



An
Bord
Pleanála

Inspector's Report ABP-317436-23

Details of Referral	Point of detail regarding condition number 17 of ABP-300045-17 (PA ref. F17A/0357)
Location	Lands west of 1-10 The Orchard, Oldtown, Co. Dublin
Planning Authority	Fingal County Council
Planning Authority Reg. Ref.	F17A/0357
Applicant	Sean McCusker
Type of Referral	Point of Detail
Referred by	Milltown New Homes Ltd.
Observer(s)	None
Date of Site Inspection	12 th April 2024
Inspector	Philip Maguire

1.0 Introduction

- 1.1. This case is a referral under Section 34(5) of the Planning and Development Act 2000, as amended. It concerns a point of detail in dispute between the referrer / developer and the planning authority regarding a condition imposed by An Bord Pleanála in relation to a grant of permission for a housing development in Oldtown, County Dublin.
- 1.2. Condition 17 of ABP-300045-17 requires the payment of a financial contribution, and the referrer is seeking a determination from An Bord Pleanála in respect of (a) an interpretation of the '2016 Development Contribution Scheme' and (b) the amount of the contribution sought, as no agreement was reached with the planning authority.

2.0 Site Location and Description

- 2.1. The referral site is located on lands to the west and southwest of 'The Orchard', an existing housing development of detached dormer style dwellings in Oldtown, a village in north County Dublin. Access is via the estate road which lies to the northeast of the referral site. The existing estate road has been extended into the referral site.
- 2.2. The referral site is an active construction site with 14 no. houses complete and occupied or substantially complete and pending occupation. Grassed open space, public footpaths, some lighting columns and wearing course are also *in situ*.

3.0 Background to Referral

- 3.1. On the 12th of March 2018, the Board upheld the decision of the planning authority and granted permission for 14 houses and associated works on lands west of The Orchard, Oldtown, Co. Dublin, under ABP-300045-17, subject to 17 no. conditions.
- 3.2. Condition 17, which is the subject matter of this referral, states that:

The developer shall 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 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. Details of the application of the terms of the Scheme 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 the proper application of the terms of the Scheme.

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.*

- 3.3. It would appear that the planning authority are seeking a total contribution of €305,985.88 based on the 2022 'residential rate' (€253,161.88) and an open space shortfall of 900sq.m (€52,824). The dispute over the financial contribution appears to have crystallized in or around the 19th of May 2023 which can be adduced from email correspondence between the developer and planning authority on the referral file.

4.0 Planning History

4.1. Referral site:

- 4.1.1. PA ref. F17A/0357 – in March 2018 the Board upheld the decision of the planning authority and granted permission for 14 houses under ABP-300045-17. The duration of this permission was extended until the 20th of June 2025 (PA ref. F17A/0357/E1).
- 4.1.2. It is important to note that the 'Notification of Decision to Grant Permission' under PA ref. F17A/0357 and dated the 4th of October 2017 contained a financial contribution condition for €52,824 'in lieu' of public open space (Condition 24) and a standard development contribution condition for €192,261 (Condition 26), albeit to be updated upon commencement of development in accordance with the Tender Price Index.
- 4.1.3. It is also important to note that the Chief Executive Order, subsequent to the Board's decision of the 12th of March 2018, and dated the 12th of April 2018, states that "with regard to Condition No. 17 the financial contribution is assessed as €204,365.00".
- 4.1.4. There is no reference to a financial contribution 'in lieu' of public open space and the only other monetary values referenced in this Chief Executive Order relate to a bond of €56,000 and cash security of €35,000 "with regard to Condition No. 16".

5.0 Statutory Provisions

5.1. Planning and Development Act 2000

- 5.1.1. Section 34(1) of the Planning and Development Act 2000, as amended, ('PDA 2000 or the Act') outlines that a planning authority may decide to grant the permission subject to or without conditions, or to refuse it. Section 34(4) of the Act lists condition-types that may or may not be imposed on a grant of permission.
- 5.1.2. Section 48(1) of the Act provides that 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 funding sources etc.
- 5.1.3. Section 48(2) of the Act provides that the basis for the determination of a contribution under Section 48(1) shall be set out in a development contribution scheme (DCS).
- 5.1.4. In addition to the terms of the scheme, Section 48(2)(c) of the Act makes provision for a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority.
- 5.1.5. Section 48(10) of the Act makes provision for an appeal to be brought to the Board where an applicant considers that the terms of the relevant DCS have not been properly applied in respect of any condition laid down by the planning authority.
- 5.1.6. Section 34(5) of the Act states:

The conditions under subsection (1) may provide that points of detail relating to a grant of permission be agreed between the planning authority and the person carrying out the development and, accordingly—

(a) where for that purpose that person has submitted to the planning authority concerned such points of detail, then that authority shall, within 8 weeks of those points being so submitted, or such longer period as may be agreed between them in writing, either—

(i) reach agreement with that person on those points, or

(ii) where that authority and that person cannot so agree on those points, that authority may—

(I) advise that person accordingly in writing, or

(II) refer the matter to the Board for its determination,

and, where clause (I) applies, that person may, within 4 weeks of being so advised, refer the matter to the Board for its determination etc.

5.1.7. Section 37(1)(b) of the Act states that:

[...] where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance [...] and subsections (1), (2), (3) and (4) of section 34 shall apply etc.

5.1.8. Section 48(1) is the statutory basis for Condition 17 of ABP-300045-17, the subject of this referral. Section 34(5)(a)(ii) of the Act provides the statutory basis for the referral.

6.0 Policy Context

6.1. Development Contributions Guidelines

6.1.1. Section 1 of the Development Contributions Guidelines (DECLG, January 2013) states that development contributions provide the only statutory mechanism for capturing planning gain as part of the development management process. It also notes that all planning permissions granted are subject to the conditions of the development contribution scheme that is in operation in the area of the relevant planning authority.

6.1.2. These Guidelines were updated under Circular Letters PL3/2013 and PL18/2013.

6.1.3. Circular Letter PL3/2013 relates to the enforcement of development contribution conditions and notes that the general practice in multi-unit residential developments is that the payment of appropriate development contributions on foot of a development contribution scheme adopted by the elected members is addressed by means of a condition attached to a planning permission requiring payment by the person carrying out the development, normally in advance or phased into the commencement.

6.2. Fingal Development Contribution Scheme 2016-2020

- 6.2.1. The Fingal County Council Development Contribution Scheme 2016-2020 ('the 2016 Scheme') came into effect on the 1st of January 2016. Section 16 noted that scheme remained effective until the 31st of December 2020 unless a new scheme was made.
- 6.2.2. The Board decision of the 12th of March 2018 was made during this effective period.
- 6.2.3. Section 9(a) of this scheme sets out the level of contribution and indicated a rate of €76.14/sq.m to be applied to residential development, subject to indexation (Note 1). Documentation on the referral file indicates that the relevant indexation rates for 2017, 2018, 2019 and 2020 were €80.85, €85.94, €92.13 and €98.21 per sq.m respectively.
- 6.2.4. Section 9(b) of this scheme sets out the level of contribution in lieu of open space.

6.3. Fingal Development Contribution Scheme 2021-2025

- 6.3.1. The Fingal County Council Development Contribution Scheme 2021-2025 ('the 2021 Scheme') came into effect on the 1st of January 2021. Section 17 notes that scheme remains effective until the 31st of December 2025 unless a new scheme is made.
- 6.3.2. The development appears to have commenced within this effective period.
- 6.3.3. Section 9(a) of this scheme relates to the level of contribution and indicates a rate of €98.21/sq.m to be applied to residential development, subject to indexation. Documentation on the referral file indicates that the relevant indexation rates for 2022 and 2023 were €106.46 and €121.34 per sq.m respectively.
- 6.3.4. Note 5 of this scheme sets out the level of contribution in lieu of open space shortfall.

6.4. Circular Letter PL 08/2023

- 6.4.1. On the 25th of April 2023, the Government approved additional measures under *Housing for All* to incentivise the activation of increased housing supply and help reduce housing construction costs. These included the introduction of a time-limited arrangements for the waiving of local authority Section 48 development contributions.
- 6.4.2. The Temporary Development Contribution Waiver Scheme applied for 1 year to all permitted residential development commenced on site between the 25th of April 2023 and the 24th of April 2024, and completed not later than the 31st of December 2025.

7.0 The Referral

7.1. Referral Question

7.1.1. The referrer has not outlined a specific question for the Board's determination. They have however indicated that they are making the referral to the Board in respect of (a) the interpretation of the 2016 Development Contribution Scheme and (b) the amount of the contribution sought. They specifically request the Board 'to determine that the indexation under the 2016 scheme expired on the 31st of December 2020' and therefore 'determine that the last applicable indexation date is the 1st of January 2020'.

7.1.2. In the absence of such a specific question, I am considering this referral as:

(a) Whether the planning authority should determine the financial contribution under Condition 17 of ABP-300045-17 under the provisions of the Fingal Development Contribution Scheme '2016-2020' or '2021-2025'; and

(b) Whether the planning authority is applying the terms of Condition 17 of ABP-300045-17 in respect of the amount sought.

7.2. Referrer's Case

7.2.1. Adrian Doyle & Associates made the referral on behalf of the developer, Milltown New Homes Ltd. on the 21st of June 2023. The case can be summarised as follows:

- Condition 17 requires the payment of contributions under the 2016 Fingal Development Contributions Scheme.
- The Council sought €192,261, updated at the date of commencement of development in accordance with the Tender Price Index (Condition 26 of Council decision).
- The 2016 Scheme notes that the rates shall be effective from the 1st of January 2016 until the 31st of December 2020 and therefore indexation is limited to the duration of the Scheme i.e., ends on the 31st of December 2020.
- The 2016 Scheme makes no reference to any period beyond the 31st of December 2020 and was not extended.

- A new scheme became effective from the 1st of January 2021 and is not applicable to permissions granted before this date.
- The Board are requested to determine that the last applicable indexation date is the 1st of January 2020.

7.3. Planning Authority Response

7.3.1. The planning authority responded on the 13th of July 2023. It can be summarised as follows:

- Condition 17 states that ‘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.’
- A Commencement Notice was submitted on the 5th of July 2022 and the commencement date was the 21st of July 2022.
- The applicable indexed rate at the date of commencement was €106.43/sq.m.
- Condition 17 refers to the “scheme at the time of payment” and this was the 2021-2025 Scheme and the indexed rate at the time of invoicing/payment was €106.46.

7.3.2. I note that the planning authority’s response also includes a copy of the 2016 Scheme and refers to Section 9(a) of this Scheme including Note 1 specifically.

7.4. Further Responses

7.4.1. Adrian Doyle & Associates, on behalf of the referrer, responded to the planning authority’s comments on the 1st of August 2023. It can be summarised as follows:

- The rates of contribution are as tabulated at Section 9(a) and have been increased by the indexation as referred to in Note 1 of the 2016 Scheme.
- The same Note 1 states that the rates shall be effective from the 1st of January 2016 to the 31st of December 2020.
- The 2021 Scheme is a standalone scheme not linked in any way to the previous one and therefore the indexation of this scheme cannot be applied to permissions granted before the 1st of January 2021.

- The 2016 Scheme allowed the Council to extend the scheme, this was not done.
- The Board is requested to determine that indexation under the 2016 Scheme does not extend beyond the 31st of December 2020 and the 2021 Scheme indexations cannot be applied.

8.0 **Assessment**

8.1. **Preliminary Points**

8.1.1. Prior to addressing the issues arising, I note that this case is a point of detail referral under Section 34(5) of the Planning and Development Act 2000, as amended, and not an appeal under Section 48(10) of the Act.

8.1.2. The point of detail arising from Condition 17 of ABP-300045-17 relates to the application of the terms of the relevant development contribution scheme, upon which the referrer and the planning authority did not reach agreement. In default of such agreement, the matter of the proper application of the terms of the relevant scheme has therefore been referred to the Board for determination.

8.1.3. Having examined the referral details and all other documentation on the referral file, including the submissions, and inspected the site, and having regard to relevant local, regional and national policies and guidance, I consider that the main issues in this referral are those raised by the referrer. The issues can be addressed under the following headings:

- The Board Order
- The Relevant Scheme
- The Amount Sought

8.2. **The Board Order**

8.2.1. I have reviewed the Inspector's Report under ABP-300045-17 and note that section 7.5 considered the planning authority's submission in respect of bond and other monetary based conditions under the heading of 'Other Issues'.

8.2.2. In relation to Condition 24 of PA ref. F17A/0357 and a payment in lieu of public open space, the Inspector noted that there was no legislative basis on which it relied. The

Inspector further noted that c. 14% of the site was proposed as public open space and was therefore satisfied that the public open space requirements were met.

8.2.3. On this basis, they did not consider that Condition 24 was necessary or justified, and recommended that only a standard Section 48 contribution condition be included.

8.2.4. As noted, Condition 17 of the Board Order gave effect to this recommendation.

8.3. The Relevant Scheme

8.3.1. In relation to whether the planning authority should determine the financial contribution required by Condition 17 of ABP-300045-17 under the provisions of the 2016 Scheme or the 2021 Scheme, I note the precise wording of this condition as cited above.

8.3.2. For clarity, it expressly states *inter alia* that:

“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.”

8.3.3. Notwithstanding the referrer’s submission, Condition 17 does not reference a specific development contribution scheme i.e., the 2016 or the 2021 schemes. However, it is clear that the relevant scheme is that scheme in operation at the time of payment.

8.3.4. In this regard, the planning authority states that a Commencement Notice was submitted on the 5th of July 2022 and the commencement date was the 21st of July 2022. On this particular basis, they submit that the applicable indexed rate on the date of commencement was €106.43 per square metre i.e., the indexed rate for 2022.

8.3.5. The referrer has not disputed the purported commencement date which I have corroborated using the Building Control Management System¹ (ref. CN0091827FL). They have instead focused on the provisions of the 2016 Scheme which was operational at the time of the Board’s decision and suggest that the last applicable indexation rate was the rate for 2020. This is reiterated in their further comments.

8.3.6. Notwithstanding the referrer’s submission, the wording of Condition 17 of ABP-300045-17 is clear, the level of contribution is subject to the provisions of the

¹ BCMS, 2024. *Welcome to the Building Control Management System (BCMS)*. [Online] Available at: <https://www.nbco.localgov.ie> (Accessed: 29th April 2024)

development contribution scheme in force at the time of payment. As noted, this may be prior to commencement of development or in an agreed phased manner.

- 8.3.7. As the development materially commenced around the 21st of July 2022, the planning authority have set the indexed rate as the applicable rate for 2022 which is subject to the provisions of the 2021 Scheme. I agree with this assessment, and I consider that the relevant scheme is the Development Contribution Scheme 2021-2025.

8.4. The Amount Sought

- 8.4.1. In relation to whether the planning authority is applying the terms of Condition 17 of ABP-300045-17 in respect of the amount sought, I do have concerns regarding the total amount in their correspondence to the referrer dated the 19th of May 2023.

- 8.4.2. For clarity, it states *inter alia* that:

“As the development commenced in 2022, the residential rate for 2022 was applied (2378 m² x €106.46 = €253,161.88). The Open Space shortfall of 900 m² = €52,824. Total amount invoiced = €305,985.88.”

- 8.4.3. The planning authority have submitted that the applicable rate for purposes of Condition 17 of ABP-300045-17 is €106.43/sq.m. Whilst I note a minor discrepancy (€0.03 difference) in the correspondence between the Council and the referrer, as outlined above, I am satisfied that the amount sought under Condition 17 is limited to the ‘indexed residential rate’, stated as €106.43/sq.m, by 2378sq.m i.e., €253,090.54.

- 8.4.4. In my opinion, there is no scope within Condition 17 to seek payment of additional contributions in respect of a purported shortfall in public open space. This was considered by the Inspector under ABP-300045-17 who noted that Condition 24 of PA ref. F17A/0357 did not have a stated legislative basis e.g. a special development contribution under Section 48(2)(c) of the Act. For the planning authority to seek such a payment now would be outside the scope of the condition and *ultra vires*.

- 8.4.5. Moreover, I also note that that the Chief Executive Order subsequent to the Board’s decision, and dated the 12th of April 2018, states that “with regard to Condition No. 17 the financial contribution is assessed as €204,365.00”. This would appear to be based on the indexed rate for 2018 i.e., €85.94/sq.m. There is no reference to a financial contribution ‘in lieu’ of public open space within this Chief Executive Order.

8.5. Conclusion

- 8.5.1. As per the wording of Condition 17 of ABP-300045-17, I conclude that the relevant scheme is the Fingal Development Contribution Scheme 2021-2025, and the planning authority should determine the financial contribution accordingly i.e., €253,090.54.

9.0 Recommendation

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

WHEREAS by Order dated the 12th day of March 2018, An Bord Pleanála, under planning register reference number ABP-300045-17 granted, subject to conditions, a permission for a development comprising the construction of 14 number dwellings and associated works on land west of 1-10 The Orchard, Oldtown, County Dublin.

AND WHEREAS condition number 17 attached to this permission states:

The developer shall 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 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. Details of the application of the terms of the Scheme 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 the proper application of the terms of the Scheme.

AND WHEREAS the planning authority required the developer to pay a standard contribution of €253,161.88 and an additional contribution of €52,824 in lieu of a shortfall in open space in order to comply with the terms of condition number 17 of this permission.

AND WHEREAS the developer and the planning authority failed to agree on the amount of financial contribution to be paid pursuant to condition number 17, and on the application of the scope of this condition, in or around the 19th day of May 2023 and the matter was referred by the developer to An Bord Pleanála on the 22nd day of June 2023 for determination:

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 the financial contribution under condition number 17 of this permission shall be determined under the provisions of the Fingal Development Contribution Scheme 2021-2025, being the applicable scheme at the time of payment and the amount of the contribution is governed by the rate set out in Section 9(a) of this Scheme, indexed to the date on which payment was due in or around the 21st of July 2022 i.e. €253,090.54.

10.0 Reasons and Considerations

10.1. Having regard to:

- (a) Sections 34(5) and 48 of the Planning and Development Act 2000, as amended,
- (b) the Fingal County Council Development Contribution Scheme 2016-2020,
- (c) the Fingal County Council Development Contribution Scheme 2021-2025,
- (d) An Bord Pleanála appeal reference ABP-300045-17 (planning authority register reference F17A/0357), including the Inspector's Report, Board Order and condition number 17 of that grant of permission specifically,
- (e) the submissions on file, and the planning history of the referral site,

the Board considers that the Fingal County Council Development Contribution Scheme 2021-2025 has been incorrectly applied by the planning authority and determines that the sum to be paid under condition number 17 of An Bord Pleanála appeal reference number ABP-300045-17 should be €253,090.54 (2378sq.m x €106.43). Whilst the Board acknowledges that this Development Contribution Scheme does allow for discretionary financial contributions in lieu of all or part of the open space requirement for a particular development, it notes that it does not form part of condition number 17 and would generally require justification as a special contribution under Section 48(2)(c) of the Planning and Development Act 2000, as amended.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Philip Maguire
Planning Inspector
30th April 2024