



An
Bord
Pleanála

Inspector's Report

ABP-313026-22

Development	Development to include material change of use of part of ground floor from Community Resource Centre to Healthcare Facility. Associated site works.
Location	Newpark Primary Care Centre, Golf Links Road, Newpark, Kilkenny
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	211021
Applicant(s)	Lou Investments Healthcare Kilkenny Ltd
Type of Application	Permission
Planning Authority Decision	Refuse x 2
Type of Appeal	First Party
Appellant(s)	Lou Investments Healthcare Kilkenny Ltd
Observer(s)	None
Date of Site Inspection	14 th May 2022
Inspector	Mary Crowley

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1.0 Site Location and Description

1.1. The appeal site is located within an established purpose built 3 storey Community Resource Centre, a relatively new development located within Kilkenny City. The property within which the additional healthcare floor space is proposed is located adjacent to an existing neighbourhood centre on land which overlooks open / recreational space. A set of photographs of the site and its environs taken during the course of my site inspection is attached. Together these serve to describe the site and location in further detail.

2.0 Proposed Development

2.1. Permission sought for development, to include the following:

- The material change of use; of part (Area: 176m²) of the ground floor Community Resource Centre use (previously granted under planning permission 18/59); to healthcare use and
- Reconfiguration of the existing internal layout & all associated site development works.

2.2. The site for the change of use is located at ground floor level in the rear block of the Healthcare Centre. It is stated that the overall scheme has an allocation of a total of 102 no car parking spaces; providing ample spaces to accommodate all user groups within the site.

3.0 Planning Authority Decision

3.1. Decision

3.1.1. Kilkenny County Council issued notification of decision to refuse permission for the following 2 no reasons:

- 1) *The proposed change of use from Community Resource Centre to Healthcare would materially contravene the zoning objective for the area indicated in the Kilkenny City and County Development Plan 2021 – 2017 for the zoning of land for the use solely or primarily as Amenity / Green Links / Biodiversity / Conservation / Open Space / Recreation. Having regard to the above, is*

considered that the proposed development will be contrary to the proper planning and development of the area.

2) The proposed change of use from Community Resource Centre to Healthcare use would contravene Condition No 1 of the Planning Ref P18/59 and would therefore be contrary to the proper planning and sustainable development of the area.

3.2. Planning Authority Reports

3.2.1. Planning Reports

- The **Case Planner** recommended that planning permission be refused for 1 no reason relating to the proposed use materially contravening the current development plan. It is noted from the Case Planners report that a second reason for refusal was added by the Senior Planner relating to the proposed uses contravening the previous grant of planning permission 18/59. The notification of decision to refuse permission issued by Kilkenny City & County Council reflects this recommendation to refuse permission for 2 no reasons.

3.2.2. Other Technical Reports

- Water Services – No objection
- Road Design – No objection

3.3. Prescribed Bodies

3.3.1. None

3.4. Third Party Observations

3.4.1. None

4.0 Planning History

4.1. There was a previous planning application on this site that may be summarised as follows:

- **Reg Ref 18/59** – Planning permission granted by way of a material contravention for a new 3 storey primary healthcare centre (4,914.8sqm) to provide for HSE health and social care services and General Practise. Condition No 1 stated as follows:

The development shall be carried out and completed strictly in accordance with:

(i) The conditions of this permission.

(ii) The documents lodged with this application on the 31st January, 2018, and further information submitted on the 10th May, 2018, except as otherwise required by the conditions of this permission.

Reason: To ensure that the development strictly accords with the permission and to ensure that effective control is maintained.

4.2. It is noted that there is a further, more recent appeal also on this site that may be summarised as follows:

- **ABP-313171-22 (Reg Ref 211020)** – Kilkenny City & County Council refused planning permission for a single reason for development, to include the following:
 - 1) The material change of use of part (Area: 155m²) of the ground floor general medical practice use (previously granted under planning permission 18/59); to a new pharmacy retail unit, which will now operate as a separate unit
 - 2) Reconfiguration of the existing internal layout & all associated site development works

The single reason for refusal is as follows:

The proposed change of use from general medical practise rooms to retail for the purposes of a new pharmacy retail unit would contravene materially the zoning objective for the area indicated in the Kilkenny City and County Development Plan 2021 – 2017 for the zoning of land for the use solely or primarily as Amenity / Green Links / Biodiversity / Conservation / Open Space / Recreation. Having regard to the above, is considered that the proposed development will be contrary to the proper planning and development of the area.

5.0 Policy Context

5.1. Development Plan

5.1.1. The operative plan for the area is the **Kilkenny City & Environs Development Plan 2021 – 2027**. The appeal site is within the developed Primary Care Centre is located on land zoned “*amenity / green links / biodiversity / open space / recreation*”. Under the current zoning, the Development Plan Objective is to “*allow for green links and biodiversity conservation and to preserve, provide and improve recreational open space*”. Permitted uses under the zoning area; open spaces, sports clubs, recreational buildings, stands, pavilions, agricultural uses, halting sites and public service installations.

5.1.2. Section 13.31 **Non-Conforming Uses** sets out the following:

Throughout the county there are uses which do not conform to the zoning objectives for the area. Extensions and improvement of premises accommodating these uses may be permitted where the proposed development would not seriously injure the amenities of the area or prejudice the proper planning and development of the area. In some cases, the Planning Authority may encourage relocation of permitted incompatible uses, for example by exchange of sites.

5.2. Natural Heritage Designations

5.2.1. The site is not located within a designated Natura 2000 site.

5.3. EIA Screening

5.3.1. Having regard to the nature and scale of the proposed development, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environment impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

6.0 The Appeal

6.1. Grounds of Appeal

6.1.1. The first party appeal against the notification of decision to refuse permission has been prepared and submitted by Peter Thompson Planning Solutions on behalf of Lou Investments Healthcare Kilkenny Limited and may be summarised as follows:

- It is noted from the Planners report that there were no objections to the proposed development. The development of primary care centres across Ireland is part of the HSE national strategy towards the provision of such facilities at a community level, and it was this which was the driver towards the grant of planning permission, not the volunteered inclusion of the community facility.
- **Material Contravention** – It is considered that the proposed development is not in material contravention of the Development Plan. Guidance towards determining what might constitute a material contravention can be found in the judgement of Barron J in *Roughan v Clare County Council (1996)*. A full and rigorous assessment of the proposal against the tests outlined in this judgement would have been appropriate in the present case as follows:
 - 1) *The location of the proposed development* – The property within which the additional healthcare floor space is proposed is located adjacent to an existing neighbourhood centre on land which overlooks open / recreational space.
 - 2) *The planning history of the site or area* – The developer of the primary care centre delivered on the provision of the open space originally designed to serve the Lakeside Housing Estate as a community parkland, in consultation with Kilkenny County Council. The developer also undertook the completion of the housing estate common areas (roads, footpaths, services, lighting etc) and provided the sports ground for St Johns School. It is understood the works to complete the estate totalled c€2.5m and the parkland c€600,000. There will be no reduction in zoned *Amenity / Green Links / Biodiversity / Open space / Recreation* and there are no further areas to be developed for such use. The proposed development will, therefore, have no impact on the open space / recreational space use.

- 3) *The objectives for the Development Plan* – The Development Plan objective for the “amenity / green links / biodiversity / open space / recreation” zoning is to allow for green links and biodiversity conservation and to preserve, provide and improve recreational open space. The change of use within an existing building will have no impact on this objective or result in any loss of green open space.
- 4) *Opposition by Local Interests* – There were no objections to the proposed development.
- 5) *If there are real of substantial grounds in the context of planning law for opposing the development* – There are no such reasons. The additional healthcare floor space will be in a permitted primary care centre and its use will be compatible and complementary to existing facilities and services.
- **Impact on Existing Permitted Use** – While the existing permitted use is “community” use, this has never been activated, therefore, there is no existing use. The proposed development will, therefore, not result in the loss of any community facility or use. The proposed use is compatible with the existing permitted use of the overall primary care centre. The precise healthcare use that the floor area will be put to is unknown at this time. The proposed internal layout provides sufficient flexibility for a range of healthcare uses. The HSE has expressed an interest for the type of accommodation shown on the layout, but no agreement has been reached.
 - **No Demand for a Community Resource Centre at this time** – The floor space has been developed, the community has shown no interest in leasing it for community use and Kilkenny County Council is not prepared to take charge of the facility on behalf of the community. The proposed unit was never developed as a free gratis and for nothing facility and this was confirmed to the planning authority before planning permission was granted.
 - **Contravention of Condition No 1 of Planning Permission Reference P18/59** – The application for planning is in respect of an amendment to the original primary care centre development involving a change of use of vacant unused floor space which, if granted, would not be in material contravention of Condition No 1 of Reg Ref P18/59.

Being a proposed healthcare use within an existing primary care centre, the use would not be contrary to the proper planning and sustainable development of the area.

- **Conclusion** – The proposed development is not a material contravention of the Development Plan. It is a change of use within a permitted primary care centre and is a permissible non-conforming use that can add to the range of primary care services and facilities available to the community. The zoning, therefore, does not present an impediment to An Bord Pleanála granting planning permission.

6.2. **Planning Authority Response**

6.2.1. None

6.3. **Observations**

6.3.1. None

6.4. **Further Responses**

6.4.1. None

7.0 **Assessment**

7.1. I would draw the Boars attention to a concurrent appeal at this site; ADP313171-22 - change of use from medical practise to pharmacy. It is recommended that both appeals be considered concurrently.

7.2. Having regard to the information presented by the parties to the appeal and in the course of the planning application and my inspection of the appeal site, I consider the key planning issues relating to the assessment of the appeal can be considered under the following general headings.

- Refusal Reason No 1 – Zoning
- Refusal Reason No 2 – Reg Ref 18/59
- Other Issues
- Appropriate Assessment

7.3. Refusal Reason No 1 – Zoning

7.3.1. Kilkenny County Council in their first reason for refusal state as follows:

The proposed change of use from Community Resource Centre to Healthcare would materially contravene the zoning objective for the area indicated in the Kilkenny City and County Development Plan 2021 – 2027 for the zoning of land for the use solely or primarily as Amenity / Green Links / Biodiversity / Conservation / Open Space / Recreation. Having regard to the above, is considered that the proposed development will be contrary to the proper planning and development of the area.

7.3.2. The appeal site is within the developed Primary Care Centre on lands zoned “*amenity / green links / biodiversity / open space / recreation*” in the Kilkenny City and County Development Plan 2021 – 2027 where the objective is to “allow for green links and biodiversity conservation and to preserve, provide and improve recreational open space”. The only permissible use under this zoning is open space. Uses that are open for consideration include sports clubs, recreational buildings, stands, pavilions, agricultural uses, public and service installations. The proposed health care use is considered to be a non-conforming use.

7.3.3. Section 13.31 Non-Conforming Uses of the Development Plan sets out the following:

Throughout the county there are uses which do not conform to the zoning objectives for the area. Extensions and improvement of premises accommodating these uses may be permitted where the proposed development would not seriously injure the amenities of the area or prejudice the proper planning and development of the area. In some cases, the Planning Authority may encourage relocation of permitted incompatible uses, for example by exchange of sites.

7.3.4. In 2018 a new 3 storey primary healthcare centre (4,914.8sqm) was granted by way of a material contravention. The facility has now been constructed and provides a broad range of community healthcare services and supports beyond the setting of a hospital, which is part of the HSE national strategy to provide such facilities at community level in Ireland. A community resource centre was proposed as part of this development for the local community’s use and was to represent a community gain together with a secure playing pitch for St Johns Senior School and a parklands design

facility to encourage more sustainable transport and links through the site. The total area of the development approved under Reg Ref 18/59 including building, footpaths, parking areas, landscaped areas and roadways is 7,803sqm. The area of developed parklands and lakes is measured at 27,949sqm and the fenced area for the playing pitch to be transferred to St Johns National School is 5,125sqm.

- 7.3.5. This primary care centre was granted planning permission (Reg Ref 18/59) on land zoned for “amenity / green links / biodiversity conservation” in the Kilkenny City & Environs Development Plan 2014 – 2020. At the time a medical centre was not a permitted use under the zoning and Members of Kilkenny County Council agreed to a Material Contravention of the Plan. Notwithstanding the material contravention that was granted under 18/59, the zoning under the Kilkenny City & County Development Plan remains “amenity / green links / biodiversity conservation / open space / recreation”, essentially unchanged from the 2014 – 2020 City and Environs Development Plan that was in place at the time of granting of the material contravention.
- 7.3.6. The Case Planner stated that the primary driver of the material contravention granted under 18/59 was the community gain that would accrue from having an HSE primary healthcare centre in the immediate area (as set out above). It is stated that the economic, social, amenity and environmental objectives of the material contravention have now been met, including the provision of the 176sqm Community Resource Centre which was part of the community gain that was proposed at the time and formed the basis of the material contravention granted under 18/59. The Case Planner concluded that this community gain should not be eroded, and the Resource Centre should remain in place for community use.
- 7.3.7. As noted on day of site inspection the primary care centre is completed and partly occupied by the HSE and other GP / private social and health care providers. The applicant submits that all of the agreed external landscaping / parkland, footpaths, cycle paths and snagging works for the Lakeside housing development have been completed. The sports pitch for St Johns school has also been completed and handed over to the school. However, the own door community resource centre floor space has been developed but not occupied. The applicant states that there have been no expressions of interest from local community groups to acquire the floor space and that Kilkenny County Council has declined to take it in charge.

- 7.3.8. While I support the Local Authority's original approach in seeking the provision of an own door community resource centre at this location having regard to the continuing zoning objective for the site it remains that a large primary care centre was granted planning permission by way of a material contravention and constructed on site. While I agree for the most part with the Case Planner that the community gain should not be eroded, and the Resource Centre should stay in place for community use it remains that it is unoccupied and that there have been no expressions of interest from local community or Kilkenny County Council. Given the established use on the site I consider that to permit a change of use from Community Resource Centre use to healthcare use would not seriously injure the amenities of the area or prejudice the proper planning and development of the area and would be compliant with Section 13.31 Non-Conforming Uses of the Development Plan.
- 7.3.9. I note that the planning authority's reason for refusal also states that the proposed development materially contravenes the zoning objective for the area. Having regard to the permitted development on the site together with Section 13.31 Non-Conforming Uses of the Development Plan, reliance on the zoning objectives for the site is not, in my view, sufficiently so as to justify the use of the term "materially contravene" in terms of normal planning practice. The Board should not, therefore, consider itself constrained by Section 37(2) of the Planning and Development Act.
- 7.3.10. Recommended that Refusal Reasons No 1 is set aside.

7.4. Refusal Reason No 2 – Reg Ref 18/59

- 7.4.1. Kilkenny County Council in their second reason for refusal states as follows:

The proposed change of use from Community Resource Centre to Healthcare use would contravene Condition No 1 of the Planning Ref P18/59 and would therefore be contrary to the proper planning and sustainable development of the area.

- 7.4.2. As previously documented planning permission was granted by way of a material contravention for a new 3 storey primary healthcare centre (4,914.8sqm) to provide for HSE health and social care services and General Practise at this site (Reg Ref 18/59 refers). Condition No 1 as referred to in the refusal above stated as follows:

The development shall be carried out and completed strictly in accordance with:

(i) The conditions of this permission.

(ii) The documents lodged with this application on the 31st January, 2018, and further information submitted on the 10th May, 2018, except as otherwise required by the conditions of this permission.

Reason: To ensure that the development strictly accords with the permission and to ensure that effective control is maintained.

7.4.3. I agree with the applicant that the application for planning is in respect of an amendment to the original primary care centre development involving a change of use of vacant unused floor space which. I refer to the foregoing assessment in relation to Refusal Reason No 1. I am satisfied, if granted, that the proposed scheme would not be in material contravention of Condition No 1 of Reg Ref P18/59.

7.4.4. Recommended that Refusal Reasons No 2 is set aside.

7.5. Development Contributions

7.5.1. I refer to the Kilkenny Council Development Contribution Scheme 2016 – 2017 and the section entitled Exemptions from the payment of Development Contributions where it states that:

Where a planning permission is issued for a change of use, the Planning Authority may consider a waiver of the development charge or part thereof where the change of use does not lead to the need for new or upgraded infrastructure/services.

7.5.2. As set out in the development description above this is an application for a change of use of part of the ground floor Community Resource Centre use (previously granted under planning permission 18/59); to healthcare. In this regard I refer to the parent application (Reg Ref 18/59 refers), where planning permission was granted for a new 3 storey primary healthcare centre (4,914.8sqm) to provide for HSE health and social care services and General Practise it is noted that Condition No 2 required the payment of a Section 48 financial contribution in the amount of €123,375.00.

7.5.3. Having regard to the exemptions from the requirement to make a payment for a change of use as set out above together with the planning history pertaining to the site I am satisfied that that no Section 48 development charge should be applied in this

case. I further consider that to do so would result in a double payment. No Development Contribution charges applicable in this case.

7.6. **Appropriate Assessment**

7.6.1. Having regard to the nature and scale of the development and its distance to the nearest 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.

8.0 **Recommendation**

8.1. Having due regard to the provisions of the Development Plan, together with all other issues arising, I recommended that permission be **GRANTED** for the following reasons and considerations.

9.0 **Reasons and Considerations**

9.1. Having regard to the zoning objective for the site in the Kilkenny City & Environs Development Plan 2021 – 2027 and the location of the site within the established Community Resource Centre, it is considered that, subject to compliance with the conditions set out below, the proposed development would be acceptable in terms of the policy requirements of the development plan, would not seriously injure the visual amenities of the area or the residential amenities of property in the vicinity and would not be prejudicial to public health. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

10.0 **Conditions**

1.	The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior
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	<p>to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.</p> <p>Reason: In the interest of clarity</p>
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Mary Crowley
Senior Planning Inspector
25th May 2022