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Section 5 submission dated 14/10/19 to An Bord Pleanala (Board reference no. PL 06F. 305458)

by Douglas Hyde, Town Planner, 134 Georgian Village, Castleknock, Dublin 15 on behalf of

**OMEGA AIR SERVICES, Omega House, Collinstown Cross, Swords Road,
Dublin**

in relation to

Section 5 request by daa for declaration to Fingal County and referral by Fingal County Council to An Bord Pleanala. Fingal County Council register reference FS5/036/19 02001019

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The three questions

daa submitted a request for a declaration under s 5, Planning & Development Act 2000, as amended, to Fingal County Council in relation to three questions related to 'the use by passengers of the airport in excess of 32 million passengers per annum'. The three questions are

(a) Is the use of the 'airport' in excess of 32 million passengers per annum (mppa) constitute 'development', if the combined capacity of Terminal 2 as permitted together with Terminal 1 does not exceed 32 mppa and if so, is it exempted development?

(b) Is the use of the 'airport' by up to 3 million connecting passengers in excess of 32 million passengers per annum (mppa) constitute 'development' if those connecting passengers are facilitated by the separately permitted transfer facility and the combined capacity of Terminal 2 as permitted together with Terminal 1 does not exceed 32 mppa?

(c) Currently a connecting passenger using Dublin Airport is double counted as both arriving and departure (sic) passenger (for the purpose of aviation security measures). If a connecting passenger is counted singly for the purposes of planning, is this development, and if so, is it exempt development?

Background/context - the conditions which imposed the "cap" of 32 mppa

1. The "three questions" referred to An Bord Pleanala fundamentally arise from the daa's legal requirement to comply with planning conditions which impose a "cap" of 32 million passengers per annum (mppa) on the combined capacity of terminal 2 (T2) as permitted together with terminal 1 (T1), as extended by the extension permitted by permission 223469.

The conditions which imposed the "cap" are condition 3 of permission 220670 for Phase 1 of T2 and condition 2 of permission 223469, and both these permissions were granted by An Bord Pleanala in 2008.

2. Permission 220670, condition 3:

Condition 3 of the permission 220670 requires that:

3. The combined capacity of Terminal 2 as permitted together with Terminal 1 shall not exceed 32 million passengers per annum unless otherwise authorised by a further grant of planning permission.

Reason: Having regard to the policies and objectives of the Dublin Airport Local Area Plan and capacity constraints (transportation) of the eastern campus.

3. Permission 223469, condition 2:

Condition 2 in permission 223469. This permission was for an extension to T1, and the development was described as

Construct extension (7427 sq.m) to north of existing main terminal building and west of existing link building which extends from main terminal to Piers A and D and build temporary compound (emphasis added).

In this permission, the wording of the condition is as follows:

2. The combined capacity of Terminal 1 (including the extension authorised by this grant of permission) and Terminal 2 granted permission under planning register reference number F06A/1248 (An Bord Pleanála appeal reference number PL 06F.220670) shall not exceed 32 million passengers per annum unless otherwise authorised by a further grant of planning permission.

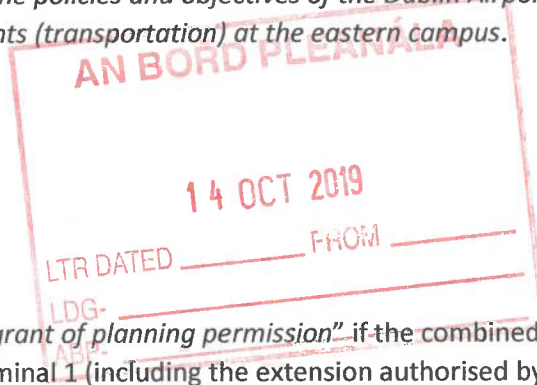
Reason: Having regard to the policies and objectives of the Dublin Airport Local Area Plan and capacity constraints (transportation) at the eastern campus.

The effect of the "cap" conditions

4. The "cap" conditions require a "further grant of planning permission" if the combined capacity of Terminal 2 as permitted together with Terminal 1 (including the extension authorised by permission 223469) is to exceed 32 mppa. (The "cap" conditions do not require that a Declaration under section 5 be sought.)

5. The Board's imposition the "cap" conditions which require that a "further grant of permission" be sought and obtained (if the 32 mppa threshold is exceeded) has the effect of changing the planning status of "**the use of T1 and T2 with an intensity in excess 32 mppa**". Because it requires authorisation by a further grant of planning permission, such use is now *ipso facto* 'development which is not exempted development'.

Legislative underpinning of this is found in sections 3 and 32 of the Planning and Development Act 2000, as amended.



- Section 3 includes a definition of “development”. The definition states that “except where the context otherwise requires”, development is “*the carrying on of any works on, in, over or under land*” or “*the making of any material change of use in any structures or other lands*”.

The present case is one “where the context (does) require” that, once the 32mppa is reached, the use of the terminals is ‘*development which is not exempted development*’ (and accordingly requires a grant of planning permission).

Thus, by virtue of its imposition of the “cap” conditions, the planning status of ‘*use of T1 and T2 at an intensity above 32 mppa*’ has been changed to that of ‘*development which is not exempted development*’.

- Section 32 of the Act states that planning permission is required for any development of lands, unless it is exempted development. Exempted development is development which does not require planning permission.

6. In addition, from the case law it is seen that a *material* change in use (and thus development requiring planning permission) can result from an increase in *the intensity of use of the activities carried out on the land*. Whether the use of the structure or land has changed in a way that is *material for planning purposes* is a question of fact and degree to be determined in the circumstances of the case. In determining whether a material change in use the ‘*planning unit*’ must be considered. On this instance, the relevant planning unit is as determined by the Board in its wording of the cap conditions.

In the present case, by virtue of its imposition of the “cap” conditions, the Board determined that triggering the “32 mppa threshold” would mean that the use of the relevant Dublin Airport lands would be changed in a way that is material for planning purposes. The appropriate ‘*planning unit*’ employed /determined by the Board in its decisions is T1 and T2, and not “the airport”.



Interpretation of (or ‘construction of’) conditions in planning permissions

7. The legal principles applicable to interpretation of planning documents and planning conditions in permissions have been considered by the Supreme Court. In particular, The interpretation (or ‘construction’) of conditions in planning permissions has been considered in a number of Supreme Court judgments. In *XJS Investments Limited v. Dun Laochaire Corporation*, the Supreme Court held that:

Certain principles may be stated in respect of the true construction of planning documents:...

(b) they are to be construed in their ordinary meaning as would be understood by members of the public ...unless such documents read as a whole necessarily indicate some other meaning.”

In *Kenny V. Dublin City Council*, the Supreme Court stated that:

A court, in interpreting a planning permission, may need to go no further than the planning document itself or even than the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will still need to interpret according to context.

In *Lanigan and Ors. V. Barry and Ors*, the Supreme Court in 2016 affirmed the dicta in *XJS Investments Limited* and pointed out that the *XJS* approach was an early example of the move towards “a text in context” method of construction (or interpretation) appropriate to the determination of the meaning of all documents potentially affecting legal rights and obligations. The text in context approach requires the court to consider the text in the context of the circumstances in which the document concerned was produced including the nature of the document itself.

Preliminary contextual points relevant to the text of the “three questions”

7. The wording of “the three questions” raises issues which are somewhat analogous to the requirements of the conditions which imposed the 32mppa “cap”.

In the “three questions”, it could be said that the word ‘airport’ is ‘substituted’ for “Terminal 1 (including the extension authorised by permission 223469) and Terminal 2”. This ‘substitution’ could be seen as a kind of retrospective re-framing of the context of the text of the “cap” conditions, especially since the Board has already determined the appropriate ‘planning unit’.

The context of the text of the “cap” conditions

8. The context of the conditions which imposed the 32 mppa cap can be seen from the reasons given by An Bord for imposition of the conditions and from the planning application documents, including the environmental impact statements (EISs).

The reasons for imposition of the “cap” conditions: These are

‘having regard to the policies and objectives of the Dublin Airport Local Area Plan (LAP) and capacity constraints (transportation) at the eastern campus’.

9. The context of the text can be seen in the various volumes of the Board’s Inspector’s reports, including appeal 220670 including Volume 3, Assessment and Volume 5 – Appendix, Report on Transportation Aspects of Planning Appeal for Second Terminal & Associated Works at Dublin Airport, Jerry Barnes, Town Planner, for An Bord Pleanala (Appendix to the Board’s Inspector’s Report on appeal 220670 into the proposed T2).

In the Barnes report, it is noted that the Dublin Airport Local Area Plan (LAP) was adopted as a statutory plan in August 2006. It provided a comprehensive framework for the development of the Airport and surrounding lands. The Plan established the concept of an Airport complex, served by two parallel runways and an eastern and western campus for terminal facilities. The landside transportation requirements for the developed airport consist principally of an ‘Airport Box’ with a road system designed and constructed to dual carriageway standard. This road box would be connected to the external national road network by the western access linking it to the N2 and an upgraded R108 connecting it with the M50 at the Ballymun interchange. There would also be a connection between the R132 and Baldoyle and between St. Margarets and Swords. Metro North would significantly enhance public transport accessibility to the Airport and the GTC would be centrally located within the complex.

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Reference to the 30 mppa figure for the eastern campus is made on page 3 of the Executive Summary of the (Dublin Airport Local Area) Plan 2006 and in section 4.2 of the main body of the text. The concept of the western campus is firmly established in Chapter 4 of the LAP. The following objective confirms its status:

TP10 -To reserve lands to the west of the north-south runway 16/34 between the two parallel runways for the future expansion of the airport to the full potential of the twin parallel runway system, and to define a development box in which the appropriate terminal, pier and apron facilities can be provided.

Ultimately the runway system will determine the full capacity of the Airport. At the oral hearing which considered appeal 220670, the inspector's report noted (at page 36, Appendix) that Sean O' Faircheallaigh, Senior Planner, Fingal County Council, explained to the hearing the rationale for the figure of 30 mppa on the eastern campus. (emphasis added)

He (Mr. Faircheallaigh) indicated that a figure of 60 mppa was assumed for the capacity of a parallel runway system, although it was emphasised that this was a very approximate figure. It was on this basis that a figure of 30 mppa for the eastern campus was included in the LAP as representing a balanced development of the whole complex. The figure of 30 mppa also appears to reflect the understanding in the NDP of T1 and T2 terminal capacity.

This balanced development of the Airport could then be served by surface access proposals included in the Plan and "...Direct surface access to the western N2 will be provided as an integral part of any development provided on the Western Campus" (p19 of LAP). The following surface access objectives are also relevant in the balanced development of the Airport.

EA2 – To implement a programme of road development on the external road network to ensure that a balanced response to the expansion of Dublin Airport occurs.

EA3 - To ensure that the road infrastructure has the capacity to better arrange traffic in the vicinity of Dublin Airport and to cater for the estimated growth in traffic in the future.

EA4 – To develop the external road network on a phased and planned basis."

The remaining external road objectives EA5 to EA15 detail the various elements of the road infrastructure.

The Report prepared by Jerry Barnes for the Board continues:

3.3.7 The provisions of the LAP therefore seek to ensure that an over-developed eastern campus does not prejudice the development of T3 on the western campus, which would be served by the western access link to the N2. The Aviation Action Plan also highlights the need to consider, at an early stage, the development of T3. It is not therefore considered that the 30 mppa figure represents a cap, but any figure over this needs to be carefully considered with due regard to the need to ensure that the development of the western campus is not prejudiced and the provision of terminal facilities are coordinated with the landside transport infrastructure.

10. The above series of extracts from the Barnes report for the Board describe the 'context of the text' of the conditions in the planning permissions which imposed the "cap" of 32 mppa on T1 and T2 combined.

- In summary, the “cap” conditions were imposed to facilitate balanced development of Dublin Airport which could then be served by the surface access proposals included in the Dublin Airport Local Area Plan 2006.

Brief comment on the “three questions”

11. In the first of the “three questions”, reference is made to “*the use of ‘Dublin Airport’ as opposed to the combined capacity of terminals T1 and T2*”.

In 2008 when the “cap” conditions were imposed, the ‘capacity of terminals T1 and T2’ was seen as synonymous with the capacity of Dublin Airport and this is seen in the Inspector’s reports; there were lengthy discussions at the Oral Hearing into 220670 and 223670 into the appropriate methodology for calculating capacity. The Inspector’s Report in 220670, at page 130 of Volume 3 said:

I consider the issue of capacity relevant mainly in the context of compliance with the policies and objectives of the LAP, in particular, whether it would undermine achieving its objectives.

CONCLUSION - RESPONDING TO THE THREE QUESTIONS:

12. It is respectfully submitted to the Board that the appropriate answers to the “three questions” should be informed by all of the points made in this submission. If the Board considers that the questions are worded in a manner appropriate to a Request for a Declaration under section 5, which seems doubtful, it is submitted that the appropriate Declarations are:

In relation to question a, the recommended Declaration/answer is “*The use is development and it is not exempted development*”, for the reasons in paragraphs 4, 5 and 6 above in particular.

In relation to question b, since many transit/connecting passengers are likely generate the need for additional staff for security, cleaning, food services, waste disposal, and as servicing these needs requires additional staff traffic movements, service providers’ traffic movements, food, drink, consumables service provider traffic movements, it is submitted the use of the airport by transit/connecting passengers should be counted in determining if the threshold figure of 32 mppa is reached. Consequently, the recommended Declaration/answer is: “*The use is development and it is not exempted development*”.

In relation to question c, while it may seem reasonable that a transit/connecting passenger should be counted singly, it appears that the section 5 request procedure is not the appropriate procedure for obtaining an answer to this question, (or to any of the three questions), in light of the wording of the “cap” conditions. The Recommended Declaration/ answer is “*This question is not considered to be a valid question for determination by the section 5 procedure*”.

Douglas Hyde, Town Planner,
on behalf of Omega Air Services, 14/10/2019

