



An
Bord
Pleanála

Inspector's Report RP06F.RP2144

Development	Point of detail regarding financial contribution condition no. 3 of PL06F.245865
Location	Unit 8, Block 6, Pluto Business Park, Damastown, Dublin 15
Planning Authority	Fingal County Council
Planning Authority Reg. Ref.	PL06F.245865
Referral	
Referred by	7 Day Auto Ltd.
Owner/ Occupier	7 Day Auto Ltd.
Observer(s)	None
Date of Site Inspection	None
Inspector	Niall Haverty

1.0 Introduction

- 1.1. This case is a referral under section 34(5) of the Planning and Development Act 2000, as amended. It was received by the Board from 7 Day Auto Ltd., and concerns a point of detail regarding Condition 3 which was attached to a grant of planning permission issued by An Bord Pleanála (Ref. PL06F.245865). The condition relates to development contributions.

2.0 Background to Referral

- 2.1. In March 2016 An Bord Pleanála, under PL06F.245865, granted planning permission to 7 Day Auto Ltd. for the erection of two surface mounted non-illuminated signs and retention permission for the change of use from light industrial to motor sales and servicing of vehicles and the erection of four non-illuminated signs at Unit 8, Block 6, Plato Business Park, Damastown, Dublin 15.
- 2.2. Condition 3 of the permission relates to the payment of development contributions and reads 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.

3.0 The Referral

3.1. Referrer's Case

3.1.1. The referrer's case can be summarised as follows:

- There is no agreement between the parties and in default of such agreement the matter has been referred to the Board.
- The economic viability of the business supported by five principle objectives of the Development Contribution Guidelines for Planning Authorities outweighs the punitive characterisation of a use as retention.
- When referrer took out lease on the unit, they were not aware that a change of use application would be required. There was never an intent to mislead or avoid planning obligations. The permitted use of unit 8 is a two storey office to front and light enterprise to rear. Referrer considered motor repair and sales would fall under light industry and enterprise. Referrer subsequently submitted a retention application.
- Referrer is a commercial-scale motor repair and sales business, servicing Garda and HSE vehicles, and is a vital part of Fingal's economy.
- Fingal County Council own the property, leased to Plato Business Park (Damastown) Management Company Ltd. who have sub-leased the unit to the referrer.
- Planning Authority's interpretation of the financial contribution condition undermines the viability of the company.
- Planning Authority issued an invoice dated 22nd June 2016 for €66,952. This point of detail referral relates to the interpretation and application of the condition and is not an appeal under section 48 of the PDA.

- Issuing of an invoice in the absence of an agreement is ultra vires the Planning Authority's powers. Where there is no agreement, the matter must be referred to the Board.
- Drafting of condition 3 by the Board is extremely problematic, as text is generic and does not pay due regard to the subject matter being a retention permission. The only alternative to payment prior to commencement is phased payments. The condition does not allow for a single payment after commencement and no invoice should therefore have issued.
- The Board's stated reason for included a financial condition is incorrect in law. Section 48(1) states that it 'may' include a financial contribution.
- Board must have regard to Government Guidelines. Section 34(2)(ba) states that the provisions of Guidelines apply instead of provisions of the Development Plan, to the extent that they differ.
- Development Contribution Guidelines reference the need to ensure such schemes do not impede job creation or result in levying of excessively high contributions.
- Guidelines include requirement for waivers in the case of change of use permissions, where change of use does not lead to the need for new or upgraded infrastructure, as well as reductions for temporary permissions.
- Guidelines state that no exemption or waiver should apply to any applications for retention. The use of 'should' rather than 'shall' or 'must' is a relevant consideration. Guidelines do not state that a reduced rate cannot be applied.
- Meath County Council's Development Contribution Scheme does not include any comparable clause to penalise all retention applications.
- On three previous occasions no payment of financial contributions was required for permission at Unit 8.
- Referrer has a 5 year lease on the unit, which is up for renewal in 2019. The contribution figure is disproportionate over such a short term. Referrer suggests a reasonable figure would be 10% of the standard levy, or a 50% reduction applying to temporary permissions as per the FCC scheme.

- Referrer has absorbed considerable expenses addressing planning matters, and has recorded trading losses of €177,000 in its first year. Financial matters are therefore of fundamental importance.
- Board is asked to consider PL15.RP2137, where Board took into account due mitigating circumstances regarding the development's history and allowing for issues of retention, applied a significant reduction to the levy.

3.2. **Planning Authority Response**

3.2.1. The Planning Authority's response can be summarised as follows:

- Development contribution was assessed in accordance with Development Contribution Scheme 2016-2020. Section 10(ii)(a) states that exemptions and reductions shall not apply to permissions for retention of development.
- Inclusion of restriction is in line with Development Contributions Guidelines for Planning Authorities 2013.
- Calculated development contribution is €66,952.

4.0 **Planning History**

4.1. **Ref. PL06F.245865/Reg. Ref. FW15A/0130**

4.1.1. Permission granted for two surface mounted non-illuminated signs and retention permission granted for change of use from light industrial to motor sales outlet, servicing of motor vehicles and ancillary associated uses and for four surface mounted non-illuminated signs.

4.2. **Reg. Ref. FW15A/0065**

4.2.1. Withdrawn application for permission for four surface mounted non-illuminated signs and retention permission for one surface mounted non-illuminated sign to an existing building.

4.3. **Reg. Ref. F00A/1110**

- 4.3.1. Permission granted for construction of a business park consisting of 132,000 sq ft of mixed use facilities comprising of office/warehousing/light industry and enterprise in six two storey blocks with associated surface car parking and other works.

5.0 **Policy Context**

5.1. **Fingal County Council Development Contribution Scheme 2016-2020**

- 5.1.1. Section 10 of the Fingal County Council Development Contribution Scheme 2016-2020 outlines exemptions and reductions, and the following are noted:

- 10(i)(q): Temporary planning permissions
 - Exempt up to 5 years duration.
 - 50% reduction for 5 – 10 years duration.
 - Full rate when permission or combination of permissions exceed 10 years (less any previous payments under the 5 – 10 years reduction).
- 10(i)(r): Change of use applications are exempt unless the revised usage constitutes a substantial intensification of use of the building or services.
- 10(ii): for clarification purposes:
 - (a) Exemptions and reductions shall not apply to permissions for retention of development.

5.2. **Development Contributions Guidelines for Planning Authorities 2013**

- 5.2.1. Section 2 of the Guidelines is entitled 'Supporting Economic Development'. It states that there is a need to encourage economic activity and that development contributions should not impede job creation. In this regard it sets out a series of reductions and waivers that Planning Authorities are required to include in their schemes, including the following:

- Reduced rates for temporary permissions to be calculated as follows: •
 - 33% of normal rate for permissions of up to 3 years

- 50% of normal rate for permissions of up to 5 years
- 66% of normal rate for permissions of up to 10 years
- waivers in the case of change-of-use permissions, where change-of-use does not lead to the need for new or upgraded infrastructure / services or significant intensification of demand placed on existing infrastructure (including, for example, transport infrastructure);
- waivers or reduced rates of development contributions for businesses grant-aided or supported by IDA / Enterprise Ireland / Shannon Development /Údarás na Gaeltachta, as well as reduced rates for developments that would progress the Government's Jobs Initiative;

5.2.2. In respect of retention permission, Section 2 of the Guidelines states:

- However, no exemption or waiver should apply to any applications for retention of development. Planning authorities are encouraged to impose higher rates in respect of such applications.

6.0 **Assessment**

6.1. **Nature of Referral**

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). The point of detail arising from condition 3 of permission Ref. PL06F.245865 relates to the application of the terms of the 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 scheme has therefore been referred to the Board for determination.

6.2. **Application of Fingal County Council Development Contribution Scheme**

6.2.1. The referrer contends that the level of development contribution sought by the Planning Authority is excessive and will affect the viability of the business. The referrer contends that they were not aware of the requirement to seek permission for

a change of use when they leased the premises, and that there had been no attempt to mislead or avoid their planning obligations.

- 6.2.2. While this may be the case, it is a fundamental legal principle that ignorance of the law is no excuse. In my view the Fingal County Council Development Contribution Scheme is quite clear in stating that, while an application for change of use is exempt where no issues of intensification arise, applications for retention of development are not exempt. There is no provision in the Scheme for individual circumstances to be taken into account when assessing contributions payable, other than those exemptions and reductions explicitly listed in Section 10, none of which apply in this case.
- 6.2.3. The referrer also contends that a reduced contribution, in line with reductions allowable for temporary permissions should be payable, since their lease is for a period of five years. However, the referrer did not seek retention permission for the change of use for a temporary period. Since permission enures for the benefit of the land, and is not tied to the applicant, the length of the applicant's lease is not a relevant planning consideration in my opinion. The use of the unit has been changed, and the current use will remain the permitted use until such time as a further grant of planning permission issues. In my opinion it would not be appropriate, therefore, to reduce the development contribution amount in line with those for temporary permissions.
- 6.2.4. The referrer submitted a copy of the Meath County Development Contribution Scheme 2016-2021 by way of comparison, and submits that it does not seek to penalise all retention applications. However, the consideration of this point of detail referral is limited to the application of the Fingal County Council Development Contribution Scheme and therefore the referrer's references to the Meath County Council Scheme are not a relevant consideration.
- 6.2.5. In conclusion, I consider that the Planning Authority correctly applied the terms of its Development Contribution Scheme and the sum payable is as set out by the Planning Authority in their letter to the referrer dated 14th November 2016. That sum was €66,952, based on a floor area of 1,126 sq m and a commercial rate of €59.46 per square metre.

6.3. Development Contribution Guidelines for Planning Authorities 2013

- 6.3.1. The referrer contends that, having regard to section 34(2)(ba) of the Planning and Development Act 2000, as amended, the provisions of the Development Contribution Guidelines for Planning Authorities 2013 apply instead of the provisions of the Development Plan to the extent that they differ. In particular, the referrer refers to the stated need to ensure that schemes do not impede job creation or result in levying of excessively high contributions and contends that while the Guidelines state that no exemption or waiver should apply to any applications for retention, the use of 'should' rather than 'shall' or 'must' is of relevance.
- 6.3.2. The stated purpose of the Development Contributions Guidelines for Planning Authorities 2013 is to provide non-statutory guidance to Planning Authorities on the preparation of Development Contribution Schemes. While the referrer refers to section 34(2)(ba) of the Acts, I note that the Development Contribution Scheme does not form part of the Development Plan, and therefore the Board is not constrained in its assessment of the matter at hand. Furthermore, I do not consider that there is any material difference between the relevant elements of the Guidelines and the Scheme. While the Guidelines reference the need to ensure that schemes do not impede job creation or result in levying of excessively high contributions, they also contain a clear disincentive for the undertaking of unauthorised development by stating not only that no exemption or waiver should apply to retention applications, but also that Planning Authorities are encouraged to impose higher rates in respect of such applications.
- 6.3.3. The referrer considers that by reference to section 48(1) of the Planning and Development Acts 2000, as amended, there is no explicit requirement for the Board to include a condition requiring the payment of a development contribution, due to the use of the word 'may' in the legislation. However, I note that section 48(11) states that:

“Where an appeal is brought to the Board in respect of a refusal to grant permission under this Part, and where the Board decides to grant permission, it shall, where appropriate, apply as a condition to the permission the provisions of the contribution scheme for the time being in force in the area of the proposed development.”

6.3.4. Having regard to section 48(11) of the PDA, I consider that the Board is required, where applicable, to include a condition requiring payment of a development contribution. As outlined above, I consider that the payment of a development contribution in accordance with the provisions of the relevant contribution scheme is applicable in this instance.

6.4. **Precedents**

6.4.1. The referrer contends that the Board's decision in case Ref. PL15.RP2137 is directly relevant to the subject referral. That case related to a point of detail referral regarding a development contribution condition attached to a Board decision to grant retention permission 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. The Board, in their Reasons and Considerations, determined that:

“Permission in principle for conversion of three retail warehouse units to cinema use was granted under appeal reference number PL 15.242726 (planning register reference number 13/106), and in that case a reduced development contribution (75% reduction) was applied for the ‘change of use’ of the retail units concerned. The development proposed under appeal reference number PL 15.246060 entails a similar but smaller cinema use, employing only two of the three retail warehouse units. Having regard to the planning history of the site and the description of development for the subsequent permission under appeal reference number PL 15.246060, which clearly distinguishes between internal works for which retention is sought and the change of use for which permission is sought, it is considered that the reduction allowable (75% reduction) under the applicable development contribution scheme for proposed change of use of a building should be applied in this instance.”

6.4.2. It is clear from the foregoing that in determining case PL15.RP2137, the Board distinguished between the works for which retention permission was sought, and the change of use, for which permission was sought. In the subject referral, the change of use has already occurred and retention permission, rather than planning

permission, was sought and granted. I do not therefore consider that the previous Board decision under PL15.RP2137 is relevant to the subject referral.

7.0 Recommendation

7.1. Having regard to the issues raised in relation to this point of detail, I consider that the Planning Authority correctly applied the terms of the Development Contribution Scheme. Accordingly, I recommend an Order in the following terms:

WHEREAS by Order dated the 31st day of March, 2016, An Bord Pleanála, under appeal reference PL06F.245865, granted, subject to conditions, permission to 7 Day Auto Ltd. care of McCutcheon Halley Walsh of 22/23 Pembroke Street Upper, Dublin 2 for the erection of two number proposed surface-mounted non-illuminated flat panel signs, retention of the change of use from light industrial to motor sales outlet, servicing of motor vehicles and ancillary associated uses and for the erection of four number existing surface-mounted non-illuminated flat panel signs to the south and east elevations of an existing building at Unit 8, Block 6, Plato Business Park, Damastown, Dublin 15:

AND WHEREAS condition number 3 attached to the said 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 facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment and the condition required that details of the application of the terms of the Scheme were to be agreed between the developer and the planning authority or, in default of such agreement, the matter was to be determined by An Bord Pleanála:

AND WHEREAS the developer and the planning authority failed to agree on the application of the terms of the Scheme in compliance with the terms of the said condition and the matter was referred by the developer to An Bord Pleanála on the 2nd day of March, 2017, 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 planning authority correctly applied the terms and conditions of the Development Contribution Scheme, which states that exemptions and reductions shall not apply to permissions for retention of development, and that the outstanding contribution required to be paid in respect of An Bord Pleanála appeal reference PL06F.245865 should be €66,952 (sixty six thousand, nine hundred and fifty two euro).

8.0 Reasons and Considerations

8.1. 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) An Bord Pleanála appeal reference PL06F.245865 (planning authority register reference number FW15A/0130), including condition 3 of that grant of permission, and
- (d) the submissions on file, and the planning history of the site

the Board considered that the scheme had been correctly applied by the planning authority and determined that the sum to be paid under condition number 3 of An Bord Pleanála appeal reference number PL06F.245865 should be €66,952. The Board considered that the Fingal County Council Development Contribution Scheme 2016-2020 does not allow for exemptions and reductions to apply to permissions for retention of development.

9.0 Matters Considered

9.1. 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.

Niall Haverty
Planning Inspector

18th May 2017