21. This can be summarised as follows-

- Fingal's development contribution rate for an office development is the same as that for a creche. If the scheme does not set the two apart in terms of scale of intensification then we are not clear as to why it would be applied here.
- It is not clear what aspect of the operation is deemed of greater intensity.
- The opening hours 7.30am to 6pm are not unlike those of an office and are less likely than same to operate into the evening.
- In relation to traffic the nature of childcare is one off drop off and collection. The number of spaces required is lower than that of an office.
- There is no specific guidance on water demand for creches however when assessing toilet provision in accordance with BS 6465-1:2006 the provision for a childcare facility is at a lower rate than an office.

8.0 Assessment

8.1. Introduction

- 8.1.1. The appeal relates to condition no. 9 only, which imposes a Development Contribution in accordance with the provisions of Section 48 of the Planning and Development Act 2000 (as amended).
- 8.1.2. Section 48 (10) (b) of the Act makes provision for an appeal to be brought to the Board where an applicant 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.
- 8.1.3. In that context I consider that the Board is required to apply the scheme as adopted by the planning authority and not to evaluate the merits or otherwise of the scheme

itself. Furthermore, as this appeal relates to a development contribution only, the Board cannot determine the application as if it was made to it in the first instance and is confined solely to the consideration of whether the terms of the scheme have been properly applied.

8.2. Level of Contribution

- 8.2.1. The appellants grounds are that the terms of Fingal County Council's Development Contribution Scheme have not been properly applied in respect of Condition 9 of their decision. They argue that the proposed development does not constitute intensification.
- 8.2.2. The proposed development has been described as a change of use from retail to a childcare facility. However, in their response to the appeal the Planning Authority clarify the permitted use of the site is in fact an '*office/professional services use*' as per condition 2 of the parent permission for the overall building i.e. F07A/0527.
- 8.2.3. Section 9 of Fingal's Development Contribution Scheme 2021 – 2025 sets out details on the level of contribution payable. The total contribution payable per square metre of Industrial/Commercial class of development is detailed as €76.69.
- 8.2.4. Section 9, Note 3 deals with Calculation of Floor Area and states-

'The floor area of proposed development where buildings are involved shall be calculated as the gross floor area. This means the gross floor area determined from the internal dimensions of the proposed buildings including the gross floor area of each floor including mezzanine floors.'

In question 12 of the application form the applicants have indicated the gross floor space of proposed works in m² as 250 sq.m and they have not put forward any other floor in the appeal.

- 8.2.5. Using this floor area and the contribution payable for commercial development the calculated figure is €19,172.50. The Planning Authority have rounded this up to €19,173 as set out in Condition 9 of their grant of permission. This is considered reasonable. On this basis I am satisfied the calculated contribution payable figure is correct.

8.3. Exemption from Contribution

- 8.3.1. Section 11 of the Scheme makes provisions for 'Exemptions and Reductions' to the payable contribution. Paragraph (v) states-

'Change of use applications are exempt, unless the revised usage constitutes a substantial intensification of use of the building or service.'

- 8.3.2. The 'Scheme' does not define how '*substantial intensification*' should be interpreted and for that matter implemented. The choice of wording suggests a planning judgement. However, there is certainly a degree of subjectivity and this would create difficulty for developers and the general public in interpreting the Scheme. The calculable amount in this regard lacks transparency.

8.4. Transparency

- 8.4.1. Development Contribution Guidelines have been published in 2003, 2007 and 2013. It is clearly detailed in both latter guidelines that they supplement each other and do not therefore replace the previous version. Each of the three documents discuss 'transparency'. In 2003 they state-

Planning authorities must ensure that, when a prospective developer examines a scheme, he or she will be able to clearly see the level of contribution they are expected to pay, as well as the basis for levying the contribution.

The 2007 Guidelines builds on this and states-

Transparency in the drawing up of schemes and in the application of revenues collected are essential elements in achieving cross community, and cross sectoral support. It is essential that all stakeholders are provided with good quality information on the levels of charges, and the means by which such charges are calculated.

- 8.5. The Fingal Scheme does not provide good quality information on the levels of charges and the means they are calculated as regards to change of use applications. I do not consider the choice of words '*substantial intensification*' would allow a developer or an ordinary member of the public to clearly see the level of contribution he or she is expected to pay as per the subject application. In my

opinion, it would be reasonable for a person to consider the subject proposal to be exempt from contributions.

- 8.6. The 2013 Development Contributions Guidelines provides waivers in the case of change-of-use permissions that do not lead to the need for new or upgraded infrastructure / services or 'significant intensification' of demand placed on existing infrastructure (including, for example, transport infrastructure).
- 8.7. In this context, the development does not require new or upgraded infrastructure or services. The question remaining is if the proposal leads to 'significant intensification' of demand placed on existing infrastructure. This wording differs from what is set out in the Fingal scheme and again ambiguity would exist for a developer or ordinary member of the public.
- 8.8. I remind the Board that they are to apply the scheme as adopted by the planning authority and not to evaluate the merits or otherwise of the scheme itself including the subjectivity a developer or person may find in the word 'substantial intensification' or the lack of transparency of same.

8.9. **Planning Authority's Justification**

- 8.9.1. In their response to the appeal the Planning Authority have justified the contribution with specific reference to the following-
- The nature of the permitted use compared to the proposed use
 - The opening hours
 - The number of staff
 - Number of children and
 - Nature of the traffic movements

and determined the proposal represents a '*substantial intensification*' of the use. These matters would generally fall within the criteria of a planning assessment and in this instance the Planning Authority have granted permission.

8.10. Assessment of Justification

8.10.1. I have reviewed the permitted development under F07A/0527. The application was originally for a substantial office development on the two upper floors, a financial service and retail unit on the ground floor. The effect of condition 2 of that permission created a scenario where-

- Two or two and a half floors of the building are permitted as office use and
- Half the ground floor or all the ground floor is permitted as a professional service use.

For the sake of clarity and ease of reference, these uses fall into class 2 and class 3 as per Part 4 Exempted development- Classes of Use of the Planning and Development Regulations 2001 (as amended).

8.10.2. I accept the nature of the permitted use and proposed use differ. This is emphasised by the fact the proposed change of use would not be exempted development. However the requirement to attain planning permission does not automatically infer a 'substantial intensification' of use of the building or service.

8.10.3. I have not been able to identify any information in terms of the opening hours for the development permitted under F07A/0527 and in particular there are no conditions regulating same. The subject application proposes opening hours of 7.30 am- 6pm and these will be regulated by condition 1 of the subject permission. These hours are likely to be similar if not less than most Office/Professional Services use and in the absence of information of F07A/0527 it could be argued the operating hours are considerably less than that under F07/0527.

8.10.4. I have not been able to identify any information in terms of the number of staff proposed and then permitted across all floors of the development permitted under F07A/0527. The subject application proposes 6 staff members which equates to more than 40 sq.m of space each. If children are included, the average space per person would be c. 4 sq.m each (not allowing for external space). I accept the needs of adults in an office/professional use are 'substantially' different to a child in a creche facility, however I am not convinced the provision of 6 staff and 53 children at peak capacity constitutes a 'substantial intensification of use of the building or service' permitted under F07A/0527 and as required by the contribution scheme.

8.10.5. The Planning Authority's final consideration relates to the nature of traffic movements. I agree that the nature of traffic movements would be different from the proposed development. Proposed traffic movements to the site could be by car which involves drop off and collection usually in the morning or evening. However, Mulhuddart is a village with residential areas nearby and in walking distance. It is also served by public transport. As such, I do not consider that every child will be transported to and from the site by car, nor do I consider every person arriving to the office or professional service would arrive by car. The nature of traffic movements to such uses would be more likely to be throughout the day rather than at peak hours in the morning and evening.

The conditions of the subject application provides for a dedicated set down area with four parking spaces. The permission granted under F07A/0527 provides for four on street car parking spaces. Table 12.8 Car Parking Standards of the Development Plan details a maximum of 0.5 spaces per classroom. The application drawings show four classrooms meaning a requirement for two parking spaces and condition 2 specifies 2 staff spaces in the basement. Offices generally require a maximum of one spaces per 30 sq.m but this is to be reduced by 50% near public transport. Mulhuddart Village is served by bus. So based on this standard, an office of 250 sq.m requires 4 car parking spaces.

Having considered all of the above, I am not convinced the nature of traffic movements to the proposed development would 'constitutes a substantial intensification of use of the building or service' as required by the Contribution Scheme.

8.10.6. Finally, the proposed gross floor area for the development permitted under F07/0527 as per Q12 of the application form was 2,747 sq.m for the building. The proposed change of use to a childcare facility of 250 sq.m of a building with 2,747 sq.m i.e. less than 10% of the floor area, is not considered to intensify the use of that building or service.

8.11. **Appropriate Assessment**

8.11.1. Having regard to the nature and scale of the development, and the separation distance to any European site, no Appropriate Assessment issues arise, and it is not

considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.12. Conclusion

- 8.12.1. It is considered that Fingal County Council's Development Contribution Scheme 2021-2025 has not been properly applied in respect of condition 9 as laid down by the planning authority. In this regard, the revised change of use from 'office/professional services use' to 'childcare facility use' does not constitute a substantial intensification of use of the building or service. Condition no.9 should therefore be removed.

9.0 Recommendation

- 9.1. I recommend that the Planning Authority be directed to **REMOVE** Condition No. 9 for the reasons and considerations set out hereunder.

10.0 Reasons and Considerations

- 10.1. Having regard to the submissions on file, the nature of the proposed development for a change of use of part of the ground floor of the existing building, from office/professional services use to a childcare use, the terms of the current Fingal County Development Plan 2017-2023, the Board considers that the planning authority has incorrectly applied the terms of the Development Contribution Scheme and that the proposed change of use does not represent a substantial intensification of use of the building or service. Condition number 9 of the permission should be removed.

Adrian Ormsby
Planning Inspector

21st of February 2022