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**Question**

Whether the provision of public toilets in conjunction with retail unit/café unit and associated site works is or is not development or is or is not exempted development.

**Location**

Griffith Park, Drumcondra, Dublin 9

**Declaration**

Planning Authority

Dublin City Council

Planning Authority Reg. Ref.

0303/21

Applicant for Declaration

Gavin Smyth

Planning Authority Decision

Is exempt from the requirement to obtain planning permission.

**Referral**

Referred by

Gavin Smyth

Owner

Dublin City Council

Observer(s)

None

Site Inspection

2nd August 2022

Inspector

Stephen Ward

## 1.0 Introduction

This is a referral case under the provisions of Section 5 of the Planning and Development Act 2000 (as amended), which is a legislative provision to determine what, in any particular case, is or is not development or is or is not exempted development within the meaning of the Act.

## 2.0 Site Location and Description

- 2.1. The site comprises a small section of Griffith Park in the northern suburbs of Dublin City. The Park stretches between Drumcondra to Glasnevin and is mainly bounded by Botanic Avenue (to the south), St Mobhi Road (to the west), Whitehall College (to the north), and residential development and the DCU campus to the east. The Tolka River runs through the Park in a northwest to southeast direction.
- 2.2. The Park has an overall area of approximately 7.5 hectares and includes gardens, walks, an outdoor gym, and a playground. The subject site itself is located between the Tolka River (to the south) and the Walsh Road residential development (to the north). It is within a triangular-shaped grass lawn bounded by pedestrian paths on three sides. The lawn area slopes gently downward to the south and west. The wider area is generally surrounded by mature tree cover, particularly to the north.

## 3.0 The Question

The question referred to the planning authority pursuant to Section 5(1) of the Planning and Development Act, 2000, as amended (“the Act”), sought clarification on the question of ‘exempted development’ regarding works consisting of:

*‘the provision of a café and toilet building measuring approx.. 12.19m long x 2.44m wide x 2.59m high within Griffith Park at the location shown on the attached OS map, with associated site works and foul drainage connection. (The referral includes the requirement for an EIA screening and AA screening)’.*

## 4.0 Planning Authority Declaration

### 4.1. Declaration

By order dated 29<sup>th</sup> September 2021 the Planning Authority decided to issue a declaration that *'the above proposed development is EXEMPT from the requirement to obtain planning permission under Section 32 of the Planning & Development Acts 2000 (as amended)'*. The reasons and considerations were cited as follows:

*'On the basis of the available information, and for the reasons and considerations set out in the above report, and having regard to the relevant legislation cited above, the proposal as described is development, exempt under Section 4(1)f of the Planning and Development Act (2000) as amended from the general obligation to obtain permission under Section 32 of the Planning and Development Act 2000 (as amended).*

*Under Section 179 of the same act, and Article 80 of the Planning and Development Regulations (2001) as amended, it falls outside the remit of Part 8 of those regulations'.*

### 4.2. Planning Authority Reports

#### 4.2.1. Planning Reports

The report of the Senior Executive Planner (29<sup>th</sup> September 2021) outlines the legislative context and the information received. The assessment of the question can be summarised as follows:

- The proposal involves the installation of a shipping container and excavation of a c. 50 metre trench to connect to services. As the proposal involves excavation, it constitutes works.
- The provision of café and toilet facilities within a public park do not constitute a material change of use of the park.
- Due to the works involved, the proposal constitutes development.
- An exemption exists under Section 4(1)(f) of the Act for *development carried out on behalf of, or jointly or in partnership with, a local authority, which*

applies in this instance. The proposal was initiated by a DCC request for tenders to enter into a contract to provide retail units in conjunction with integrated toilet facilities.

- Section 4(1)(f) does not provide an exemption from other obligations under the Act, notably Section 178 and Section 179.
- Section 178 outlines that the local authority shall not effect any development which materially contravenes the development plan. In this regard, the following is outlined:
  - The Park is zoned Z9 'Amenity/Open Space Lands/Green Network' and 'Public service installations which would not be detrimental to the amenity of the Z9 zoned lands' is a 'permissible use' within this zoning. Kiosk, tea room, and café/restaurant uses are open for consideration.
  - The coffee shop will include an integrated, ancillary toilet for use by customers and the general public during park opening hours. This is a common element of cafes and management and maintenance will be the responsibility of the concessionaire.
  - The location of the site within a 'conservation area' and Policy CHC4 of the Development Plan is acknowledged. The proposal will be in keeping with the character of the Park.
  - The provision of café and toilet facilities in the Park would be consistent with the policies of Chapter 10 of the Development Plan and the DCC Parks Strategy.
  - The site is close to a site of archaeological interest, DU018-011 (Holy Well). It is not within a zone of archaeological interest.
  - The proposal does not materially contravene the Development Plan.
- Section 179 and the associated Article 80 of the Planning and Development Regulations 2001 (as amended) outlines a list of developments which require a Part 8 application. In this regard, the following is outlined:

- Article 80(1)(j) mandates that ‘*the construction or erection of a fire station, a library or a public toilet*’ requires assessment under Part 8’.
  - The proposal involves a temporary coffee shop with an integrated, ancillary toilet, which is a common element of cafes, and the management and maintenance will be the responsibility of the concessionaire, not DCC.
  - The toilets are not considered to be ‘public toilets’ *per se* as they are more akin to typical café toilets for the use of customers only whereas these toilets will also be made available to members of the public without the need to make a purchase during café opening hours.
  - The development is therefore one which falls outside the remit of Part 8 of the Regulations.
- As a preliminary examination, the planning authority has concluded that there is no real likelihood of significant effects on the environment, whereupon the local authority has concluded that an Environmental Impact Assessment is not required.
  - The site is proximate to the Rover Tolka, which provides a potential link to the Natura 2000 sites in Dublin Bay. Notwithstanding this, it is proposed to connect to the mains services. Potential effects on European Sites are negligible and not likely to occur. The Planning Department has undertaken an AA Screening and has determined that the preparation of a Natura Impact Statement is not necessary.
  - The Planner’s recommendation is in accordance with the DCC declaration.

## 5.0 Planning History

There would not appear to be any relevant planning history pertaining to the subject site. I have carried out a search of the Board’s database and I have not found records of any other relevant cases.

## 6.0 Policy Context

### 6.1. Development Plan

- 6.1.1. The site is zoned Z9 'Amenity/Open Space Lands/Green Network' with a stated objective '*to preserve, provide and improve recreational amenity and open space and green networks*'.
- 6.1.2. The site is also located within a designated 'conservation area'. Policy CHC 4 of the Development Plan outlines the policy to protect the special interest and character of all conservation areas. Development within or affecting a conservation area must contribute positively to its character and distinctiveness, and take opportunities to protect and enhance the character and appearance of the area and its setting, wherever possible.
- 6.1.3. The Development Plan notes a 'Site of archaeological Interest' (Ref. DU018011) to the north of the site. Policy CHC 9 of the Development Plan seeks to protect and preserve National Monuments.
- 6.1.4. Chapter 10 deals with 'Green Infrastructure, Open Space and Recreation'. Relevant policies and objectives can be summarised as follows:
- GI10: To continue to manage and protect and/ or enhance public open spaces to meet the social, recreational, conservation and ecological needs of the city and to consider the development of appropriate complementary facilities which do not detract from the amenities of spaces.
- GIO11: To support the implementation of the Dublin City Council Parks Strategy.
- GIO12: To improve visitor facilities, including cafés, toilet, shower and changing-room facilities, based on the recommendations of the Parks Strategy.
- 6.1.5. The Dublin City Parks Strategy 2019-2022 includes Griffith Park as part of the River Tolka corridor. The following policies are included:
- The provision of cafes/tea rooms and restaurants (with public toilets) will be promoted and expanded following consideration of their commercial viability and character of the receiving park.

- The provision of toilets will be considered within parks as part of other built facilities where active management and monitoring is present.
- To manage our parks, open spaces and cemeteries as a connected network of green infrastructure that provides habitats of international importance for protected species and sustains ecosystems.
- To ensure that corridors are maintained throughout DCC administrative area as continuous elements of green infrastructure to afford passage for wildlife and prevent severance of habitats by 'grey' infrastructure. To work to restore connectivity of corridors where insensitive development has taken place previously or where there are opportunities to work cooperatively with landowners to promote this.

## 6.2. Natural Heritage Designations

The Royal Canal Proposed Natural Heritage Area is located c. 900 metres south of the site. The nearest Natura 2000 site is the South Dublin Bay and River Tolka Estuary SPA (site code: 004024), located c. 2.5km to the southeast. The inner Dublin Bay area includes other Natura 2000 sites such as South Dublin Bay SAC (site code: 000210), North Dublin Bay SAC (site code: 000206) and North Bull Island SPA (site code: 4006).

## 7.0 The Referral

### 7.1. Referrer's Case

- 7.1.1. The applicant has referred the DCC declaration to the Board in accordance with the provisions of Section 5 (3)(a) of the Act. In doing so, the referrer has revised the question to the following:

*'Whether the provision of public toilets in conjunction with retail unit/café unit, c. 12.19m long x 2.44m wide x 2.59m high with associated site works including foul drainage connection, water connection, ESB connection or generator provision, hard standing area, bin provision, outdoor seating/tables, removal of trees, alterations to*

*landscaping and all associated works above and below ground, is or is not development or is or is not exempted development.'*

7.1.2. The referrer's case can be summarized under the following headings:

#### Conflict of interest

- The planning authority has a clear conflict of interest given their interest in the proposal. The question should have been referred to the Board under section 5(4) of the Act.
- Statements in the 'Invitation to Tender' are highlighted as follows:
  - Responsibility for compliance with planning requirements is unclear.
  - Similar vagueness does not apply to utilities and services connections.
  - The programme period was not sufficient to facilitate planning permission.
- The local authority had a predetermined idea that planning permission would not be necessary.
- The DCC Planner's report acknowledges that the emergency provisions of section 179(6) of the Act did not apply.
- It is unlikely that any prospective tenderers would have provided for the cost of a planning application.

#### Archaeology

- The site of archaeological interest is c. 30m from the subject site.
- Archaeological records state that the 'well' formed part of a house. Historical publications and mapping also suggest that the well and house formed part of a much larger ensemble of buildings of significant industrial heritage.
- The area is well known to have acted as a dumping ground prior to its development as a park in the 1930s. In combination with its historical context, it is possible that archaeological remains exist in the vicinity of the site and the proposed excavation route for underground services.

- The evidence would suggest that, at the very least, an archaeological desk study would be warranted in line with best practice objectives outlined in the Development Plan.

#### Impact on Conservation Area

- The proposal does not comply with the provisions of Policy CHC4.
- The tender criteria make no reference to 'architectural quality'.
- The proposed location is revised from that originally proposed. The visual impact of the unit did not form a significant part of the thinking (if any) behind the revised location.
- Unlike other similar DCC developments, the proposed building is not close to any existing buildings and is highly visible.
- Only an artist's impression of the building has been made available and there is a concern that other facades, including 'back of house' type characteristics will be in prominent view.
- There are concerns that the proposal will harm the setting of the conservation area by reason of its obtrusive or dominant form.
- As per Policy CHC4, new facilities should be contemporary architectural buildings of exceptional design quality and in harmony with the conservation area. In this instance the proposal is well below standards.
- With reference to Section 178(2) of the Act, the Board is invited to conclude that the proposal is a material contravention of the Development Plan by reason of design, location and use within a zoned conservation area and in a Z9 zoning objective.

#### The question (and Part 8 question)

- The proposal is 'development' within the meaning of the PDA2001 (*sic*).
- It is not clear whether a contract has been entered into by the local authority. The wording of Section 4(1)(f) of the Act is present tense, not future tense.
- The tender appears to be for retail uses, while the DCC assessment is for a café use. Legislation requires a specific use, not a catch-all commercial use.

- The toilet and café are split from the supporting infrastructure and the infrastructure is not part of the contract. It is clearly 'development' and is not 'exempted development' as per Section 4(1)(f) of the Act. The tender indicates that it is accepted by DCC that the infrastructure element requires a planning process.
- Section 4(4) of the Act provides that development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required, and Article 9 of the 2001 Regulations outlines that certain works shall not be exempted development. The Board is requested to consider:
  - The conservation status of the area in the Development Plan and relative objectives.
  - The lack of servicing information, including the requirement for 4m width access for deliveries, refuse etc.
  - The lack of archaeological impact assessment.
  - Ecological impact, especially protected species such as bats and otters.
- Dr Clara Greed's definition of 'public toilets' outlines the concept that they can be either 'on or off-street' and that those provided by a restaurant (or café) are also public.
- The DCC Planner's report depiction of the proposed toilets as ancillary to the café is not aligned with the description of the project as outlined in the tender, a 'community flyer', and a presentation to local elected representatives. These were portrayed to the community as much needed public toilets, which was subsequently diminished by DCC as an incidental item.
- The configuration of the unit also allows for direct external access to the toilets without the need to enter the café.
- The DCC Parks Strategy accepts that such café/restaurant facilities can include 'public toilets', which is consistent with the referrer's case and, as such, is development requiring a Part 8 process.

- The tender requires that the public toilet must be open when the Park is open.
- The planning authority has failed to state the cost of the works, which may well exceed €126,000 (as was the case in similar projects) and trigger a Part 8 process.

### AA Screening

- Documented screening is required to determine whether an Appropriate Assessment is required.
- The site is only 35m from the River Tolka and requires groundworks, bins and connections to services. The Park forms part of the River Tolka Corridor and Development Plan policies seek to manage and maintain the ecological sensitivities of such areas.
- Having ascertained the environmental information available to DCC in the making of the declaration, it is submitted that the AA Screening is inadequate to allow for review. The Tolka River is a direct source-pathway-receptor to a Natura 2000 site and requires a high level of documented screening in accordance with EU legislation.
- The screening determination must be based on scientific information and there must be uncertainty as to the absence of significant effects.
- The proposal may include direct or indirect effects on the River Tolka Estuary SPA and South Dublin Bay SAC, and on protected species in the vicinity. The full extent of works and the in-combination impacts of other plans and projects have not been considered, including the proposed development of a playground in the park.
- The screening test is based on a 'precautionary approach' with a relatively light trigger for AA.
- It is considered that a NIS is required, and the development is not therefore exempt.

## EIA Screening

- The case of Carvill and Anor vs. DCC and Anor [2021] IEHC 544 found that consideration of the temporary nature of a development fundamentally undermined the credibility of the screening for EIA and AA.
- DCC failed to include the relevant data in the preliminary examination.
- The nature of the development is exceptional in its context/setting and the size is significant.
- There is inadequate information about the waste generation/management, and there will be possible emissions and pollutants.
- The planning authority has failed to consider other existing/permitted projects.
- The proposal has the potential to affect Dublin Bay and Tolka SAC via the hydrological link of the Tolka River.
- The site was a former dumping ground and has an area of archaeological interest in the vicinity.
- The preliminary examination should have led to a full EIA Screening and there is a conflict interest in DCC's assessment.

## Ecology

- The Tolka River is home to otters, a protected species under the EU Habitats Directive.
- There is no waste management plan or construction management plan.
- Hard surfacing is proposed, and trees are to be felled.
- The bat survey is not available, and it is unclear if a bat derogation licence will be sought.

## Proper Planning and Sustainable Development

- As the COVID-19 restrictions are easing, a more permanent solution for toilets in the Park would be appropriate.
- Public consultation has been inadequate, and the Part 8 process applies.

- The proposal should not be viewed as temporary and will likely extend beyond 5 years.
- The proposal has not been properly planned in conjunction with the development of the playground and has the potential to grow in an unplanned way.
- A precedent relating to 15/17 Drumcondra Road has established that Section 4(1)(f) does not give the local authority the right to do whatsoever it pleases (ABP. Ref. 308540 refers).
- The design and size of the toilet facility is inadequate for the needs of users.
- The financial advantages to the local authority of this cost-neutral procurement model come at the cost of the loss of a significant amenity and associated environmental concerns.
- The need for a café is questioned in the context that local rate-paying businesses are serving the community very successfully.

## 7.2. **Planning Authority / Owner's Response**

7.2.1. Dublin City Council did not respond to the referral.

## 8.0 **Statutory Provisions**

### 8.1. **Planning and Development Act, 2000 (as amended)**

8.1.1. **Section 2(1)** of the Act states the following:

- 'development' has the meaning assigned to it by Section 3;
- 'exempted development' has the meaning specified in section 4;
- 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

8.1.2. **Section 3(1)** of the Act states that:

- *'development' means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land'.*

8.1.3. **Section 4(1)** of the Act sets out various forms and circumstances in which development is exempted development for the purposes of the Act, including:

- **Section 4(1)(f)** providing for *'development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity'.*

8.1.4. **Section 4(2)** of the Act provides that *'the Minister may, by regulations, provide for any class of development to be exempted development'.* The main regulations made under this provision are the Planning and Development Regulations 2001, as amended.

8.1.5. **Sections 4(4) and 4(4A)** outline that development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required, unless as otherwise prescribed by regulations made under 4(A).

8.1.6. **Section 178(2)** states that *'The council of a city shall not effect any development in the city which contravenes materially the development plan'.*

8.1.7. **Section 179** outlines that the Minister may prescribe that certain 'Local authority own development' shall be subject to regulations made under this section providing for procedures to be followed, including public consultation (i.e. Part 8 of the Regulations of 2001).

## 8.2. **Planning and Development Regulations, 2001 (as amended)**

8.2.1. **Article 6 (1) states:**

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 1.

- 8.2.2. **Article 9(1)** outlines that development to which article 6 relates shall not be exempted development if the carrying out of such development would conflict with the various conditions outlined in subsections (a) to (d).
- 8.2.3. **Part 1 of Schedule 2** sets out ‘general’ exempted development to which Art 6(1) refers.
- 8.2.4. **Part 8** outlines the requirements in respect of specified development by, on behalf of, or in partnership with local authorities. Article 80 outlines the development prescribed for the purposes of section 179 of the Act, including:
- (j) the construction or erection of a fire station, a library or a public toilet, and*
- (k) any development other than those specified in paragraphs (a) to (j), the estimated cost of which exceeds €126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus.*

## 9.0 **Assessment**

### 9.1. **Preliminary Matters**

- 9.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the matters raised in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development within the meaning of the relevant legislation.
- 9.1.2. In this regard, I note that section 8.0 of the referral addresses several issues relating to the ‘proper planning and sustainable development of Griffith Park’. These issues include the need for a more permanent solution; inadequate public consultation; the likelihood that the proposal would remain beyond the anticipated 5-year period; the need to integrate with other planned developments; the potential for unplanned growth of the proposal; the inadequate design and capacity of the proposal; the procurement model used; and the potential impact on other coffee shops. I consider that these matters are outside the scope of this section 5 referral case as outlined in paragraph 9.1.1 above.

9.1.3. I note that the referrer has revised the wording of the question from that originally submitted to the planning authority. Given that the proposal does not yet exist and has not gone through a planning process, I acknowledge that it is difficult to define the full details of the proposal. However, having regard to the information available on file, I am satisfied that the question currently posed by the referrer to the Board, as outlined in section 7.1.1 of this report, generally reflects the nature and scale of the proposal. Accordingly, I have no objection to determining the referral on this basis.

9.1.4. I note the concerns raised by the referrer regarding the planning authority's alleged conflict of interest in this case. However, the question has now been referred to the Board and a *de novo* assessment will be carried out. Therefore, the question of the alleged conflict of interest no longer applies.

## 9.2. **Is or is not development**

9.2.1. Section 3 (1) of the Planning and Development Act, 2000 (as amended) states that development "*means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land*".

9.2.2. Regarding the question of 'use', I note that there is no statutory definition of 'material change of use'. However, it is generally linked to the degree of change and the materiality of the associated impacts, which are determined on the individual merits of a case. In this regard, excerpts from relevant case law judgements include the following:

*Galway County Council v. Lackagh Road Ltd (1985) I.R. 20*

*'To test whether or not the uses are materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use'*.

*Westmeath County Council v. Quirke (1996) I.C.L.Y. 750*

*'Many alterations in the activities carried out on the land constitute a change of use, however, not all alterations will be material. Whether such changes amount to a*

*material change of use is a question of fact as explained in Monaghan County Council v Brogan (1987) IR 339. Consideration of the materiality of a change in use means assessing not only the use itself but also its effects’.*

*Esat Digifone v South Dublin County Council (2002) 3 I.R. 585 (2002) 2 I.L.R.M. 547*

Quoting from Galligan<sup>1</sup>, states that ‘*The consideration to be taken into account in determining materiality must at least be relevant to ‘proper planning and development and the preservation of amenities’ which are the twin objectives of the preamble to the legislation. The question is whether there were sufficient planning considerations raised by the change in activity to justify its submission to development control’.*

- 9.2.3. Having regard to the foregoing, I consider that the subject site constitutes a negligible portion of the overall Park area. I also consider that the proposed toilet/café uses would be wholly ancillary to the overall use of the Park for amenity and recreation purposes. I do not consider that the proposed uses would result in the intensification of use of the Park or result in any effects that would be materially different to the existing uses. Accordingly, I do not consider that the proposal would constitute ‘development’ by reason of a material change of use.
- 9.2.4. However, the proposed development would involve excavation works to facilitate the proposed service connections and the creation of a level surface area to accommodate the installation of the proposed prefabricated building. Accordingly, I am satisfied that the proposal would involve the carrying out of ‘works’ and would constitute ‘development’ in accordance with section 3(1) of the Act.

### 9.3. **Is or is not exempted development**

- 9.3.1. As previously outlined, the planning authority has relied upon the provisions of section 4(1)(f) of the Act, which provides that ‘*development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity’ shall be exempted development.*

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<sup>1</sup> Irish Planning Law and Procedure (1997, p60)

- 9.3.2. From the tender details and other information on file, it is clear to me that the development would be carried out on behalf of or jointly in partnership with Dublin City Council. I note that the referrer has raised some questions regarding the contractual element of this provision. Firstly, the referrer has questioned whether or not a contract has been entered into. I acknowledge that there is no clarity on this matter. However, I would highlight that the development has not yet been carried out and it is clear to me that the tender process would require a subsequent contract. Secondly, the referrer contends that the supporting infrastructural works are not part of the contract given that the tender states that the local authority will have no responsibility for the provision of such services. However, I consider it clear that the tender specifies that the successful tenderer must manage the provision of these services as part of the contract. The infrastructure is not excluded from the contract simply because the local authority will not be responsible for its provision in a similar way to which it would not be responsible for the provision of the building itself.
- 9.3.3. Having regard to the foregoing, I am satisfied that the proposed development would be in accordance with the exempted development provisions of section 4(1)(f) of the Act. Notwithstanding this, I consider that the Board must also consider restrictions on this exemption as outlined in section 4(4) and section 178 (2) of the Act.

#### 9.4. **Restrictions on exemption**

- 9.4.1. I acknowledge that the referrer highlights restrictions on exemption as outlined in Article 9 of the Regulations. However, Article 9 applies only to development to which Article 6 of the Regulations applies. Article 6 outlines a variety of classes of development, none of which apply to the proposed development. Therefore, the proposed development does not rely on Article 6 and the restrictions outlined in Article 9 do not apply in this case.
- 9.4.2. Section 178(2) of the Act is an applicable restriction and states that '*The council of a city shall not effect any development in the city which contravenes materially the development plan*'.
- 9.4.3. In terms of zoning provisions, I note that the site is within the wider Z9 'Amenity/Open Space Lands/Green Network' zone that covers the Park. Section 14.8.9 of the Development Plan outlines that a 'public service installation which

would not be detrimental to the amenity of the Z9 zoned lands' is a 'permissible use' within this zone. It also outlines that uses such as a kiosk, tea room, or café/restaurant would be 'open for consideration'. I acknowledge that the proposal includes a mixture of uses, including public toilets which would provide a public service. In terms of its impact on the amenity of the lands, I am conscious of the designation of the Park as a 'conservation area' and Policy CHC4 of the Development Plan. I would also accept that the full details of the proposed design are not available. However, based on the dimensions and images provided, I consider the proposed structure to be of limited scale. It would be of a low-profile, simple form, and the timber cladding would be in keeping with its parkland setting. On this basis, I do not consider that the proposal would be detrimental to the amenity of the lands or the special interest or character of the conservation area. Accordingly, I would conclude that all proposed uses would be 'permissible' or 'open for consideration' and would not materially contravene the zoning objectives or conservation area policy of the Development Plan.

9.4.4. Regarding the 'Green Infrastructure, Open Space and Recreation' policies and objectives of the Development Plan, I note that GI10, GIO12, and the Parks Strategy support the consideration of complementary facilities in Parks, including cafes and toilets. The proposed development would be consistent with this approach.

9.4.5. I note the proximity of the proposed development to monument DU018-011 (Holy Well) and the policies/objectives of the Development Plan which seek to protect the archaeological heritage of the city. The subject site is more than 30 metres from the monument and is outside the defined 'zone of notification' as per the National Monuments Service mapping. I have reviewed the historic mapping and I acknowledge the relationship between the well and additional development to the north of the site. However, there is no evidence of significant historical development within the footprint of the proposed development. The proposed works are relatively minor in scale and are unlikely to damage any significant archaeological material. Accordingly, I do not consider that the proposal would materially contravene any archaeological policies or objectives of the Development Plan.

9.4.6. I also acknowledge the ecological value of such Parks and the policies and objectives of the Development Plan which seek to protect habitats and species. In particular, I note that bats and otters are protected by national and EU legislation.

- 9.4.7. A bat survey/report has been carried out which found no roosts within the footprint of the development, albeit that activity was very high. The report concludes that the proposal will not affect bats during construction or operation stage and that there will be ample feeding areas and commuting routes. Measures are recommended to include the provision of bat boxes and to address the potential impacts of future tree removal and lighting.
- 9.4.8. The planning authority has referred to the Dublin Otter Survey, which found signs of otter within the Park but no holts. It contends that the 35m separation distance from the river will exceed the recommended 15m distance.
- 9.4.9. Having regard to the established public use of the Park, the minor scale of the proposed development, and the location of the proposed works away from important habitats or commuting/foraging areas such as trees/hedges and water courses, I am satisfied that the development will not adversely impact on bats, otters, or other ecological features. Therefore, the proposed development would not materially contravene any of the ecological policies/objectives of the Development Plan. The potential for impacts on Natura 2000 sites is dealt with separately in section 9.5 below.
- 9.4.10. Having regard to the foregoing and the provisions of section 178(2) of the Act, I do not consider that the proposed development would materially contravene the Development Plan.
- 9.4.11. I consider that the other restriction which applies to section 4(1)(f) of the Act is outlined in section 4(4), which states that development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required. These matters are discussed in the following sections.

## 9.5. **Appropriate Assessment Screening – Preliminary Examination**

- 9.5.1. The nearest Natura 2000 site is the South Dublin Bay and River Tolka Estuary SPA (site code: 004024), located c. 2.5km to the southeast. The inner Dublin Bay area includes other Natura 2000 sites such as South Dublin Bay SAC (site code: 000210), North Dublin Bay SAC (site code: 000206) and North Bull Island SPA (site code: 4006). The subject site is not, therefore, within or adjacent to any Natura 2000 sites.

- 9.5.2. In terms of potential pathways, I note that the Tolka River flows to the south of the subject site and enters Dublin Bay / Tolka Estuary. The river is approximately 35m to the south of the subject site and the route of the river flows a distance of c. 2.7km to the boundary of South Dublin Bay and River Tolka Estuary SPA. Therefore, the potential for hydrological pathways is quite limited.
- 9.5.3. At construction stage, potential impacts would be limited to the possibility of construction run-off entering the River Tolka and subsequently impacting on the water quality of the Natura 2000 sites within Dublin Bay. However, having regard to the limited scale and complexity of the proposed works and the separation distance from the River Tolka, I consider it unlikely that there would be any discharges that would affect the water quality of the river. Furthermore, given the existence of a significant distance and hydrological buffer from the Natura 2000 sites and the assimilative capacity of waters in Dublin Bay, I am satisfied that there would be no likely significant effects on any Natura 2000 sites.
- 9.5.4. At operational stage, I again acknowledge the potential pathway via the River Tolka. It is proposed that the development will be connected to the public water and wastewater services to the east of the site and no emissions will discharge to the river. I acknowledge that wastewater will ultimately be discharged to Dublin Bay via the Ringsend WWTP, but the impact upon the existing capacity and quality standards will be minimal. I note the potential for the use of a diesel generator at operational stage and the potential for additional waste generation in the vicinity of the site. However, in accordance with standard best practice for waste and pollution control and having regard to the limited scale of the development and its separation distance from the river, I consider it unlikely there would be any operational emissions to affect the quality of the River Tolka. Furthermore, given the existence of a significant distance and hydrological buffer from the Natura 2000 sites and the assimilative capacity of waters in Dublin Bay, I am satisfied that there would be no likely significant effects on any Natura 2000 sites.
- 9.5.5. I acknowledge that ex-situ impacts can occur in cases where Qualifying Interest species use sites outside the designated Natura 2000 site. However, in this case, I consider that the proposed development would be of limited scale and would not involve the significant loss/fragmentation of any suitable habitat. The construction stage would be of limited scale and duration and would not be likely to cause any

significant disturbance to habitats/species. The site is within an existing public park and the operational stage is not likely to significantly change the nature or intensity of its use or to cause any significant disturbance to habitats or species. Accordingly, I am satisfied that there is no likely potential for significant ex-situ effects on any Natura 2000 sites.

- 9.5.6. I have considered other existing/permitted plans and projects for the area, including the planned playground development in the Park. Having regard to the nature and scale of those other plans and projects, together with the potential impacts of the proposed development, I do not consider that significant cumulative / in-combination effects would be likely to occur on any Natura 2000 site.
- 9.5.7. Therefore, having regard to the nature and limited scale of the proposed development within a serviced urban area and the separation distance to the nearest European sites, it is concluded that no Appropriate Assessment issues arise as the proposed development would not be likely to have a significant effect individually or in combination with other plans or projects on a European site.

#### 9.6. **Environmental Impact Assessment – Preliminary Examination**

- 9.6.1. The planning authority has concluded that, having regard to the nature, size, and location of the development, there is no real likelihood of significant effects on the environment and that EIA is not required.
- 9.6.2. With regard to EIA thresholds, Schedule 5 of the Planning and Development Regulations 2001 (as amended) sets out the various categories of development which shall be subject to mandatory EIA. The proposed development is not within any of the specific categories listed.
- 9.6.3. However, it is noted that Part 2, 10 (b)(iv) provides that mandatory EIA is required for *‘Urban development which would involve an area greater than 2 ha in the case of a business district, 10 ha in the case of other parts of a built-up area and 20 ha elsewhere. (In this paragraph, “business district” means a district within a city or town in which the predominant land use is retail or commercial use.)’*. Like most urban projects, the proposed development can be seen as ‘sub-threshold’ in this category.
- 9.6.4. In summary, it is proposed to install a prefabricated building consisting of a café and toilet, to connect to services, and to carry out all associated siteworks. The building

would have a floor area of c. 30m<sup>2</sup> or 0.003 hectares. I acknowledge that the site area may be slightly larger than this to accommodate associated siteworks etc. In any case, the site area would constitute only a minute portion of the applicable threshold of 10 hectares. I do not consider that the lower 'business district' threshold applies in this case.

- 9.6.5. The site is located with a parkland setting surrounded mainly by urban housing and educational developments. While the Park has a mainly natural setting, it does include a significant presence of development including a playground, gym, and servicing facilities. The proposed uses would be ancillary to the existing amenity and recreational uses associated with the Park. Having regard to the nature and extent of development within and surrounding the Park, I consider that the introduction of the proposed building and associated uses would not have an adverse impact in environmental terms on the existing and surrounding land uses.
- 9.6.6. I acknowledge that the site is part of a designated 'conservation area'. However, having regard to the limited scale of the proposed development and the context of existing and surrounding development, I am satisfied that the proposed development can be considered at this location without the need for EIA.
- 9.6.7. The proposed development is not likely to have a significant effect on any European Site (as outlined in Section 9.5 of this Report). The proposed development is distanced c. 35 metres from the nearest watercourse. Having regard to this separation distance and the limited scale of the proposed development, I do not consider that the construction or operational phase would give rise to significant pollution impacts on nearby water courses (whether or not linked to any European site or other sensitive receptors). The proposed development would not have any significant environmental effects on bats, otters, or any other significant ecological features.
- 9.6.8. The proposed development would use the public water and drainage services of Irish Water and Dublin City Council, upon which its effects would be minimal. Similar to most developments, I acknowledge that the proposal has the potential to produce noise, waste (food, packaging, etc.) and other accidental emissions such as fuel, liquids, etc. However, I do not consider that the proposed development would not give rise to waste, pollution, or nuisances that differ significantly from that arising

from other urban developments. It would not give rise to a risk of major accidents or risks to human health.

- 9.6.9. I note that the referrer has raised concerns about archaeological heritage and the historical use of the site for waste disposal. However, having reviewed historical mapping and the limited scale of the proposed groundworks, I do not consider that the proposed development will have any significant environmental effects associated with archaeology, landfill, or contaminated lands.
- 9.6.10. I have considered other existing/permitted plans and projects for the area, including the planned playground development in the Park. Having regard to the nature and scale of those other plans and projects, together with the potential impacts of the proposed development, I do not consider that significant cumulative / in-combination environmental effects would occur.
- 9.6.11. In conclusion, having regard to the nature and limited scale of the proposed development and the absence of any significant environmental sensitivity or connectivity to any sensitive location, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

## 9.7. **The 'Part 8 question'**

- 9.7.1. The referral raises the question as to whether or not the proposed development is required to comply with the 'Part 8' requirements of the 2001 Regulations, as provided for under section 179 of the Act of 2000.
- 9.7.2. At the outset, I would highlight to the Board that this is a 'section 5' application, which deals specifically with the questions of what constitutes 'development' and 'exempted development'. In my opinion, the question of whether or not a development is required to comply with the requirements of section 179 (Act of 2000) and Part 8 (Regulations of 2001) is a completely separate matter which has no impact on the questions of 'development' or 'exempted development'.
- 9.7.3. Apart from screening determinations regarding the requirement for AA and EIA of local authority development (i.e. as per Articles 250(3)(b) and 120(3)(b) of the Regulations respectively), I am not aware of any legislative provisions which would

allow the Board to determine whether or not a Part 8 process is required. Therefore, I consider that any determination by the Board in this regard would be *ultra vires*.

- 9.7.4. Furthermore, the fact remains that the development has not yet been carried out. Therefore, even if it was determined that a development was of a class that is subject to Part 8 requirements, I do not consider that the provisions of section 179 or Part 8 would be contravened until such time as the development was carried out. In this case, I acknowledge that the 'reasons & considerations' of the DCC declaration include an opinion that the development 'falls outside the remit of Part 8'. However, that DCC declaration would not preclude the carrying out of a Part 8 process prior to the carrying out of the proposed development.
- 9.7.5. Having regard to the foregoing, I consider that the 'Part 8 question' in this case is entirely separate to the questions of 'development' and 'exempted development' as outlined in section 5 of the Act of 2000. Therefore, I advise the Board that this case should not include a determination as to whether or not the proposed development should be subject to the requirements of Part 8 of the Regulations of 2001.
- 9.7.6. In the event that the Board disagrees with this approach, I propose to provide an opinion on the 'Part 8 question'. I note that Article 80 of the Regulations outlines the development prescribed for the purposes of section 179 of the Act, and I consider that the following classes are relevant to the proposed development:
- (j) the construction or erection of a fire station, a library or a public toilet, and*
- (k) any development other than those specified in paragraphs (a) to (j), the estimated cost of which exceeds €126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus.*
- 9.7.7. With regard to class (j) above, I note that the referrer has questioned the planning authority's contention that the toilets are not 'public toilets' given that they are ancillary to the café and will not be managed or maintained by DCC.
- 9.7.8. In relation to proposed toilets, I note that the DCC 'invitation to tender' document was titled 'the provision of public conveniences in conjunction with retail units', albeit that the associated text describes the scope/specification as 'retail units with integrated

toilet facilities'. Other notable features of the documentation on file includes the following:

- The tender requires that the public convenience is provided to all members of the public when it is open, which should coincide with Park opening times
- The DCC Community Notification flyer refers to the installation of a 'public toilet & coffee shop' and that the toilet will be open for use by members of the public during park opening hours
- The DCC Planner's report indicates that the toilets will also be made available to members of the public without the need to make a purchase during café opening hours
- The images of the proposed unit indicate that a separate external access will be available to the toilet, with no requirement to enter the café
- The DCC presentation document (by Colin O'Reilly, Director of Services) outlines a background which is based on '*unprecedented requests for assistance from local businesses, public representatives and residents to provide public conveniences across the city*'.

9.7.9. Having regard to the above, I consider the proposed unit would provide mixed functions consisting of toilet and café facilities. And given the stated requirements and the proposed design of the toilet facilities, I consider that it would constitute a 'public toilet' which would be different to the normal arrangements of toilets being provided within commercial units for customer use. I do not consider that the toilets would be purely ancillary to the café use. In my opinion, the toilet element would constitute an equal, if not primary, purpose of the proposed development.

9.7.10. In conclusion, I consider that the proposed development includes the erection of a public toilet, which should be subject to Part 8 provisions in accordance with Article 80 (1)(j) of the Regulations of 2001. The estimated cost of the development is not clear, and I am not, therefore, able to reach a conclusion in respect of Article 80(1)(k). As previously outlined, I do not advise that this should form part of the Board's section 5 declaration. However, the Board may wish to consider issuing an advisory note in this regard.

## 10.0 Recommendation

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 following works at Griffith Park, Drumcondra, Dublin 9, constitutes development and if so whether that development can be considered exempted development:

*The provision of a café and toilet building measuring approx. 12.19m long x 2.44m wide x 2.59m high within Griffith Park, with associated site works and foul drainage connection. (The referral includes the requirement for an EIA screening and AA screening).*

**AND WHEREAS** Gavin Smyth of 6 Ferguson Road, Drumcondra, Dublin, requested a declaration on this question from Dublin City Council and the Council made a declaration by order of the 29<sup>th</sup> day of September, 2021, stating that the proposed development is exempt from the requirement to obtain planning permission under Section 32 of the Planning & Development Acts 2000 (as amended):

**AND WHEREAS** the question was referred to An Bord Pleanála by Mr. Gavin Smyth on the 26<sup>th</sup> day of October, 2021, including a revised wording of the question as follows:

*'Whether the provision of public toilets in conjunction with retail unit/café unit, c. 12.19m long x 2.44m wide x 2.59m high with associated site works including foul drainage connection, water connection, ESB connection or generator provision, hard standing area, bin provision, outdoor seating/tables, removal of trees, alterations to landscaping and all associated works above and below ground, is or is not development or is or is not exempted development'.*

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

- (a) Sections 2(1), 3(1), 4(1)(f), 4(4), and 178(2) of the Planning and Development Act, 2000, as amended,
- (b) Articles 6 and 9, and Part 8 of the Planning and Development Regulations 2001, as amended
- (c) the provisions of the Dublin City Development Plan 2016-2022,
- (d) the characteristics of the site and the pattern of development in the area, and
- (e) the report of the Inspector:

**AND WHEREAS** An Bord Pleanála has concluded that the proposal involves works which constitute development and is exempted development as it falls within the scope of Section 4(1)(f) 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 Planning and Development Act 2000, as amended, hereby decides that the works consisting of the provision of public toilets in conjunction with retail unit/café unit, c. 12.19m long x 2.44m wide x 2.59m high with associated site works including foul drainage connection, water connection, ESB connection or generator provision, hard standing area, bin provision, outdoor seating/tables, removal of trees, alterations to landscaping and all associated works above and below ground, at Griffith Park, Drumcondra, Dublin, is development and is exempted development.

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Stephen Ward  
Senior Planning Inspector

2nd August 2022