



An
Bord
Pleanála

Inspector's Report ABP-300501-17

Question

Whether the car parking spaces granted under Reg Ref D98A/0022 / ABP PL06D106187 enable them to be used for public use or does their use as public spaces amount to a material change in their use and intensification, is or is not development or is or is not exempted development.

Location

Killiney Hill Plaza, Killiney Hill Road, Killiney, Glenageary, Dublin

Declaration

Planning Authority

Dun Laoghaire Rathdown County Council

Planning Authority Reg. Ref.

Ref12617

Applicant for Declaration

Killiney Hill Plaza Management Co Ltd

Planning Authority Decision

Grant Permission

Referral

Referred by

Killiney Hill Plaza Management Co Ltd

Owner/ Occupier

Killiney Hill Plaza Management Co Ltd

Observer(s)

None.

Date of Site Inspection

14th April 2018

Inspector

Mary Crowley

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1.0 Site Location and Description

1.1. The car parking spaces are located to the front of a residential complex on Killiney Hill Road, within the Killiney Village cluster and to the south of the roundabout with Victoria Road. A set of photographs of the site and its environs taken during the course of the site inspection is attached.

2.0 The Question

2.1. Whether the car parking spaces granted under Reg Ref D98A/0022 / ABP Ref PL06.106187 enable them to be used for public use and / or does their use as public spaces amount to being a material change in their use and intensification that would require permission to be sought is or is not development or is or is not exempted development at Killiney Hill Place, Killiney Hill Road, Killiney, Co. Dublin.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1. A Declaration was requested by Killiney Hill Plaza Management Company Limited on 23rd October 2017 in relation to the above question.

3.1.2. The application was submitted by Marston Planning Consultancy on behalf of the applicant, Killiney Hill Plaza Management Co Ltd and was accompanied by the following documents:

- Cover letter prepared by Marston Planning Consultancy, the contents of which are similar to Referrers submission outlined in Section 6 below.
- OS Map
- Site plan submitted as part of the 1998 planning application
- Unsolicited further information submitted as part of the 1998 application
- Compliance submission made in relation to the 1998 application

- 3.1.3. A Declaration was issued by Dun Laoghaire Rathdown County Council on 17th November 2017 that concluded that the above question was “not considered to be development”. The Declaration states as follows:

“In pursuance of its functions under the Planning & Development Acts 2000 (as amended), Dun Laoghaire Rathdown County Council has, by Order No Ref 160/17 dated 17th November 2017 decided to issue a Declaration that the car parking spaces granted under Reg Ref D98A/0022 APB Ref PL06D.106187 at Killiney Hill Plaza, Killiney Hill Road, Killiney, Glenageary, Dublin to be used for public use and / or does their use as public spaces amount to being a material change in this use and intensification that would require planning permission to be sought as outlined in the plans and documentation submitted to the Planning Authority on 23rd October 2017 is not considered to be development as per Section 3(1) of the Planning and Development Act 2000 as amended is hereby approved

3.2. Planning Authority Reports

3.2.1. Planning Reports

- 3.2.2. The **Record of Executive Business Chief Executive’s Orders** refers to the report received from Transportation Planning dated 16th November 2017. It is stated that the parking of cars whether public or private constitutes “development” or “work” as defined above. The report also states that it is not considered that the parking of cars whether public or private is a material change of use defined in Section 3(1) of the Planning and Development Act 2000, as amended, and, therefore, does not constitute development.

3.2.3. Other Technical Reports

- 3.2.4. The report received from **Transportation Planning** referred to in the Case Planners report was requested by the Board on the 6th April 2018. In response the following was provided

“Section 5 – Transportation Report

The Council (DLRCC – Parking Control Section) wrote to the Gardai at Dun Laoghaire recently and advised them that Killiney Hill Road is a Regional Road, and as such the footpaths and the roadway (including the parking bays

in question) are maintained and in charge of Dun Laoghaire Rathdown Council.”

4.0 Planning History

4.1. **PL06D.106187 (Reg Ref D98A/0022)** – An Bord Pleanála granted permission in 1998 for the demolition of premises formerly known as Jades Restaurant and erection of a three storey development consisting of one number penthouse apartment, associated car parking with entrance gates to the lands at the rear, car parking and enclosed garden area to the front with pedestrian entrance gates off Killiney Hill Road, Killiney Village, Co Dublin subject to 6 no Conditions. Conditions of note are as follows:

- **Condition No 1** – The proposed private garden area to the front shall be omitted and the area paved and landscaped. Before commencement of development, a revised layout of paving and landscaping proposals for the area shall be submitted for agreement with the planning authority. This layout shall include details of the public footpath and parking spaces on Killiney Hill Road, including dimensions.

Reason: In the interest of the amenities of the area.

5.0 Policy Context

5.1. Development Plan

5.1.1. The operative plan for the area is the Dun Laoghaire Rathdown County Development Plan 2016 – 2022. The site is within an area Zoned “A” where the stated objective is *“to protect and / or improve residential amenity”*. The site is also located within the Killiney Architectural Conservation Area.

5.2. Natural Heritage Designations

5.3. The site is not located within a designated Natura 2000 site. The closest European sites are the Dalkey Islands SPA and the Rockabill to Dalkey Island SAC.

6.0 The Referral

6.1. Referrer's Case

- 6.1.1. Under Reg Ref D98A/0022 / ABP Ref PL06D.106187 permission was granted for 3 no car parking spaces and enclosed garden area to the front of the proposed scheme along with pedestrian entrance gates off Killiney Hill Road. The car parking spaces permitted under the 1998 permission along Killiney Road were located within the red line of the application and were therefore within the control / ownership of the applicant at the time of making the application. No reference is made in the planning application or appeal by any of the parties, the Board or Planning Authority that the spaces along Killiney Hill Road were for public use.
- 6.1.2. Further, when the planning application was made to the Council a total of seven car parking spaces were proposed to serve the development. Reference is made to the report submitted by the applicants agent in 1998 (Neil Burke-Kennedy Designs) and the Local Authority Planners Report that stated that four of these spaces were to the rear to serve the apartments and three along Killiney Hill Road were to serve visitors apartment complex. The applicants Architects Report stated that *the no. of car spaces at the rear has been reduced from 6 to 4 (one space per unit was agreed in principle at meeting with the planners dated 10th November 1997 with provision for 3 visitor spaces to be provided at the front of the building)*. This clearly establishes a link between the proposed development of Killiney Hill Plaza and the provision of car parking spaces on Killiney Hill Road to serve the development.
- 6.1.3. A compliance submission dated 8th May 1999 was made to the Council in relation to Condition No 1 of the Boards decision. This stated that the three car parking spaces along Killiney Hill Roads were to be reserved for visitors of the tenants of the development. It is noted that the Planning Authority did not make any response in relation to this submission and therefore the only reasonable interpretation is that they viewed the submission as being in compliance with Condition No 1.
- 6.1.4. It is submitted that the Council have provided significant weight to the Report that they received from the Transportation Planning (dated 16th November 2017) that stated that the footpaths and roadway (including the parking bays in question) are

maintained and in charge of the Planning Authority. Submitted that this is irrelevant to the consideration of this referral.

6.1.5. Reference is made to the following law cases:

- Lancefort Ltd vs An Bord Pleanála – the permission granted by the Board in 1999 is a valid permission.
- Ashbourne Holdings Ltd vs An Bord Pleanála
- Readymix (Eire) Ltd vs Dublin City Council – Where the planning permission recorded in the statutory register is self-contained, it will not be permissible to go outside the planning unit in construing it. This is critical to the interpretation of the use of the car parking spaces, which were unequivocally linked to the granting of permission under the 1998 application. Submitted that whether the spaces are taken in charge or not is irrelevant to the interpretation of their use and the permission that granted the spaces.

6.1.6. There is a requirement that any development is carried out in conformity with the permission pertaining to that development or to any condition that that permission is subject to. It is submitted that having undertaken an assessment of the permitted development the following is correct:

- At no time during the application and decision making process were the car parking spaces along Killiney Hill Road referred to as public car parking spaces
- Without the car parking spaces along Killiney Hill Road, or at least two of them, the application would have had an insufficient number of car parking spaces to meet the 1998 Development Standards and is likely to have been refused permission as it would have been served by an insufficient number of car parking spaces and
- The spaces are referred to as visitor spaces during the application and as car parking spaces reserved for tenants of the development in the compliance submission. Noted that this compliance submission was accepted by the Planning Authority.

6.1.7. The Supreme Court in Kildare County Council vs Goode held that intensification can result in a material change of use. In this instance the permission granted the development of three car parking spaces along Killiney Hill Road. It is clear that they

were not granted to be used as public car parking spaces but for the sole benefit of the residents and visitors of Killiney Hill Plaza. This is particularly pertinent given the lack of parking spaces to serve existing dwellings and public spaces in the area. Their use as public car parking spaces could amount to an intensification / material change in their use and a significant alteration of the planning unit granted by the Board for the development of Killiney Hill Plaza and amount to a material intensification requiring permission to be sought. Submitted that it has the potential to result in unauthorised parking on Killiney Hill Road and also on Talbot Road that would result in a traffic hazard and have a negative impact on residential amenity. The car parking spaces formed part of and were irrevocably linked to the attaining of permission for Killiney Hill Plaza. In essence if the car parking spaces along Killiney Hill Road were not proposed as part of the development then it is unlikely that permission would have been granted as there would have been an insufficient number of car parking spaces.

- 6.1.8. The Board is requested to conclude that the increase in use of the car parking spaces; traffic hazard that would ensue; the potential for illegal parking and other amenity impacts must lead to a conclusion that the use of the spaces as fully public car parking spaces will result in a material intensification of their use and materially alter the planning unit thus resulting in an insufficient number of car parking spaces to serve Killiney Hill Plaza as per the grant of permission under Reg Ref D98A/0022 / ABP Ref PL06D.106187.

6.2. Planning Authority Response

- 6.2.1. Dun Laoghaire Rathdown County Council in their submission dated 19th January 2018 stated that they have no further comments to add.

6.3. Further Responses

- 6.3.1. There are no further responses recorded on the appeal file.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

7.1.1. Development

7.1.2. Section 3(1) of the Planning and Development Act 2000, as amended states:

“In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land”

7.1.3. Section 2(1) of the Planning and Development Act 2000, as amended states:

“Any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.”

7.1.4. Section 4(2) provides for exempted development as follows:

Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principle regulations made under this section are the Planning and Development Regulations, 2001.

7.2. Planning and Development Regulations, 2001 (as amended)

7.2.1. Article (6)(1) of the Regulations states that subject to Article 9 development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 2.

7.2.2. Under Part 2, Section 9 of the Planning and Development Regulations, 2001 development to which Article 6 relates shall not be exempted development for the purposes of the Act:

(a) *if the carrying out of such development would*

(i) *contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,*

7.3. Other

7.3.1. Reference is made to the following Case Law throughout the Referral file:

- Lancefort Ltd vs An Bord Pleanála
- Ashbourne Holdings Ltd vs An Bord Pleanála
- Readymix (Eire) Ltd vs Dublin City Council
- Butler vs Dublin Corporation
- Kildare County Council vs Goode

8.0 Assessment

8.1. A Referral was lodged with An Bord Pleanála by the Killiney Hill Plaza Management Company Limited on 14th December 2017 asking:

Whether the car parking spaces granted under Reg Ref D98A/0022 / ABP Ref PL06.106187 enable them to be used for public use and / or does their use as public spaces amount to being a material change in their use and intensification that would require permission to be sought is or is not development or is or is not exempted development at Killiney Hill Place, Killiney Hill Road, Killiney, Co. Dublin.

8.2. The appeal was prepared by Marston Planning Consultancy on behalf of Killiney Hill Plaza Management Company Limited against the Declaration issued by Dun Laoghaire Rathdown County Council under Section 5 of the Planning and Development Act 2000 (as amended). The Declaration stated that *the use of the car parking spaces granted under Reg Ref D98A/0022 APB Ref PL06D.106187 for public use is not considered to be development as per Section 3(1) of the Planning and Development Act 2000 as amended*

8.3. The Referrer submits that the three car parking spaces are integrally linked to and are private spaces that form part of the permission granted by An Bord Pleanála under Reg Ref D98A/0022 / ABP Ref PL06D.106187 and that their use as public car parking spaces is development requiring planning permission.

8.4. Is or is not development

- 8.4.1. I agree with the applicant that what is critical in this instance is whether the use of the 3 no car parking spaces along Killiney Hill Road as public car parking spaces rather than car parking spaces serving the Killiney Hill Plaza development amounts to development.
- 8.4.2. I have considered the history file pertaining to this site; PL06D.106187 refers. This history application was for the demolition of premises formerly known as Jades Restaurant and the erection of a three storey residential development and associated car parking that was granted planning permission by An Bord Pleanála in August 1998 subject to 6 no conditions. The Board will be aware that where a permission incorporates other documents, it is the combined effect of the permission and such documents which must be looked at in determining the proper scope of the permission. In this case it is clear from the drawings and details submitted with the application together with the report of the applicants agent dated 21st January 1998, (Neil Burke-Kennedy Designs) that 3 no visitor car parking spaces were to be provided at the front of the building parallel to Killiney Hill Road to serve the scheme. It is also noted that the Roads Department Planning Report dated 26th February 1998 concluded that *the proposal should be accepted as it provided parking in a manner which avoids cars traversing the footpath, which is safer for pedestrians.* Further the report of the Local Authority Case Planner noted the proposal to provide *three parallel spaces at the front to serve visitors.*
- 8.4.3. The decision of Dun Laoghaire Rathdown County Council to grant permission was appealed. The Planning Inspector in their report to the Board noted the provision of 3 no car parking spaces along the Killiney Hill. The Board granted permission subject to 6 no conditions. Condition No 1 required the proposed private garden area to the front shall be omitted and the area paved and landscaped and that before commencement of development, a revised layout of paving and landscaping proposals for the area fronting Killiney Hill Road to include details of the public footpath and ***parking spaces on Killiney Hill Road***, shall be submitted for agreement with the planning authority (emphasis added).
- 8.4.4. Having regard to the foregoing I agree with the applicant that 3 no parallel car parking spaces fronting Killiney Hill Road are linked to Killiney Hill Plaza and that

these 3 no spaces are private car parking spaces serving the parent residential development at Killiney Hill Plaza only (PL06D.106187 refers). I am also of the view that a change of use from private car parking spaces to public car parking spaces at this location is a material change of use by reason of an intensification of use from a low turnover of private residential / visitor car use serving Killiney Hill Plaza only to a high turnover of public car use serving Killiney Village and its associated retail, restaurant and public house use.

- 8.4.5. Therefore a change of use from private car parking associated with Killiney Hill Plaza to public car parking is a material change of use and is therefore development as defined in Section 3(1) of the Planning and Development Act 2000, as amended.

8.5. Is or is not exempted development

- 8.5.1. The principal classes of exempted development are provided for under Section 4 of the 2000 Act and under the Planning and Development Regulations 2001 as amended. The primacy of exemption is to remove certain minor or insignificant development from the requirements to obtain planning permission. Article (6)(1) of the Regulations states that subject to Article 9 development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 2. There are no exemptions for the change of use from use as a private car park to use as a public car park or vice versa in Schedule 2 of the Planning and Development Regulations 2001 as amended.
- 8.5.2. Further, as established above, the 3 no spaces are tied to the planning permission granted under PL06D.106187 as being visitor car parking spaces to serve the permitted residential development of Killiney Hill Plaza only. Therefore any change of use from that permitted i.e. 3 no private car parking spaces serving Killiney Hill Plaza will require planning permission.
- 8.5.3. A change of use from private car parking associated with Killiney Hill Plaza to public car parking is not exempted development.

9.0 Recommendation

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

AND WHEREAS Killiney Hill Plaza Management Ltd requested a declaration on this question from Dun Laoghaire Rathdown County Council and the Council issued a declaration on the 17th day of November 2017, stating that the matter was not development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 23rd day of October, 2017:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (d) Parts 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (e) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) A change of use from private car parking serving Killiney Hill Plaza to public car parking is a material change of use and is therefore development as defined in Section 3(1) of the Planning and Development Act 2000, as amended.

- (b) There are no exemptions for the change of use from use as a private car park to use as a public car park or vice versa in Schedule 2 of the Planning and Development Regulations 2001 as amended.
- (c) A change of use of 3 no private car parking spaces provided to the front of, and, serving Killiney Hill Plaza, to use as public car parking is not exempted development.
- (d) These 3 no private car parking spaces are tied to PL06D.106187 as being visitor car parking spaces to serve the permitted residential development of Killiney Hill Plaza. Therefore any change of use from that permitted i.e. to use as public car parking is not exempted development and will require planning permission.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (X) (x) of the 2000 Act, hereby decides that the is/ is not development and is/ is not exempted development.

Mary Crowley

Senior Planning Inspector

22nd May 2018