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Bord  
Pleanála

## Inspector's Report ABP 313719-22

<b>Development</b>	Extension to Kilternan Cemetery Park
<b>Location</b>	Ballycorus Road, Kilternan, Dublin 18.
<b>Planning Authority</b>	Dun Laoghaire Rathdown County Council
<b>Planning Authority Reg. Ref.</b>	D21A/0502
<b>Applicant</b>	Kilternan Cemetery Park Ltd.
<b>Type of Application</b>	Permission
<b>Planning Authority Decision</b>	Grant subject to conditions
<b>Type of Appeal</b>	1 <sup>st</sup> Party v. conditions
<b>Appellant(s)</b>	Kilternan Cemetery Park Ltd.
<b>Observer(s)</b>	Colman Curran & Elizabeth Clooney
<b>Date of Site Inspection</b>	None
<b>Inspector</b>	Pauline Fitzpatrick

## **1.0 Site Location and Description**

The site, which has a stated area of 7.2 hectares, is located immediately to the west and south of the existing Kilternan Cemetery Park within the townlands of Tiknick, Glenamuck South and Ballycorus. The cemetery is to the south of and accessed from Ballycorus Road.

## **2.0 Proposed Development**

The application was lodged with the planning authority on the 31/05/21 with further plans and details including revised public notices submitted 13/04/22 on foot of a request for further information dated 22/07/21 (following a time extension in which to lodge details).

The proposal is for an extension of the existing cemetery to provide for:

- Traditional burial ground area over c.1.48 hectares with 4,709 no. plots
- Ash plot burial of c.0.65 hectares with 7,011 no. plots
- Reflection gardens with an area of c. 0.56 hectares
- New access from Ballycorus Road in addition to connection to the existing cemetery
- 157 no. car and No. 30 bicycle spaces
- Bridge spanning the Loughlinstown River to provide connection between the burial ground areas north and south of the river,
- Pedestrian paths and walkways,
- Landscaping, infill and regrading works and associated site development works.

The application is accompanied by a suite of documents and supporting plans and details.

## 3.0 Planning Authority Decision

### 3.1. Decision

Grant permission for the above described development subject to 18 conditions.

**Condition 15:** €63,452.16 contribution towards expenditure that was/or is proposed to be incurred by the planning authority in respect of surface water infrastructure and facilities benefitting the development as provided for in the Development Contribution Scheme made on 14<sup>th</sup> December 2015.

**Condition 16:** €1,451,716.02 contribution towards expenditure that was/or is proposed to be incurred by the planning authority in respect of the provision of roads infrastructure and facilities benefitting the development as provided for in the above referenced scheme.

**Condition 17:** €941,620.14 contribution towards expenditure that was/or is proposed to be incurred by the planning authority in respect of the provision of the community and parks infrastructure, facilities and amenities benefitting the development as provided for in the above referenced scheme.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

The 1<sup>st</sup> planner's report dated 21/07/21 recommends a request for further information. The 2<sup>nd</sup> report dated 10/05/22 following further information notes that in terms of development contributions the commercial rate per sq.m. for the 7.2 hectare site and 162 car parking spaces applies.

#### 3.2.2. Other Technical Reports

Transportation Planning following further information recommends clarification of further information on visibility exit requirements.

1<sup>st</sup> report from Drainage Planning recommends further information. The 2<sup>nd</sup> report following further information has no objection subject to conditions.

Public Lighting Section recommends further information.

The 1<sup>st</sup> report from Ecologist retained by the planning authority recommends further information. The 2<sup>nd</sup> on receipt of further information recommends a request for clarification of further information.

Environmental Health Officer has no objection subject to conditions.

Environment Section recommends conditions should permission be granted.

The report from Parks and Landscape Services recommends a request for further information.

### **3.3. Prescribed Bodies**

Inland Fisheries Ireland details conditions should permission be granted.

### **3.4. Third Party Observations**

Objections to the proposal received by the planning authority cite scale of proposal, need for extension, impact on amenities of adjoining property including protected structures, impact on biodiversity, flooding, impact on water quality and access and traffic.

## **4.0 Planning History**

PL06D.242619 (D13A/0193) – permission granted for cemetery park.

## **5.0 Policy Context**

### **5.1. Development Plan**

The Dun Laoghaire Rathdown County Development Plan 2022 came into effect after the application was lodged but prior to the planning authority's decision.

The site is within an area zoned B the objective for which is to protect and improve rural amenity and to provide for the development of agriculture.

Views southwards along Ballycorus Road are listed for protection with an objective to protect and preserve trees and woodlands relevant to the lands.

## **5.2. Natural Heritage Designations**

None in the vicinity.

## **6.0 The Appeal**

### **6.1. Grounds of Appeal**

The submission by John Spain Associates on behalf of the applicant refers. The appeal is against conditions 15, 16 and 17 only. The grounds of appeal can be summarised as follows:

- The formulation and rationale for the conditions must be assessed in the context of the Guidelines for Planning Authorities on Development Management, 2007.
- The development contribution scheme has not been properly applied. Cemetery developments with no built floorspace should not be subject to development contributions for commercial floorspace. No buildings are proposed as part of the development.
- Burial ground is a separate use class from commercial/industrial development. It provides a community benefit for the County in terms of providing burial space for residents and acts as a local amenity, with extensive walkways.
- Burial grounds are not considered commercial floor area for the purposes of commercial rates.
- The development is already served by existing road infrastructure, it will not rely on the public surface water system and it will provide additional open space facilities for this part of the County.
- The car parking proposed is ancillary to the overall planning use as a cemetery and therefore should be exempt.
- Permission granted for the existing cemetery under ref. PL06D.242619 (D13A/0193) attached a section 48 financial contribution which amounted to €25,771.98. The contribution was based on the final floor area of the built

elements within the development which were calculated to be 347 sq.m. The area of the cemetery relating to burial plots and car parking was not considered as commercial floor area and was not subject to development contributions. The contribution sought in the current case equates to more than 95 times that amount. The current contribution scheme is not materially different to that in place when the above application was decided.

- Precedent cases PL06S.239778 (SD10A/0331) at Lucan, F20A/0393 at Portmarnock, 17/1143 at Sallins cited.
- The contributions sought would render the extension unviable.

## 6.2. Planning Authority Response

The breakdown in the application of the contribution scheme is as follows:

### Calculations Details

	Area
Traditional burial ground	c.1.78 hectares (17,800 sq.m.)
Ash plot burial area	c. 0.65 hectares (6,500 sq.m.)
Car park	162 spaces at 12 sq.m. (486 sq.m.)
<b>Total</b>	<b>24,786 sq.m.</b>

	Measure (sq.m.)	Commercial/ Unit Price	Total
Surface Water	24,786	€2.56	€63,452.16
Transportation	24,786	€58.27	€1,451,716.02
Community & Parks	24,786	€37.99	€941,620.14
<b>Total</b>			<b>€2,456,788.32</b>

*Note:* The response is accompanied by a copy of the report from the Drainage Planning Section following receipt of the further information prior to the planning authority's decision.

### 6.3. Further Responses

The planning authority's submission was circulated for comment. The response from John Spain Associates, accompanied by a legal opinion, refers. In addition to reiterating points made in the original appeal submission the following are noted:

- The planning authority's submission does not include any rationale for the imposition of the development contributions and is not a substantive response to the grounds of appeal.
- The response does not provide information on the specific provisions in the Development Contribution Scheme on which the calculation was based. It confirms that the calculations were based on floor area.
- The car parking is for use by visitors to the cemetery and is ancillary to the development.
- The drainage report included in the response refers to the further information submitted prior to the planning authority's decision. The development is not dependent on the delivery of public drainage infrastructure.

#### *Legal Opinion*

- Applying the principles of reasonable interpretation the reference to square metres of industrial/commercial development in the scheme would be construed as applying to the area of any structures that are constructed, as opposed to open space use of a burial ground.
- The term 'gross floor space' is defined in the Planning and Development (Housing) and Residential Tenancies Act 2016 and the Planning and Development Regulations, 2001, as amended. The definitions apply to structures, only.
- The schedule of fees in Section 2 of Schedule 9 of the regulations uses the term 'square metres' in the context of structures but uses 'hectares' for other uses including use of land as a burial ground.

- Where the term square metres is used in juxtaposition with hectares the former applies to structures whereas the latter tends to refer to more external uses which do not involve the construction of structures.
- This interpretative approach is fortified by the reference to commercial development and burial use in the County Development Plan. A court would construe the references to cemetery use in the Development Plan as being distinct and separate from commercial development and that the reference to commercial development in the contribution scheme would not apply to the proposed cemetery.

#### 6.4. **Observations**

An observation has been received from Colman Curran & Elizabeth Clooney. The issues raised relate to scale of proposal, impact on biodiversity, tree removal and traffic

*Note:* An appeal against the planning authority's decision to grant permission has not been lodged with the Board. The only appeal received is that from the 1<sup>st</sup> Party against financial contributions 15, 16 and 17 only.

#### 7.0 **Assessment**

The current appeal is made under Section 48(10)(b) of the Planning and Development Act, 2000, as amended. No 3<sup>rd</sup> party appeal has been received against the planning authority's notification of decision to grant permission thus the development is not before the Board for assessment de novo. The question to be addressed is whether the terms of the development contribution scheme have been properly applied by the planning authority in its imposition of conditions No. 15, 16 and 17, only. The Dun Laoghaire Rathdown County Council Development Contribution Scheme 2016-2020 adopted on the 14/12/15 pertains.

The proposal is for the extension of Kiltarnan Cemetery Park. The area of the extension is c. 7.2 hectares. It will provide for traditional burial plots, ash burial plots, reflection gardens, new access from Ballycorus Road, 157 no. car spaces, a bridge spanning the Loughlinstown River to provide connection between the burial ground areas north and south of the river, pedestrian paths and walkways, landscaping, infill

and regrading works and associated site development works. No buildings or structures are proposed as part of the development.

The planning authority in response to the appeal sets out the means of calculation for the contributions. The areas for the traditional burial plots and ash burial plots are deemed subject to contributions, presumably on the basis that these form the 'commercial' component of the development. The 162 parking spaces are also identified as being subject to the scheme. I note that this parking provision was reduced to 157 spaces in the further information response.

Section 9 of the contribution scheme sets out the level of contributions applicable for three classes of development only, namely residential, domestic extensions and industrial/commercial. In all three the contribution is calculated per square metre. The scheme does not provide for a contribution to be paid for any other classes of development save for car parking which is not an ancillary use (see Section 10(n)(ii) – Exemptions and Reductions). It is noteworthy that Development Contribution Schemes prepared by other local authorities have included 'other' development whereby contributions are required to be levied with reference to other means of measurement rather than square metres.

As per the Planning and Development Regulations, 2001, as amended "gross floor space" is defined as the area ascertained by the internal measurement of the floor space on each floor of a building (including internal walls and partitions), disregarding any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building". As noted in the legal opinion supporting the applicant's submission the schedule of fees for planning applications in Section 2 of Schedule 9 of the regulations uses the term 'square metres' in the context of structures and the term 'hectares' for other uses including use of land as a burial ground. I refer the Board to class 12 in the schedule.

In the context of the above detail and having regard to the principles of reasonable interpretation I conclude that 'square metres' applies to structures. Whilst the cemetery is commercial in nature in that a monetary transaction occurs for the services provided therein no enclosed structures or buildings are proposed as part of

the development and, thus, is not subject to the requirements of the development contribution scheme.

The 157 car parking spaces to be provided are ancillary to the main use of the site, namely for use by visitors to the cemetery. Again, on the basis of reasonable interpretation the provisions of Section 10 (n)(ii) of the scheme do not apply.

In conclusion I consider that the planning authority has not properly applied the provisions of its section 48 contribution scheme.

## **8.0 Recommendation**

Having regard to the foregoing I recommend that the planning authority be directed to **OMIT** condition numbers 15, 16 and 17 for the following reasons and considerations:

## **9.0 Reasons and Considerations**

It is considered that the planning authority has not properly applied the terms of the Dun Laoghaire Rathdown County Council Development Contribution Scheme 2016-2020. The extension to Kilternan Cemetery Park does not include any structures or buildings and the application of the contributions per square metre of industrial/commercial class of development as set out in section 9 of the scheme is not appropriate. In addition the carparking to be provided is ancillary to the main use of the lands and the application of the contribution for car parking as set out in Section 10 (n)(ii) of the scheme is not appropriate.

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**Pauline Fitzpatrick**  
**Senior Planning Inspector**

**December, 2022**