



An  
Bord  
Pleanála

## Inspector's Report RP15.RP2137

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<b>Development</b>	Point of detail regarding financial contributions condition No. 6 of 246060 and Condition No. 7 of 242726.
<b>Location</b>	Units 2, 3 & 4 Dundalk Retail Park, Dundalk, Co. Louth.
<b>Planning Authority</b>	Louth County Council.
<b>Planning Authority Reg. Ref.</b>	No Declaration.
<b>Applicant(s)</b>	Magahy Broderick Associates.
<b>Type of Application</b>	Point of Detail.
<b>Planning Authority Decision</b>	No Declaration.
<b>Type of Appeal</b>	First Party
<b>Appellant(s)</b>	None.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	<a href="#">Click here to enter text.</a>
<b>Inspector</b>	Una Crosse

## 1.0 Introduction and Background

- 1.1. This referral was lodged with the Board on 20<sup>th</sup> October 2016 under Section 34(5) of the Planning and Development Act 2000, as amended. This provision provides for matters to be referred to the Board where a point of detail is in dispute between the applicant and planning authority. The case relates specifically to Condition No. 6 of PL15.246060 and Condition No. 7 of PL15.242726 both of which relate to Development Contributions.

## 2.0 Site Location & Proposed Development

- 2.1. The site in question comprises Units 2, 3 and 4 of Dundalk Retail Park located on the Inner Relief Road in Dundalk. The units were originally developed for retail warehousing. The two permissions subject of this referral sought the change of use of 3 of the units (Units 2, 3 & 4) to cinema use with the second permission seeking to reduce the change of use to cinema to Units 2 & 3 and provide for retail warehousing uses within Unit 4 as originally permitted.

## 3.0 Planning History

The relevant planning applications related to these units are set out in chronological order as follows:

- 3.1. **Ref. 13/106 - PL55.242726**
  - 3.1.1. Change of use of Units 2, 3 & 4 (GFA 2,802 sq.m) from retail warehouse use to a seven-screen cinema including ancillary areas comprising of an entrance foyer with ticket kiosk and food and beverage sales, coffee shop, service and circulation areas and toilets. The development also included modifications to the external appearance of the units including the creation of a new main entrance to the cinema at Unit 2, closing-off of entrances at Units 3 and 4, and the provision of emergency exit doors to the east and west elevations. The proposal involved the construction of an internal wall between Unit 4 and Unit 5 to facilitate Unit 5 to operate as a standalone retail warehouse unit.

3.1.2. Condition No. 2 of the Notification from the PA required the payment of **€58,877.02** as a development contribution under Section 48 (Public Piped Services - €31,074.18, Roads - €21,015, Recreational and Amenities - €6,787.84).

3.1.3. Condition No. 7 of the Boards Order is an unspecified Section 48 condition.

3.2. **Ref. 15/726 – PL15.246060**

3.2.1. Retention (for works carried out) and permission to complete alterations to previously approved permission for a change of use of Units 2, 3 and 4, Dundalk Retail Park, from retail warehouse use to cinema use, Louth County Council Planning Register Reference Number 13520106 (formerly Dundalk Town Council Register Reference Number 13/106), An Bord Pleanála Appeal Reference Number PL 55.242726. The alterations comprise of the reduction in the size of the cinema to be now contained within Units 2 and 3 only and reversion of Unit 4 to retail warehouse use, and for the internal reconfiguration of the ground floor and projector room level including reducing the overall seat numbers from 1,693 to 1,095 in nine cinemas and minor alterations to the elevations including relocation of escape doors to suit the reconfigured internal plan.

3.2.2. Condition No. 9 of the Notification from the PA required the payment of **€102,041.04** as a development contribution under Section 48 (Public Piped Services - €27,701.67, Roads - €56,190, Recreational and Amenities - €18,149.37).

3.2.3. Condition No. 6 of the Boards Order is an unspecified Section 48 condition.

#### 4.0 **Development Contribution Scheme**

The current Development Contribution Scheme which applies to Louth County Council's administrative area is the Louth County Council Development Contribution Scheme 2016-2021 adopted on 19<sup>th</sup> September 2016 and which replaced all other Schemes which applied within the administrative area. The scheme in effect at the time both the relevant applications were decided was the Dundalk Town Council Development Contribution Scheme 2010-2014 which came into effect in March 2010 and which was amended in 2014 and remained in force until the current scheme was adopted in September 2016.

## 5.0 Conditions Subject of the Referral

### 5.1. Condition No. 7 of PL55.242726 is as follows:

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.

### 5.2. Condition No. 6 of PL15.246060 is as follows:

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 within one month of the date of this order 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.

## 6.0 The Referral

### 6.1. Grounds of Referral

The referrers grounds are summarised as follows:

- Not been able to agree the appropriate amount with the Council and advised to refer the matter;
- Parent permission PL55.242726 in respect of change of use of Units 2, 3 & 4 to cinema use which attracted a contribution which was 25% of the charge (75% reduction) that would apply to a new build;
- Later permission PL15.246060 sought to vary the earlier permission omitting Unit 4 from the Change of use to cinema and minor internal alterations which was a retention application due to incorrect invalidation of a previous application;
- Application was not a de novo application for the change of use to cinema of units 2 & 3;
- Application fee charged by the Council for consideration of the application for retention of the internal alterations was €280;
- Understand that Council's opinion is that the 75% reduction in respect of changes of use is not being applied as the application was for retention;
- Retention application was not for retention of the change of use (which attracts the charges) but for retention of the internal alterations which do not attract a charge;
- Consider the charges to be applied total €39,337.68 applying the charges to Units 2 & 3 with no charges applicable to Unit 4 as no change of use;

- Consider as matter of principle that application of charges for changes of use is contrary to Section 48 of the Act;
- Act also requires that charges are appropriate and consider 'double charging' in respect of change of use is contrary to the Act;
- Willing to pay €39,337.68 as set out;

## 6.2. **Planning Authority Response**

In response the Planning Authority have stated the following which I have summarised:

- Planners report at decision stage clearly details the rational for the application of the development contribution in accordance with the scheme (Section 10(x))
- Application was subject to two third party appeals;
- Applicant did not appeal any of the conditions including Condition 9 which related to the development contributions;
- Considered by LCC that confirmation of the contribution due was merely a procedural matter to confirm with the applicant that actual cost required to be paid on foot of Condition 6 of the ABP decision which is standard practice;
- There was no change to the development or circumstances and therefore calculation undertaken at decision stage by LCC stood with additional requirement included by the Board that contribution be paid within 1 month;
- Similar contribution case (Ref. PL15.246142) in Drogheda which PA considers establishes a precedent in relation to calculation of contributions;
- PA advise that no payment of contribution received on foot of original permission Ref. 13/520106 (PL55.242726);

## 6.3. **Further Response from the Planning Authority**

The Board requested by letter dated 28<sup>th</sup> November 2016 a breakdown of the amounts sought in respect of the two conditions subject of this referral. The PA forwarded the planning reports related to both applications. The following summarises the response from the Planning Authority:

- Letter from the PA states that the Planner confirms that the financial contributions are as per the planning reports for each application:
- In respect of PL55.242726 section 9(ix) of the report refers to development contributions;
- It is stated that the site is located within a Key Opportunity Site as per section 3.2.7 of the Development Plan and as per Table 3 of the Development Contributions Scheme a 50% reduction is applicable:
- It further states that the higher reduction of 75% applies through the change of use reduction permitted;
- The total levy due is €58,877;
- In relation to PL15.246060 Section 10(x) of the planning report refers to Development Contributions;
- It states that it is noted that the proposal is an alteration to a parent permission (PL55.242726-13/106) the contributions for which have not been paid and therefore considered that contributions should be applied on this application;
- Notes that the contribution scheme does not allow exemptions in retention applications with the 75% previously applied no longer applicable;
- Contributions to be paid on the full extent of the cinema (Units 2 & 3 – 1873 sq.m);
- No contribution is payable on unit 4 as the cinema use is not taken up and the last permitted use was retail warehouse with contributions paid;

## 7.0 **Assessment**

- 7.1. Prior to addressing the matters related to the contributions required, I would note that the Board have no role in determining whether the application of charges for changes of use is appropriate or not in respect of the general principle of Section 48 of the Act. This assessment therefore relates to the application of the Development Contribution Scheme as it applies to the relevant applications.
- 7.2. For ease of reference I will summarise the situation as I see it. Permission was sought to change the use of Units 2, 3 & 4 from retail warehousing to cinema use

under Ref. 13/106 which was appealed to the Board and granted under PL55.242726. The floor area of this development was 2802 sq.m. While an unspecified contribution was requested under Condition 7 of the Boards decision, Condition No. 2 of the Notification from the PA required the payment of **€58,877.02**. The Planners report at section 9(ix) states that as the site is located within a Key Opportunity Site as per section 3.2.7 of the Development Plan and as per Table 3 of the Development Contributions Scheme a 50% reduction is applicable and that as the proposal is a change of use that the higher reduction of 75% applies.

- 7.3. Following on from this decision, an application was made under Ref. 15/726 for retention of works already carried out and permission to complete the alterations to a previously approved permission (set out above) with the alterations comprising the reduction of the cinema to Units 2 & 3 and the reversion of Unit 4 to retail warehouse use. Condition No. 9 of the Notification from the PA required the payment of **€102,041.04**. The Planners report at section 10(x) states that it is noted that the proposal is an alteration to a parent permission (PL55.242726-13/106), that the contributions for the parent permission have not been paid and that the contribution scheme does not allow exemptions in retention applications with the 75% previously applied no longer applicable. It is determined that the contributions are to be paid on the full extent of the cinema (Units 2 & 3) which has an area of 1873 sq.m. As noted by the PA in their response to the referral, Condition No. 9 of the PA's Notification was not appealed to the Board following the decision on 14 December 2015.
- 7.4. I would suggest to the Board for the purposes of clarity that it is the most recent decision and Condition No. 6 of the Boards decision under PL15.246060 as it appears that it is this development that has been implemented and it would not be appropriate to seek the payment of two contributions under each of the permissions related to the use.
- 7.5. I note the PA's reference to a previous decision in Drogheda (PL15.246142) where a contribution condition was appealed on the basis that the Contribution Scheme had not been properly applied as one level of a two level cinema had already been levied and to levy again would be double charging. The PA contention was that the level which had already been levied was subject to reconfiguration in the application and as such contributions were applicable. The Board decided that the planning authority properly applied the terms of the Drogheda Borough Council Development



Contribution Scheme, which does not provide for any exemptions or reductions for development in respect of which retention has been sought and granted.

- 7.6. I would suggest to the Board that it is reasonable for the PA to expect that the amount of contribution applicable would be the same as they had originally proposed in their decision if no changes are made within the Boards decision as is the case in the applications subject of this referral. Furthermore, there would be no reason to differ from same if the condition relating to the Contribution had not been appealed which it was not.
- 7.7. The PA therefore are requesting the payment of €102,041.04 as was the original amount requested in their Notification of decision. This has been calculated on the basis of an area of 1873 sq.m and a charge per sq.m of €14.79 for public piped services (total €27,701.67), €30 per sq.m for roads (total €56,190) and €9.69 per sq.m for recreational and amenities (total €18,149.37).
- 7.8. The applicants are proposing to pay €39,337.68 which is set out in their letter to the Board which is approximately 38% of the figure requested by the PA. The breakdown provided provides for €10,358.06 for each unit for public piped services, (total €20,716.12); €7005 for each unit for roads (total €14010); and €2,260.28 for each unit for recreational and amenities (€4520.56). I note that the applicants state that the area of Unit 2 and Unit 3 is 934 sq.m per unit and whereas the calculation in the Planners report is based on Unit 2 and Unit 3 being 936.5 each.
- 7.9. Therefore, the key issue in this referral, in my opinion, is whether the reduction for change of use applications is applicable or not in this instance.
- 7.10. The referrer argues that the retention application was not for the retention of the change of use, which they state attract the charges, but for the retention of internal alterations which do not attract a charge.
- 7.11. The application submitted and appealed to the Board under Ref. 15/726 (PL15.246060) included public notices which outline the nature of the development. They describe the development as seeking retention permission for works carried out and permission to complete the alterations to previously approved permission. Drawing No. 02 Rev. P1 highlights the areas in pink for which retention is sought and comprises a considerable area of the floor area of the application area.

- 7.12. The contribution scheme referred to in the Conditions attached by the PA was the 2004 scheme for Dundalk Town Council. This scheme was updated by the Dundalk Town Council Development Contribution Scheme 2010-2014. This would have been in force at the time of the making of the decisions of both applications by the PA and the Board. This Scheme includes exemptions and reduced contributions at Section 7.1. Table 3 includes reduced contributions with change of use provided with a 75% reduction. This section also includes 5 criteria which apply to the reductions with No. 1 stating reductions will not apply to retention applications.
- 7.13. In my opinion, the scheme does not differentiate between elements of an application which may require retention and those which may not. It is stated that the reductions do not apply to retention applications with no provision for applications which include part retention or not. The Board cannot imply provisions which are not expressly stated in the Scheme. Therefore, if there is a retention element as part of the application then the reduction would not apply. While I acknowledge the applicant's argument that the retention element relates to works rather than the use, I would suggest to the Board that the two are inextricably linked in this case as the works are required to facilitate the use. The application of the Scheme is the only consideration in this regard and I consider that in the context of the wording of the scheme and the decision of the Board in respect of the Drogheda complex outlined above, that the Scheme was properly applied.
- 7.14. In addition, the applicants somewhat obliquely refer to a mix up at PA stage about a non-retention application that was incorrectly invalidated and suggest that it was for this reason that a retention application was required. I do not consider this a reasonable argument as they would have needed full permission to undertake the works rather than a submitted application. In this regard I consider that the PA are appropriately applying the charge as originally proposed.

## 8.0 Recommendation

- 8.1. I recommend that the Development Contribution payable in respect of Condition No. 6 of PL15.246060 is €102,041.04

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Una Crosse  
Senior Planning Inspector

January 2017