



An  
Bord  
Pleanála

## Inspector's Report RP06F.RP2141

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<b>Details of Referral</b>	Point of Detail regarding Conditions No.s 12, 13 and 14 of PL06F.242233.
<b>Location</b>	Carrickbrack road, Sutton, Dublin 13.
<b>Planning Authority</b>	Fingal County Council.
<b>Referrer</b>	Copia Capital Partners Limited.
<b>Type of Referral</b>	First Party regarding Conditions
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	Not required.
<b>Inspector</b>	Patricia Calleary.

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## 1.0 Introduction

- 1.1. **RP06F.RP2141** is a referral received by the Board from Vincent JP Farry and Co. Ltd, acting on behalf of the referrer, Copia Capital Partners Ltd. It concerns points of detail in dispute between the applicant and the planning authority regarding Conditions 12,13 and 14 attached to a grant permission under the Boards order ref: PL06F.242233 dated 22<sup>nd</sup> November 2013.
- 1.2. Condition No.12 requires the lodgement of an unspecified bond, cash deposit or other security. Condition No.13 requires a standard unspecified S.48 financial contribution in respect of public infrastructure and facilities benefiting the development and Condition No.14 requires a S.48 financial contribution in respect of the shortfall in the provision of public open space benefiting the development.

## 2.0 Background to Referral.

- 2.1. Under PL06F.242233, An Bord Pleanála granted permission subject to 13 conditions for development for the construction of five houses and all associated site development works at Carrickbrack Road, Sutton, Dublin 13. Conditions No. s 12,13 and 14 are the subject matter of this referral.
- 2.2. Various correspondence documents exchanged between the developer and the planning authority are on the board's referral file. These include invoices for the monetary amounts under Conditions No.s 12,13 and 14 and a warning letter under Section 152 of the Planning and Development Act 2000, as amended, dated 2<sup>nd</sup> November 2016 which issued from Fingal County Council to Copia Capital Partners Ltd.

## 3.0 The Referral

### 3.1. Referrer's Case

- 3.1.1. It is the referrer's contention that in respect of Condition No.12, a cash payment of €15,000 would be appropriate, that €87,317 is the contribution due under Condition No.13 and that there should be no payment required in respect of open space

(Condition No.14). A summary of the referrers case in respect of each condition is set out under as follows:

#### **Condition No.12**

- In a letter dated 4<sup>th</sup> March 2016, the PA require €25,000 as a cash payment which though reduced from that applied in their decision made under F13A/0146 on the planning application remains excessive;
- Pipework would be constructed in accordance with the drawings, a shared basecourse surface would be a required provision for access to the five houses, therefore the bond should only be required as security for the surface coating of the shared entrance itself;
- Request that the payment required would be reduced to €15,000.

#### **Condition No.13**

- S.48 of the Planning and Development Act, 2000 has been amended by s.29(3)(A)(c) of the Urban Regeneration and Housing Act, 2015 which empowers the Council to amend a previous condition to reduce the amount due in line with rates which are contained in a new contribution scheme.
- A calculation on the Councils file references €120,414 which was derived by multiplying the total floorspace (1146.8 sq.m) by the adopted residential rate of €105 per sq.m under the 2013 Contribution scheme. The PA have since adopted a new contribution scheme in 2016 and the rate within that scheme, €76.14, should now apply with a resultant levy of €87,317 for the proposed residential development;
- Request that An Bord Pleanála direct the Council to accept a phasing arrangement of five individual payments of €17,463, immediately before the sale of each dwelling.

### **Condition No.14**

- Regarding shortfall in open space, the condition attached in all respects represents a 'special' contribution;
- An Bord Pleanála have previously directed the removal of similar conditions. Extracts from inspectors reports on appeal assessments state that the respective contribution schemes did not provide for contributions in lieu of open space;
- Policy OS02 (requiring open space standard of 2.5ha per 1000 inhabitants) would mean that the use of the contribution scheme in this way would result in an over provision of public open space;
- Quantum of open space is achieved in the wider area and a further payment should not be required;
- Applicants are already providing for communal open space under Class 3 – Community & Parks Facilities & Amenities under the general S.48 scheme;
- Requests the Board to apply a 'nil' amount.

### **3.2. Planning Authority's response**

3.2.1. A summary of the Planning Authority's case is set out under as follows:

### **Condition No.12**

- This was initially assessed at decision stage as €50,000 in respect of a bond or alternatively €38,000 in respect of a cash security, in accordance with a Managers Order No.PBN/31/01. However, on commencement of the development signed on 27<sup>th</sup> November 2015, revised rates in line with the Chief Executives Order No. PL/GEN/05/14 dated 22<sup>nd</sup> day of June 2015<sup>1</sup> were applied as follows: 'Development of 2-10 units - €25,000 cash deposit or €40,000 Bond'.

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<sup>1</sup> Note: The Managers order appears to have been signed on 22<sup>nd</sup> day of June 2014 and a true copy of the order was signed on 22<sup>nd</sup> day of June 2015.

### **Condition No.13**

- The development contribution amount was assessed at €120,414 in accordance with the Development Contribution scheme 2013-2015, i.e.  $1146\text{sq.m} \times €105.00 = €120,414$ .
- The development contribution was determined at final grant stage in 2013 under the Development Contribution scheme 2013-2015 in place at the time at a rate of €105/sq.m.
- As the permission was granted pre-January 2014, it was the responsibility of the PA to collect the development levy with respect to water services.

### **Condition No.14**

- The development contribution amount was assessed in accordance with the Development contribution scheme 2013-2015;
- Class 1 (75%) or  $328.125 \text{ m}^2 @ €200,000 \text{ per acre} = (328.12 \times €200,000)/4046.9 = €9,459$ ;
- Class 2 (25%) or  $109.375 \text{ m}^2 @ €350,000 \text{ per acre} = (109.38 \times €350,000)/4046.9 = €16,216$ ;
- Total of Class 1 and Class 2 = €25,675.

### **Phasing**

Payment of the development contributions are sought in line with Fingal County Council's phasing protocol, i.e. 25% on commencement and 75% over the course of the build.

## **4.0 Planning History**

- 4.1. Board Order (PL06F.242233): On 22<sup>nd</sup> November 2013, permission was granted on appeal for 5 No. houses and all associated works.

## 5.0 Policy Context

### 5.1. Local Planning Policy - Fingal County Development Plan, 2011 to 2017

- 5.1.1. **Zoning objective:** The site is located within an area zoned with the objective RS which seeks 'Provide for residential development and protect and improve residential amenity'.
- 5.1.2. **Public open space standards: Objective OS02** requires a minimum public open space provision of 2.5 hectares per 1000 population. For the purposes of this calculation, public open space requirements are to be based on residential units with an agreed occupancy rate of 3.5 persons in the case of dwellings with three or more bedrooms and 1.5 persons in the case of dwellings with two or fewer bedrooms. **Objective OS03** requires an equivalent financial contribution in lieu of open space provision in smaller developments where open space generated by the development would be so small as not to be viable, split between Class 1 (75%) and Class 2 (25%). **Objective OS05** requires the monetary value in lieu of open spaces to be in line with the Fingal County Council Development Contribution Scheme.

### 5.2. Fingal Development Contribution Schemes

- 5.2.1. The current scheme is the Development Contribution Scheme 2016-2020 which came into effect on 1<sup>st</sup> January 2017. At the time of the granting of permission, the operable scheme was the Fingal Development Contribution Scheme 2013-2015.
- 5.2.2. Section 9 (a) of that decision sets out the contribution payable in respect of infrastructure which is €143 per square metre of residential development broken down as follows: Class 1 (Roads Infrastructure & facilities) - €69.84; Class 2 (Water & Drainage Infrastructure & facilities) - €49.91; Class 3 (Community & Parks facilities & amenities) - €23.25.
- 5.2.3. Note 3 provides (b) : *'The Fingal Development Plan provides the discretion to the Council to determine a financial contribution in lieu of all or part of the open space requirement for a particular development. This contribution in lieu of open space will be levied at the following rates; 1. Class 1 Open Space - €200,000 per acre to purchase land based on the value of amenity land, plus €100,000 per acre for development costs. 2. Class 11 Open Space - €1,250,000 per acre to purchase land*

*in residential areas, plus €100,000 per acre for development costs. These rates may be reviewed by the Council from time to time having regard to market conditions. The contributions collected will be used for the provision of open spaces, recreational and community facilities and amenities and landscaping works. (See Appendix 2)'.*

5.2.4. Payment and phasing arrangements are set out under Section 12 and 13 of the scheme.

### **5.3. Development Contributions – Guidelines for Planning Authorities 2013**

5.3.1. These guidelines were issued under section 28 of the PDA 2000 (as amended) with a stated aim to provide guidance on the drawing up of development contributions to reflect radical economic changes.

## **6.0 Assessment**

### **6.1. Scope of the Referral/Role of Board**

6.1.1. This referral on a 'point of detail' is made under Section 34(5) of the Planning and Development Act, 2000, as amended. It is noted that Section 34(5) states: 'The conditions under subsection (1) may provide that points of detail relating to any grant of permission may be agreed between the planning authority and the person to whom the permission is granted and that in default of agreement the matter is to be referred to the Board for determination'.

6.1.2. It is noted that the point of detail request relates to Condition 12, 13 and 14 of PL06F.242233 This permission was granted by the Board in November 2013 following a third party appeal against a decision to grant planning permission.

### **6.2. Consideration of Condition No.12**

6.2.1. The referrers case is that the PA require €25,000 as a cash payment which though reduced from that attached to their decision on the application remains excessive as most of the works that would require security would be complete prior to occupation of the houses. It is contended that the bond would only be required as security for the final surface coating of the shared entrance itself. The referrer requests the



Board to reduce the payment to €15,000. The PA in their response state that the assessment was based on a revised Chief Executives Order which came into effect on 22<sup>nd</sup> June 2014 and which lowered the rates set by the previous Managers Order. As the development commenced on 27<sup>th</sup> November 2015, the revised lower rates applied were as follows: 'Development of 2-10 units - €25,000 cash deposit or €40,000 bond'.

- 6.2.2. A compliance submission on file from Infinite Focus Consulting Engineers to the Planning Authority dated 20<sup>th</sup> February 2016 clearly sets out the intention to lodge the sum of €38,000. The letter refers to Condition No. 15(b) but this is most likely a clerical error as the relevant condition is No.12. This was followed by a Chief Executives order No. PCN/45/16 dated 3<sup>rd</sup> March 2016 which relates specifically to the financial contribution and cash security requirements for the specific development proposal. It also sets out phasing arrangements for the Phase 1 (3 units) and deferring Phase 2 (2 units).
- 6.2.3. Having regard to the above, specifically the Original Managers order No. PBN/31/01 dated 24<sup>th</sup> July 2001 and amended rates under the Chief Executives order No. PL/GEN/05/14 dated 22<sup>nd</sup> June 2014 which relates to all residential developments in Fingal, and which now remains current, I am satisfied that the amount payable should accord directly with the latest rates of €25,000 cash deposit or a €40,000 bond of an insurance company.

### 6.3. **Consideration of Condition No.13**

- 6.3.1. The referrer suggests that S.48 of the Planning and Development Act, 2000 has been amended by s.29(3A)(c) of the Urban Regeneration and Housing Act, 2015 which empowers the Council to amend a previous condition to reduce the amount due in line with rates which are contained in a new contribution scheme. As the Council have since adopted a new contribution scheme in 2016 and the rate within that scheme is €76.14, the referrers case is that the lower rate should now apply which would result in a levy of €87,317 for the proposed scheme. The referrer requests An Bord Pleanála to direct the Council to reduce the amount payable under Condition No.13 and also to accept a phasing arrangement of five individual payments of €17,463, immediately before the sale of each dwelling. In response, the PA states that the development contributions were determined under the

Development Contribution scheme 2013-2015 in place at the time of the final grant of permission at a rate of €105/sq.m.

- 6.3.2. A reduced rate is being sought on the basis that the referrer believes that the Urban Regeneration & Housing Act 2015 obliges the P.A. to apply the reduced charge rate to unsold housing units. However, I am satisfied that the matter before the Board is whether the terms of the Development Contribution Scheme that was in operation at the time that permission was granted on 22<sup>nd</sup> day of November 2013 have been properly applied. I do not accept that the stated provisions in the Urban Regeneration and Housing Act 2015, which in this case relates to the change in circumstance brought about by the adoption of a new Development Contribution Scheme with new reduced charges, is relevant to the case currently before the Board. Section 48 (3A) of the Planning and Development Act, 2000, as amended, inserted by S.29 of the Urban Regeneration and Housing Act 2015, does not appear to confer any function on the Board in respect of the application of reduced charges for housing units that remain unsold.
- 6.3.3. I consider that the PA applied the correct contribution rate of €105/sq.m under the Development Contribution scheme 2013-2015 and based on a total GFA of 1146 sq.m, the amount of contribution to be paid in respect of the five houses equates to €120,414. In conclusion, I am satisfied the PA correctly applied the terms of the Development Contribution scheme in respect of condition no.13.

#### 6.4. **Consideration of Condition No.14**

- 6.4.1. The proposed residential development on the c 0.1 ha site, does not contain any public open space. Objective OS03 requires an equivalent financial contribution in lieu of open space provision in smaller developments where open space generated by the development would be so small as not to be viable (split between Class 1 - 75% and Class 2 - 25%).
- 6.4.2. The referrer contends that the condition attached regarding the shortfall in open space is in effect a 'special' contribution. It is submitted that An Bord Pleanála have previously directed the removal of similar conditions and refers to two Board Orders on appeal cases. It is also submitted that the use of the contribution scheme in this way would over-provide open space in the context of the quantum of space required

in the wider area and furthermore that the applicants are already providing for communal open space under 'Class 3 – Community & Parks Facilities & Amenities' under the general S.48 scheme and accordingly requests the Board to apply a 'nil' payment.

6.4.3. In response, the PA state that the payment in lieu of open space is provided under the S.48 scheme, i.e. the Development contribution scheme 2013-2015. I am satisfied that the provision is contained in the S.48 scheme and a special contribution does not apply in this instance. I have had regard to the wording of the condition and to Note 3 in the adopted scheme, where it clearly sets out that 'The Fingal Development Plan provides discretion to the Council to determine a financial contribution in lieu of open space requirement for a particular development based on the following rates:

- Class 1 Open Space - €100,000 per acre to purchase land based on the value of amenity land, plus €100,000 per acre for development costs and
- Class 11 Open Space - €250,000 per acre to purchase land in residential areas, plus €100,000 per acre for development costs'.

6.4.4. The precedents set out by the referrer relate to instances where, **on appeal**, the Board directed the removal of special contributions applied in lieu of non-provision of open space. These precedents referenced are not comparable as Condition No.14 is not a special contribution condition but rather a S.48 general contribution condition. If the referrer considered that the terms of the Fingal Development Contribution Scheme had not been correctly applied, then the appropriate course of action would have been to submit a first party appeal against the development contributions applied under Condition No.14 of F13A/0146. No such appeal was lodged at the time and I do not consider it open to the referrer to query the attachment of the condition at this stage.

6.4.5. I am satisfied that the contribution was provided for under the adopted scheme and does not fall within a special contribution. I am also satisfied that the methodology used by the PA is in accordance with the development contribution scheme having regard to Note 3 of the scheme. The PA have based their calculation on a shortfall of 437.5 sq.m of open space. This is in line Objective OS02 of the Fingal development plan. The rationale arrived at for this figure is also set out under the planning report

which accompanied the original planning application and I have attached an extract as an appendix to this report for information purposes.

- 6.4.6. I consider that the terms of the Fingal Development Contribution Scheme 2013-2015 which applied at the time of the grant of permission have been properly applied in respect of condition no.14 and that the rate of contribution applicable is €25,675.

## 6.5. Phasing of payments

- 6.5.1. The referrer requests the Board to direct the PA to accept a phasing of five individual payments of €17,463, before the sale of each dwelling. In response, the PA stated that payment of the development contributions are sought in line with Fingal County Council's phasing protocol, i.e. 25% on commencement and 75% over the course of the build.
- 6.5.2. The PA have sought a phasing of 25% on commencement and 75% over the course of the build. This I believe is a matter between the PA and the developer and on in which the Board have no statutory role. I have based this on the wording of the S.48(15)(a) of the Planning and Development Act 2000, as amended which states 'A **Planning authority may facilitate** the phased payments of contributions...' and on Conditions 13 and 14, both which state 'or in such phased payments as the **Planning authority may facilitate**'. In addition, Section 12 and 13 of the scheme itself also provide for phased payments as may be facilitated by the Council.

## 7.0 Conclusion and Recommendation

Following my assessment above, I recommend an order as follows:

**WHEREAS** by order dated the 22<sup>nd</sup> day of November, 2013, An Bord Pleanála, under appeal reference number PL06F.242233 granted subject to conditions a permission to Brian Wallace and Kevin Thompson care of Stephen Little and Associates of 6 Upper Mount Street, Dublin for development comprising the construction of four number 1.5 storey, split level, five bedroom detached houses (circa 262 square metres gross floor area each) and one number single storey, split level, four bedroom detached house (circa 234 square metres gross floor area) and all associated site development works, including access from Carrickbrack Road via one number existing site entrance upgraded to serve house plots 1, 2 and 3, and via one number

new site entrance to serve house plots 4 and 5; site excavation, landscaping and boundary treatments, lighting and service connections all on a site measuring circa 0.98 hectares, bounded to the north by a graveyard associated with Saint Fintan's Church, to the west by South Hill housing estate, to the east by Carrickbrack Road and to the south by a detached dwelling at Carrickbrack Road, Sutton, Dublin.

**AND WHEREAS condition number 12** attached to the permission required the developer to lodge with the planning authority a cash deposit, a bond of an insurance company, or other security to secure the provision and satisfactory completion and maintenance until taken in charge by the local authority of roads, footpaths, watermains, drains, public open space and other services required in connection with the development, coupled with an agreement empowering the local authority to apply such security or part thereof to the satisfactory completion or maintenance of any part of the development. The form and amount of the security was to be as agreed between the planning authority and the developer or, in default of agreement, the matter was to be determined by An Bord Pleanála,

**condition number 13** attached to the permission required the developer to 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 was to be paid prior to commencement of development or in such phased payments as the planning authority may have facilitated and to be subject to any applicable indexation provisions of the Scheme at the time of payment. The condition required that details of the application of the terms of the Scheme were to be agreed between the planning authority and the developer or, in default of agreement, the matter to be determined by An Bord Pleanála

and **condition number 14** attached to the permission required the developer to pay to the planning authority a financial contribution in respect of the shortfall in the provision of public open space 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 was to be paid prior to commencement of development or in such phased payments as the planning authority may have facilitated and to be subject to any applicable indexation provisions of the Scheme at the time of payment. The condition required that details of the application of the terms of the Scheme were to be agreed between the planning authority and the developer or, in default of agreement, the matter to be determined by An Bord Pleanála;

**AND WHEREAS** the developer and the planning authority failed to agree on the above details in compliance with the terms of these conditions and the matter was referred by the developer to An Bord Pleanála on the 15<sup>th</sup> day of December, 2016 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 under **condition number 12**, the appropriate type and amount of security would be a bond of an insurance company for €40,000 (forty thousand euro) or a cash deposit of €25,000 (twenty five thousand euro) and that the amount payable under **condition number 13** is €120,414 (one hundred and twenty thousand, four hundred and fourteen euro) and under **condition number 14** is €25,675 (twenty five thousand, six hundred and seventy five euro).

## Reasons and Considerations

Having regard to:

- (1) the nature and scale of the development as described under appeal reference number PL06F.242233 and the submissions and documentation on file;
- (2) The specific wording of **Condition number 12** of the permission granted by the Board under PL06F.242233 which required the payment of security to secure the provision and satisfactory completion and maintenance until taken in charge by the local authority of roads, footpaths, watermains, drains, public open space and other services required in connection with the development and the Managers order No. PBN/31/01 dated 24th July 2001 and amended

rates under the Chief Executives order No. PL/GEN/05/14 dated 22<sup>nd</sup> day of June 2014 which set the applicable rates for security;

- (3) The specific wording of **Condition number 13** (public infrastructure and facilities) and **Condition number 14** (shortfall in the provision of public open space) of the permission granted by the Board under PL06F.242233 which required the payment of financial contributions under the terms of the Development Contribution Scheme prior to the commencement of development or in such phased payments as the planning authority may facilitate, and in default of agreement that the matter should be referred to the Board;
- (4) Section 48 of the Planning and Development Act 2000, as amended and the terms of the applicable Fingal Development Contribution scheme 2013-2015 at the date of the grant of permission;

The Board considers that in respect of condition number 12, the appropriate type and amount of security would be a bond of an insurance company for €40,000 (forty thousand euro) or a cash deposit of €25,000 (twenty five thousand euro only), that the terms of the Fingal Development Contribution scheme 2013-2015 has been properly applied in this instance and that the appropriate amounts to be paid are €120,414 (one hundred and twenty thousand and four hundred and fourteen euro) in respect of Condition number 13 and €20,675 (twenty five thousand, six hundred and seventy five euro) in respect of Condition number 14.

### **MATTERS CONSIDERED**

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

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Patricia Calleary  
Senior Planning Inspector

14<sup>th</sup> March 2017