



An
Bord
Pleanála

Inspector's Report ABP-300881-18

Question	Whether the erection of utility boxes on the street is or is not development and is or is not exempted development
Location	College Green Lower Grafton Street, Dublin 2
Declaration	
Planning Authority	Dublin City Council
Planning Authority Reg. Ref.	0298/17
Applicant for Declaration	Frank McDonald
Planning Authority Decision	Is Exempted Development
Referral	
Referred by	Frank McDonald
Observer(s)	None
Date of Site Inspection	20/02/2019 30/10/2019
Inspector	Gillian Kane

1.0 Site Location and Description

- 1.1.1. The subject utility boxes are located at the corner of College Green & Grafton Street and on Grafton Street outside the Provost's House of Trinity.

2.0 The Question

- 2.1.1. Whether the erection of utility boxes on College Green and Lower Grafton Street is or is not development and is or is not exempted development.
- 2.1.2. As noted by the submission of both DCC and TII, the number and location of cabinets at the two subject sites has changed during the course of this referral. A site inspection undertaken by DCC in August 2017 identified 8 no. technical cubicles outside no. 36 College Green and 11 no. cubicles outside the Provosts House. An email sent from ESB to the Planning Department (dated 18 December 2017) states that from the photo of cabinets at Provost the cabinets can be identified. The email continues that from "the second photo" at College Green, the first cabinet is an "ancient DCC traffic control pillar" and no.s two to eight are DCC or TII cabinets. Whilst the photos used by the Planning Department have not been made available to the Board, it appears that some of the cabinets referred to have been removed.
- 2.1.3. A submission from Dublin City Council to the Board dated May 2019 provides a photo and map of some of the cabinets. The submission shows five cabinets outside no. 36 Grafton Street: DCC traffic Controller Cabinet, DCC Transmission Cabinet, TII / Luas Automated Vehicle System Cabinet, DCC ODF Fibre Cabinet and one unlabelled cabinet. My site visit in October 2019 shows the situation the same as that photographed in May 2019.
- 2.1.4. For ease of reference and using the numbering system started in the first TII submission, the information received by the Board can be tabled as follows:

	Oct 2017 (TII)	Dec 2017 (ESB)	May 2019 (TII)	May 2019 (DCC)
Grafton Street				
1	Outside of referral area	n/a	n/a	n/a
2	New Road Traffic Controller Cabinet	DCC or TII cabinet	DCC Road Traffic Controller Cabinet	DCC Road Traffic Controller Cabinet
3	New Transmission Cabinet	DCC or TII cabinet	DCC Traffic Transmission Cabinet	DCC Traffic Transmission Cabinet
4	TII Cabinet New automatic vehicle Location System Cabinet	DCC or TII cabinet	Luas New automatic vehicle Location System Cabinet	Luas AVLS cabinet
5	Optical Distribution Frame Cabinet	DCC or TII cabinet	Optical Distribution Frame Cabinet	DCC ODF fibre cabinet
6	Transmission Cabinet	DCC or TII cabinet	Removed	n/a
7	Road Traffic Controller	DCC or TII cabinet	Removed	n/a
8	Road Traffic Controller	DCC or TII cabinet	Removed	n/a
Provosts House TCD				
1	Road Traffic Controller	DCC Traffic Controller	Removed	n/a
2	Unknown, not TII	BT Telecoms Pillar	Unknown, not Luas related	No information provided
3	Public Lightning Cabinet	DCC Public Lighting Cabinet	Public Lightning Cabinet	No information provided
4	ESB mini pillar	DCC micro pillar that houses the ESB supply	ESB mini pillar	No information provided
5	Main ESB supply	ESB mini pillar installed by TII contractors and connected by the ESB as part of the initial Luas works to provide supply to the DCC public lighting, DCC traffic and BT telecoms,	Main ESB supply	No information provided
6	Public lighting Cabinet	DCC public lighting cabinet	Public lighting Cabinet	No information provided
7	ESB mini pillar for new Road Traffic Controller	DCC micro-pillar that houses ESB supply for DCC	ESB mini pillar for new Road Traffic Controller	No information provided

		Traffic controller		
8	Road Traffic Controller	DCC Traffic controller	Road Traffic Controller	No information provided
9	Transmission Cabinet	DCC Traffic Transmission Cabinet	Transmission Cabinet	No information provided
10	TII Cabinet New Automatic Vehicle Location System	TII	Luas New Automatic Vehicle Location System	No information provided
11	TII Cabinet Trackside Distribution Cabinet	TII	Luas Trackside Distribution Cabinet	No information provided

2.1.5. From the above, the situation as of Oct 2019 is that there are five cabinets outside no. 36 Grafton Street, four of which are in the ownership / control are DCC or TII / Luas and one micro cabinet that is unknown. Outside the TCD provost's house there are ten cabinets. Of these ten, one (no. 2) is a BT Telecoms cabinet and the remaining nine relate to operations by DCC and TII / Luas. The submission of DCC notes that the DCC traffic controller cabinets house the equipment that runs the three pedestrian crossings. The DCC transmission cabinets house the equipment for the CCTV cameras and the fibre transmission equipment. And the ODF cabinet houses 96/144 fibre cables for multiple distribution of the DCC infrastructure.

2.1.6. I propose to assess this referral on the four cabinets at no. 36 Grafton Street and the ten cabinets outside the Provosts House.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1. Following a request for further information, on the 15th January 2018 Dublin City Council issued a declaration stating that "the proposed development IS EXEMPT from the requirement to obtain planning permission under section 32 of the Planning and Development Act 2000-2013".

3.1.2. The Recommendation states: "Based on the additional information received, the utility boxes / cabinets on the street at College Green / Lower Grafton Street are considered to be exempted development under section 38 of the Roads Traffic Act 1994 and under the provisions of the Rail Order associated with the Luas light rail scheme".

3.2. **Planning Authority Reports**

3.2.1. **Planning Report:** The structures appear to have been put in place by statutory undertakers such as Dublin City Council Traffic Department, Dublin City Council Public lighting section, ESB and Luas Cross City. It is considered that the cubicles / cabinets are works undertaken by a statutory undertaker in connection with the movement of traffic by rail in, on, over or the operational land of the undertaker and could be considered exempt development. In addition, it should be noted that enabling and construction works involved in facilitating the Luas light rail scheme have necessitated the removal and relocation of a number of pre-existing cubicles / cabinets in the vicinity. As a consequence, new cubicles have been placed / replaced in College Green and / or Grafton Street. It is considered that these works could also fall under the provision of the Rail Order (Part 4 Miscellaneous and General, section 23 interference with Apparatus) which states that the relevant undertaker may and upon reasonable request by the Agency, shall without reasonable delay remove the apparatus and / or relocate it or other apparatus in substitution for it in such position or location as may be agreed with the Agency. Section 38 of the Roads Traffic Act 1994 provides for traffic signals to be erected. Traffic signals needs cabinets and as a number of the cabinets on College Green and Lower Grafton street are used by the City Council traffic department, these cabinets could be considered exempted development. Some ambiguity exists regarding the stakeholder / user of the cabinets / cubicles

4.0 **Relevant Planning History**

4.1.1. **PL29N.NA0004:** Planning permission granted for the construction, operation and maintenance of a light railway system from St Stephen's Green to Broombridge, Dublin on the 2nd August 2012.

5.0 **The Referral**

5.1. **Referrer's Case**

5.1.1. The referrers case can be summarised as follows:

- Section 38 of the Road Traffic Act 1994 deals exclusively with traffic calming measures taken "in the interest of the safety and convenience of road users". The specific subject matter is set out in the left-hand margin of this section of the Act.

- A traffic calming measure is defined in s38 as one which “shall be deemed to be a structure forming part of the public road concerned and necessary for the safety of road users”. Traffic calming measures “means measures which restrict or control the speed or movement of, or which prevent, restrict or control access to a public road or roads by mechanically propelled vehicles... and measures which facilitate the safe use of public roads by different classes of traffic”. These include the provision of traffic signs, road markings, bollards, posts, poles, chicanes, rumble areas, raised lowered or modified junctions, works to reduce to modify the width of the roadway and landscaping, planting or other similar works”
- It is submitted that the utility boxes are directly associated with the operation of Luas Cross city and therefore they cannot be considered to be traffic calming measures.
- The Board will be aware of the controversy over the visual obtrusiveness of the utility boxes within the Grafton Street and Environs ACA and the Special Planning Control Scheme.
- Section 7.3.5 of the Luas Cross City EIS (Luas BXD) refers to the need for four electricity substations to serve the route from St Stephens Green to Broombridge. There is a vague reference to “technical cubicles located above ground in the vicinity of tram stops and in some cases on adjoining streets”.
- The EIS states that the technical cubicle for Trinity would be at the underground toilets at the Thomas Moore statue. There are random boxes at ground level beside the statue. The EIS does not mention technical cubicles at the southern side of College Green or at the Provost’s House.
- The Boards railway order mentions the construction of a “technical cubicle” (Work no. 10) on the south side of Dawson Lane. Work no, 39 refers to the construction of a cubicle on Princes Street North, work no. 46: Thomas Lane, works no. 50 and 56: western side of Marlborough Street, work no. 65: Dominick Street Lower. None of the works refer to the construction of several cubicles on College Green or Lower Grafton Street. There is no indication of these installations on the drawings submitted by the RPA.
- The An Bord Pleanála Inspector’s Report referred to an objection to the cubicle on Marlborough Street on the grounds of negative impact on the property and the

visual amenity of the area. The report notes that the RPA representative stated that cubicles were generally “not on main thoroughfares”. The report notes that another RPA representative stated that the RPA generally tried to decrease visibility of cubicles. Locations that caused visual intrusion were rejected by the City Council. The An Bord Pleanála Inspector recommended that the technical cubicle on Marlborough street be omitted on the grounds of adverse impact on the character of the street. An alternative location was to be agreed with the City Council. The option of relocating the cubicle to North Great Georges street was rejected due to the historic heritage of the street. The referrer submits that this consideration would apply with much greater emphasis to College Green and Lower Grafton Street.

- The installation of 126 no. thick steel poles from Stephen’s Green to Parnell Street has attracted attention. The banks of ‘technical cubicles’ represents a step too far.
- The EIS for the College Green Plaza shows the four utility boxes. This is the only drawing on which they are shown.
- It is submitted that the technical cubicles are not only an eyesore but also an impediment to pedestrian movement. That they are right next to the interface between the plaza and the two-way cycle route represents a traffic hazard. Therefore, it is all the more surprising that the City Council is now relying on section 38 which is about making streets safer.
- It is submitted that as the banks are not mentioned in the Railway Order, the EIS for the Luas, the Board Inspector’s report or the drawings submitted by the RPA, therefore their installation is unauthorised development and requires an application for permission.

5.1.2. The referral submission is accompanied by copies of correspondence between the referrer and the City Council.

5.2. **Planning Authority Response**

5.2.1. The position of the three DCC cabinets at the junction of College Green and Grafton Street is shown in attached map and photograph.

5.3. TII Response

- 5.3.1. The position of the TII is “The Railway Order made by An Bord Pleanála under case ref. PL29N.NA0004 approved the construction operation and maintenance of a light railway system from St. Stephens Green to Broombridge, Dublin.” The response states that the first schedule of the Railway Order defines authorised works and TII confirms that the cubicles identified in the attached figures are works required for the purposes of the railway under the Railway Order. TII has no other cabinets / technical cubicles or utility boxes. The response notes that under section 38 of the Transport (Railway Infrastructure) Act 2001, the technical cubicles are exempted development for the purposes of the Planning and Development Act 2000, as amended. Section 38 provides that “development consisting of the carrying out of works authorised by the Board and specified in a railway order, or of any incidental or temporary works connected with such development shall be exempted development”.
- 5.3.2. Subsequent to the TII’s submission of 11 October 2017, Luas Cross City has been completed and is fully operational. It is noted that there has been some rationalisation of cabinets / technical cubicles at College Green / Lower Grafton Street and updated TII figures are attached to the response.

6.0 Statutory Provisions

6.1. Planning and Development Act, 2000

- 6.1.1. The following statutory provisions are relevant in this instance.
- 6.1.2. Section 2: “**statutory undertaker**” means a person, for the time being, authorised by or under any enactment or instrument under an enactment to— (a) construct or operate a railway, canal, inland navigation, dock, harbour or airport, (b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or (c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking;
- 6.1.3. Section 2(1): In this Act, except where the context otherwise requires “**works**” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...;

“**structure**” means any building, structure, excavation or other thing constructed or made on, in or under any land, or any part of a structure so defined and (a) Where this context so admits, includes the land on, in or under which the structure is situated”.

6.1.4. Section 3(1): in this Act, "**development**" means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.

6.1.5. Section 4(1): sets out developments that shall be exempted development for the purposes of this Act.

6.1.6. Section 5(1): If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

(4): Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

6.2. **Road Traffic Act 1994**

38.—(1) A road authority may, in the interest of the safety and convenience of road users, provide such traffic calming measures as they consider desirable in respect of public roads in their charge.

(2) A road authority may remove any traffic calming measures provided by them under this section.

(3) Before providing or removing traffic calming measures under this section of such class or classes as may be prescribed, a road authority shall—

(a) consult with the Commissioner;

(b) publish a notice in one or more newspapers circulating in the functional area of the authority—

- (i) indicating that it is proposed to provide or remove the measures, and
- (ii) stating that representations in relation to the proposal may be made in writing to the road authority before a specified date (which shall be not less than one month after the publication of the notice);
- (c) consider any observations made by the Commissioner or any representations made pursuant to *paragraph (b) (ii)*.
- (4) The making of a decision to provide or remove traffic calming measures of a class prescribed under *subsection (3)* and the consideration of observations or representations under *paragraph (c)* of that subsection shall be reserved functions.
- (5) Traffic calming measures shall not be provided or removed in respect of a national road without the prior consent of the National Roads Authority.
- (6) The Minister may issue general guidelines to road authorities relating to traffic calming measures under this section and may amend or cancel any such guidelines and, where any such guidelines are, for the time being, in force, road authorities shall have regard to such guidelines when performing functions under this section.
- (7) A traffic calming measure provided under this section shall be deemed to be a structure forming part of the public road concerned and necessary for the safety of road users.
- (8) (a) A person who, without lawful authority, removes or damages or attempts to remove or damage a traffic calming measure provided under this section shall be guilty of an offence.
- (b) An offence under this subsection may be prosecuted by the road authority in whose functional area the acts constituting the offence were done.
- (9) In this section—
- “provide” includes erect or place, maintain and (in the case of an instrument for giving signals by mechanical means) operate and cognate words shall be construed accordingly; and
- “traffic calming measures” means measures which restrict or control the speed or movement of, or which prevent, restrict or control access to a public road or roads by, mechanically propelled vehicles (whether generally or of a particular class) and

measures which facilitate the safe use of public roads by different classes of traffic (including pedestrians and cyclists) and includes the provision of traffic signs, road markings, bollards, posts, poles, chicanes, rumble areas, raised, lowered or modified road surfaces, ramps, speed cushions, speed tables or other similar works or devices, islands or central reservations, roundabouts, modified junctions, works to reduce or modify the width of the roadway and landscaping, planting or other similar works.

6.3. **Transport (Railway Infrastructure) Act 2001**

38.—Each of the following shall be exempted development for the purposes of the Act

(a) development consisting of the carrying out of railway works, including the use of the railway works or any part thereof for the purposes of the operation of a railway, authorised by the Minister and specified in a railway order or of any incidental or temporary works connected with such development;

(b) development consisting of the carrying out of railway works for the maintenance, improvement or repair of a railway that has been built pursuant to a railway order.

6.4. **Planning and Development Regulations, 2001**

6.4.1. Article 6(1) of the Planning and Development Regulations, 2001 states that

“Subject to Article 9 development of a class specified in Column 1 and Part 1 of Schedule 2 shall be exempted development for the purposes of the Act”.

Those relevant to the subject referral include:

CLASS 23 The carrying out by any railway undertaking of development required in connection with the movement of traffic by rail in, on, over or under the operational land of the undertaking, except—

(a) the construction or erection of any railway station or bridge, or of any residential structure, office or structure to be used for manufacturing or repairing work, which is not situated wholly within the interior of a railway station, or

(b) the reconstruction or alteration of any of the aforementioned structures so as materially to affect the design or external appearance thereof.

Class 26 “The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking”.

7.0 Assessment

7.1. Is or is not development

- 7.1.1. The Board has been requested to determine if the erection of utility boxes on College Green and Lower Grafton Street is or is not development and is or is not exempted development.
- 7.1.2. The first question that must be determined is whether the erection of the boxes is or is not development. In Section 2 of the Planning and Development Act 2000, as amended, the definition of "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. It is considered that the erection of the boxes is “works” as it is clearly an act of construction.
- 7.1.3. As per section 3(1) of the Act, "development" is the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land. I am satisfied that the erection of the boxes is works, and that such works were carried out on land and therefore constitute “development” as per section 3(1) of the Planning and Development Act 2000, as amended.

7.2. Is or is not exempted development

- 7.2.1. The determination of the City Council was that the utility boxes / cabinets were considered to be exempted development under section 38 of the Road Traffic Act 1994 and under the provisions of the Rail Order associated with the LUAS light rail scheme.
- 7.2.2. In assessing the request before it, the City Council stated that a site visit was undertaken and that based on external labels attached to the side of the cabinets “it would appear that the structures have been put in place by statutory undertakers such as Dublin City Council Traffic Department, Dublin City Council Public Lighting Section, ESB and Luas Cross City”. The report states that therefore the boxes are exempted development under class 23 of the regulations. The City Council report also notes that as part of the Luas cross city works, a number of cabinets were moved / relocated in College Green and Lower Grafton Street. It was stated that

these relocated boxes are exempted development under Part 4 of the Rail Order which provides that the relevant undertaker could remove / relocate apparatus in agreement with the Agency. Finally, the report notes that section 38 of the Roads Traffic Act 1994 provides for the implementation of traffic management measures on the public road. Traffic signals need cabinets to operate and as a number of the cabinets in question are used by Dublin City Council, the report states that these cabinets can be considered to be exempted development.

7.2.3. The planning report notes that it was not clear what stakeholder was using each cabinet and so further information was requested of the Environment & Transportation Department of Dublin City Council, Luas Cross City, Transport Infrastructure Ireland and ESB. The planning department asked each body to identify ownership of the cabinets by way of photographs and / or a drawing and also to indicate if any of the cabinets were temporary and would be removed once redundant. The first report of the Planning department notes that at the two locations there were 8 no. cabinets at College Green and 11 no. cabinets at the Provosts House.

7.2.4. The responses received by the City Council can be summarised as follows:

- DCC Environment & Transport Dept: all cabinets used by the Dept. have been installed to meet the requirements of traffic signalling in the area for Tram, vehicles and pedestrians. All cabinets would be covered by the Railway Order or by Dublin City Council's powers as a Road Authority. DCC have no cabinets in the area that are not required for traffic management purposes.
- ESB: 1 of the 13 no. cabinets is associated with the ESB: a mini pillar located at Provost. It was installed by TII and connected to ESB as part of the initial Luas works to provide supply for DCC public lighting, DCC traffic and BT Telecoms.
- TII: The cabinets / technical cubicles are works required for the purposes of the railway under the railway order. Under section 38 of the Transport (Railway Infrastructure) Act 2001, the cubicles are exempted development for the purposes of the Planning and Development Act 2000 as they have been specified in a railway order that has been authorised by the Board

7.2.5. The question before the Board is whether the works undertaken are de-exempted from the need to receive planning permission by virtue of some piece of legislation. The pieces of legislation referred to by the City Council are Section 38 of the Roads Traffic Act, Class 23 of the Planning and Development Regulations 2001 and the provisions of the Rail Order associated with the Luas Light Rail Scheme.

Road Traffic Act 1991

7.2.6. Regarding the reference by the City Council to **section 38 of the Roads Traffic Act 1994**, as a means under which the cabinets can be considered exempted development the City Council have stated that traffic signals are considered a traffic management measure and that as the cabinets facilitate the operation of those traffic signals, therefore they fall under section 38. I note the submission of DCC (email dated 10 April 2019 from one member of DCC staff to another) that states that the DCC traffic controller cabinets house the equipment that runs the three pedestrian crossings. I consider that this would fall under the definition of a ‘traffic calming measure’ as per section 38(9) of the act. This states that a traffic calming measure is defined as (amongst a long list of other measures) “measures which facilitate the safe use of public roads by different classes of traffic (including pedestrians and cyclists)”. The cabinets listed as no. 2 and 3 at Grafton Street would therefore be considered traffic calming measures. Section 38 of the Road Traffic Act provides for the provision of such measures, however there is nothing in the Planning and Development Act 2000 or 2001 Regulations that provides that such works shall be exempt from the need to receive planning permission.

Transport (Railway Infrastructure) Act 2001

7.2.7. Section 38 of the Transport 2001 act provides that works authorised by the Board and specified in a railway order are exempted development. The question before the Board therefore is whether the cabinets in question are ‘works authorised by the Board’ and whether they are specified in a Railway Order. The Railway Order in question is the decision of the Board under PL29N.NA0004, otherwise known as the Railway (Luas Broombridge -St. Stephen’s Green to Broombridge) Order, 2011.

Works Authorised by the Board

7.2.8. The Boards order Part 1 (appended), provides an ‘Interpretation’ in section 2, from which the following is relevant: “**authorised works**” means the works specified in the

First Schedule to this Order or any part of them and any works required for the purposes of the railway or any part of the railway, including works ancillary to the purposes aforesaid such as parking by buses or by persons using vehicles who intend to complete their journey by railway, and relocation of utilities and any other works authorised by this Order or any part of them;

7.2.9. The First schedule of the Order (appended) lists approx. 145 no. works, of which many relate to 'technical cubicles'. None of the 145 no. works however refer specifically to technical cubicles on College Green or outside the TCD Provosts House.

7.2.10. Of note is **Work no. 16** is "Realign kerbs on Nassau Street and Grafton Street to form and or/ redefine loading bays, footpaths, sections of roadway and hard landscape areas and to reflect the traffic management arrangements, as shown on Plan No. BXD-RO 29 O-A". **Work no. 23** also refers to traffic management arrangements on Grafton street: "Realign kerbs on Grafton Street, College Green, Westmoreland Street, D'Olier Street, O'Connell Street Lower, College Street, Fleet Street, Townsend Street, Hawkins Street, Burgh Quay and Pearse Street to form and/or redefine traffic islands, loading bays, footpaths, sections of roadway and hard landscape areas and to reflect the traffic management arrangements, as shown on Plan No. BXD-RO 29 A-B." Without the benefit of the quoted drawing, it is not clear if the stated traffic management arrangements included a number of technical cubicles, however. I note that it is the submission of the Referrer, that the cubicles in question are not indicated on the named drawings.

7.2.11. I note the issue of technical cubicles arose during the course of the Boards assessment of the Railway Order. A reference in the Inspectors report (section 6.11.7, page 254) states that "Technical cubicles are referred to at Section 7.3.5 EIS, Book 1. It is indicated that they are located above ground in the vicinity of tram stops and in some cases on adjacent streets. They contain equipment related to each individual tram stop such as electrical power supplies, telecommunications equipment, cable transmission network equipment and equipment for the automatic vehicle location system". This description matches that provided by both DCC and TII as being the functions of the various cubicles noted within the referral area. Again, without the benefit of the EIS and the quoted section however, it is not clear if

this reference refers to the specific cubicles mentioned in the Order or of other, general or existing cubicles would be used as part of the “authorised works”.

- 7.2.12. On the balance of probability, it is considered that the reference to specific cubicles within the first schedule of the Order relates to those listed cubicles *only* and does not confer a wider authorisation of other cubicles, notwithstanding that they may provide an identical service to the railway provision.
- 7.2.13. The First schedule also refers to “any works required for the purposes of the Railway or any part of the Railway...”. It is clear that the position of both DCC and the TII is that the cubicles in question provide a direct function for the Railway. One can understand the position of the Referrer that the visual and physical impact of the existing cubicles is such that they cannot be erected without some level of assessment. Likewise, the position of TII is understandable – the operation and maintenance of the railway relies on the existence of the cubicles in close proximity to the railway line. However, one must note that works undertaken by a statutory undertaker for the purposes of construction and operation of a railway line are exempted development under class 23 of the regulations. This is addressed further below.

Class 23 of the Planning and Development Regulations 2001

- 7.2.14. Class 23 of the 2001 regulations provides that “the carrying out by any railway undertaking of development required in connection with the movement of traffic by rail in, on, over or under the operational land of the undertaking” is exempted development if undertaken by a statutory undertaker.
- 7.2.15. Section 2(1) of the Planning and Development Act 2000, as amended defines a ‘statutory undertaker’ as a person “for the time being, authorised by or under any enactment or instrument under an enactment to (a) construct or operate a railway, canal, inland navigation, dock, harbour or airport, (b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or (c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking.” I am satisfied that the Railway Procurement

Agency can be considered to be a statutory undertaker under the Transport (Railway Infrastructure) Act 2001, specifically section 11 of said act.

7.2.16. The submission of TII is that utility cabinets in question relate to the operation of the Luas and therefore “are consented as works (i.e. works required for the purpose of the railway) under the Railway Order”. TII, in their submission to the Board (22 May 2019) state that they have no other cabinets / technical cubicles or utility boxes associated with Luas, other than those identified. Using the information presented in Table 1 above, cabinet no. 4 on Grafton Street and cabinets no. 10 and 11 outside the Provosts House

7.2.17. I am satisfied that the three cabinets (4, 10 and 11) identified by TII as being for the direct function of the LUAS can be considered works undertaken by a statutory undertaker for the operation of a railway and therefore can be considered exempted development under Class 23 of the Planning and Development Regulations 2001, as amended.

Transport (Railway Infrastructure) Act 2001

7.2.18. **Section 38** of the Transport (Railway Infrastructure) Act 2001 provides that “Each of the following shall be exempted development for the purposes of the Act of 2000 (a) development consisting of the carrying out of railway works, including the use of the railway works or any part thereof for the purposes of the operation of a railway, authorised by the Minister and specified in a railway order or of any incidental or temporary works connected with such development; (b) development consisting of the carrying out of railway works for the maintenance, improvement or repair of a railway that has been built pursuant to a railway order”

7.2.19. I am satisfied that the three TII cabinets referred to in section 7.2.17 would also be considered exempted development under section 38 of the Transport (Railway Infrastructure) Act 2001. Of the remaining cabinets, the submission of DCC is that their cabinets house equipment that operates the pedestrian crossings, controls the movement of traffic and houses the equipment for CCTV. While these works are not directly involved in the running of the railway, they are nonetheless required for the safe operation of the railway and its interaction with other modes of transport on the road in question. I am satisfied that the following would also fall within section 38 as being incidental works connected with the operation of the railway:

Grafton Street:

- Cabinet 2: DCC Road Traffic controller Cabinet
- Cabinet 3: DCC Traffic Transmission Cabinet and
- Cabinet 5 DCC Optical Distribution Frame Cabinet

Provosts House:

- Cabinet 5: ESB mini pillar installed by TII contractors and connected by the ESB as part of the initial Luas works to provide supply to DCC public lighting, traffic and BT telecoms.
- Cabinet 7: ESB mini pillar that houses supply for the DCC traffic controller
- Cabinet 8: DCC Road Traffic Controller
- Cabinet 9: DCC Traffic Transmission Cabinet

7.2.20. In summary, I am satisfied that the following cabinets are considered exempted development under section 38 of the Transport (Railway Infrastructure) Act 2001: Grafton Street: cabinet no.s 2,3 and 5 and Provost House: cabinet nos. 5,7,8 and 9 And that the following cabinets are considered exempted development under Class 23 of the Planning and Development Regulations, 2001, as amended: Grafton Street: cabinet no. 4 and Provosts House: cabinet no.s 4, 7, 8 and 9.

7.2.21. This leaves cabinet no.s 3 and 6 (both DCC public lighting), outside the Provosts House, TCD. It is considered that these two cabinets would fall under **class 26** of the Planning and Development Regulations, 2001, as amended which provides for the “The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking”.

7.2.22. I note that a single micro pillar outside no. 36 Grafton Street is unidentified by any of the parties to this submission. Whilst it is likely that the cubicle is an ESB micro pillar, it is considered reasonable in the interests of clarity to omit it from the assessment of the referral, given the outstanding question of its function and ownership.

7.2.23. I am satisfied that each of the identified cubicles outside no. 36 Grafton Street and the Provosts House of TCD are development and are exempted development.

7.3. Restrictions on Exempted Development

- 7.3.1. The referrers submission to the Board notes that the visual impact of utility boxes within the Grafton Street ACA, but does not make reference to the impact that would have on the legislative provisions for exempted development. Further, I note that the Referrer did not raise the issue of the Provost's House as being on the RPS. The owner of Provost's House was not notified of this referral. The Board may wish therefore to disregard the following paragraphs as being a 'new issue'.
- 7.3.2. Both of the sites are located within the Grafton Street ACA (see appended figure). Section 82 of the Planning and Development Act 2000, as amended states that "(1) Notwithstanding paragraph (a), (h), (i), (ia), (j), (k) or (l) of section 4(1), or any regulations made under section 4(2), the carrying out of works to the exterior of a structure located in an architectural conservation area shall be exempted development only if those works would not materially affect the character of the area. (2) In considering an application for permission for development in relation to land situated in an architectural conservation area, a planning authority, or the Board on appeal, shall take into account the material effect (if any) that the proposed development would be likely to have on the character of the architectural conservation area.
- 7.3.3. The utility boxes in question are not part of the exterior of any structure within the ACA and therefore section 82 of the Planning and Development Act 2000, as amended or article 9(1)(xii) do not apply.
- 7.3.4. The Provost's House is a Protected Structure (ref. no. 3240 in the DCC RPS, Volume 3 of the development plan). The description refers to "The Provost's House, Trinity College: House, boundary walls, gate piers and gates". Section 57 of the Planning and Development Act 2000, as amended states that "the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if those works would not materially affect the character of the structure, or any element of the structure, which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest"
- 7.3.5. I am satisfied that the utility boxes in question do not materially affect the character of the wall of the Provost's House, the setting of the protected structure or any curtilage of the protected structure. Whilst their location is adjacent to the wall of the

Provost's House, I am satisfied that they do not materially affect it to the extent that its special interest would be compromised. Some form of utility box or cabinet has existed at the subject location for a considerable period of time. Whilst they have no architectural merit and are not aesthetically pleasing, it is considered that they are an accepted part of the streetscape and probably unnoticed by a majority of people. I am satisfied that the de-exemptions provided for under section 57 of the Planning and Development Act 2000, as amended do not apply to the utility boxes in question. I note the Board's decision under PL29S.RL.3218 which considered that works which were minor and reversible were considered a minimal intervention to a Protected Structure and therefore did not materially affect its protected structure status. Likewise, the issue of limited works to a Protected Structure were concluded by the Board to not materially affect the character of a protected structure or elements of the structure which contributed to its special interest(PL20.RL.3551).

- 7.3.6. I am satisfied that the subject cabinets do not endanger public safety by reason of traffic hazard and are not de-exempted under article 9(1)(iii) of the Planning and Development Regulations 2001, as amended.

8.0 Recommendation

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

WHEREAS a question has arisen as to whether the erection of utility boxes on College Green and Lower Grafton Street is or is not development and is or is not exempted development is or is not development or is or is not exempted development:

AND WHEREAS Frank McDonald requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 15th day of January 2018 stating that the matter was exempted development:

AND WHEREAS Frank McDonald referred this declaration for review to An Bord Pleanála on the 9th day of January, 2018:

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

- (a) Section 2(1), 3(1), 4(1)(h), 57 and 82 of the Planning and Development Act, 2000, as amended,
- (b) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Class 23 and Class 26 of Part 1, Schedule 2 of the of the Planning and Development Regulations, 2001, as amended,
- (d) Road Traffic Act 1991
- (e) Transport (Railway Infrastructure Act 2001,
- (f) The Boards Order and accompanying schedules for PL29N.N0004
- (g) The report of the Inspector

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The development has been undertaken by a Statutory Undertaker in connection with the movement of traffic by rail, on, in, over or under the operational land of the railway, or any part of a Railway, and comes within the scope of Class 23 of the Planning and Development Regulations 2001, as amended
- (b) The development has been undertaken by a Statutory Undertaker authorised to provide an electricity service and comes within the scope of Class 26 of the Planning and Development Regulations 2001, as amended
- (c) The development has been undertaken by a Statutory Undertaker authorised to provide an electricity service and comes within the scope of Class 26 of the Planning and Development Regulations 2001, as amended
- (d) The development consists of the carrying out of railway works, for the purposes of the operation of a railway, authorised by the Minister and specified in a railway order or of any incidental or temporary works connected with such development and therefore comes with the scope of Section 38 of the Transport (Railway Infrastructure) Act

2001,

- (e) The utility boxes, by reason of their scale and use would not materially affect the character of a protected structure (Provost's House, TCD) or the Grafton Street and Environs ACA, or of any element of the structure, which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, and therefore, the works come within the scope of the exempted development provisions of Section 4(1)(h) of the Planning and Development Act, 2000, and the application of such exempted development provisions in relation to the said works is not affected by the provisions of Section 57(1) or Section 82 of the Planning and Development Act, 2000, as amended.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the erection of utility boxes on College Green and Lower Grafton Street is development and is exempted development

Gillian Kane
Senior Planning Inspector

31 October 2019