



An
Bord
Pleanála

Inspector's Report ABP-313420-22

Question

Whether the construction of a refuse bin storage area for the exclusive use of the adjacent Eurospar shop and the storage of waste therein and on the adjacent public footpath and parking spaces is or is not development and is or is not exempted development

Location

129-131 Ballymun Road, Glasnevin,
Dublin 11

Declaration

Planning Authority

Dublin City Council

Planning Authority Reg. Ref.

0069/22

Applicant for Declaration

Bridget O'Neill.

Planning Authority Decision

Is Exempted Development.

Referral

Referred by

Bridget O'Neill.

Owner/ Occupier

Not known.

Observer(s)

None.

Date of Site Inspection

8 February 2023.

Inspector

Stephen Rhys Thomas

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1.0 Site Location and Description

- 1.1. The site is located in the car park of a neighbourhood centre that fronts onto the west side of Ballymun Road at its junction with St Pappin's Road about 1.5km south of Ballymun town centre. The opposite side of the Ballymun Road is a mix of housing set back from the Ballymun Road and open parkland/campus lands (adjacent to DCU/Hampstead Park to the south east).
- 1.2. The centre comprises a curved row of two storey premises in keeping with the two-storey residential character of the area. This parade of commercial premises is separated from the main junction by a slip road and landscaped buffer. Off-street perpendicular car parking is provided on each side of the slip road, and it is two car parking spaces to the front of Eurospar/Subway that are occupied by the subject site.
- 1.3. All premises have been considerably extended at ground and first floor level and also to the rear almost covering their original sites. A small trolley bay is located off the footpath. At time of inspection a large and enclosed bin store occupies two car parking spaces to the front of the retail premises. Car park spaces were full in addition to some double parking and parking partly on footpaths and adjacent roads.

2.0 The Question

- 2.1. The referrer seeks a determination as to whether the construction of a refuse bin storage area for the exclusive use of the adjacent Eurospar shop at 129-131 Ballymun Road, Glasnevin, Dublin 11 and the storage of waste therein and on the adjacent public footpath and parking spaces is or is not development and is or is not exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).

3.0 Planning Authority Declaration

3.1. Declaration

On the 30 March 2022 Dublin City Council, in accordance with section 5 of the Planning and Development Act 2000 as amended, decided to issue a notification of

declaration stating that the development as described would be exempt from the requirement to obtain planning permission under Section 32 of the Planning and Development Act 2000 (as amended).

3.2. Planning Authority Reports

3.2.1. Planning Reports

3.2.2. The planning report considered sections 2, 3, 4(1)(f) and 4(4) of the Planning and Development Act 2000 (as amended), article 80 and 250 of the Planning and Development Regulations 2001 (as amended), photographs and particulars submitted as part of register reference 0069/22 associated with the Section 5 application. The report concluded that the construction of an enclosed structure was 'works' but that because the area now enclosed had been in use for the storage of wheeled refuse bins, no material change of use has occurred.

3.2.3. The works are considered to have taken place under section 4(1)(f) of the Planning and Development Act 2000 (as amended), – development carried out on behalf of, or jointly or in partnership with, a local authority, under instruction from the Council's Public Realm Officer, under contract. Such development is controlled by section 178 and 179 of the Planning and Development Act 2000 (as amended). The development does not contravene the Development Plan and does not include a waste disposal facility.

3.2.4. Given the scale of development an EIA is not required, and the development has been screened for AA.

3.2.5. Recommendation – the development is considered to comply with section 4(1)(f) of the Planning and Development Act 2000 (as amended), and no requirement to obtain permission under section 32 of the 2000 Act.

3.2.6. Other Technical Reports

None.

4.0 Planning History

4.1. Site/adjacent:

PA Ref: WEB1148/22 – Permission for the RETENTION of part change of use from Retail to Coffee Shop (2 St. Pappins Rd), and for Retention of Rooflights (129-131 Ballymun Rd front & rear) repairs & alterations at Eurospar, 129-131 Ballymun Rd / 2 St. Pappins Rd, Dublin 9.

PA Ref: 2581/19 and ABP Ref: PL29N.304667 – Permission refused for a mixed use Building extension including 14 apartments and offices and all associated works.

PA ref 1528/01 refers to grant of permission for a two-storey extension to front and side of the premises on site. Condition 5 restricted first floor storage to ancillary use for ground floor retail.

PA Ref: 1528/01 - Two storey extensions to front / side of costcutters supermarket.

4.2. Planning Enforcement History

PA Ref: E0637/21 – Unauthorised bin store. Case closed, declared exempted development.

4.3. Relevant Referrals

- 4.3.1. I have also reviewed the Board's Referral System database to establish whether the issue of waste storage bin enclosures has been previously considered by the Board. In this respect a single referral, ABP reference ABP-310420-21, has some relevance. The referrer sought an answer as to whether the creation of hard standing area for the storage of refuse bins is or is not development and is or is not exempted development. The Inspector in this case concluded that the provision of hard standing on an area previously in use for open space was considered to be works and a change of use and there being no provision in the Planning and Development Act 2000 and/ or the Planning and Development Regulations 2001 to render the development to be exempted.

5.0 Policy Context

5.1. Development Plan

The **Dublin City Development Plan 2022-2028** is the operative statutory plan for the area. The site is located on lands subject to Zoning Objective Z3 – Neighbourhood Centres, To provide for and improve neighbourhood facilities.

Open for consideration - civic and amenity/recycling centre.

5.2. Natural Heritage Designations

The referral site is not located in or immediately adjacent to a European Site, a Natural Heritage Area (NHA) or a proposed NHA (pNHA). There are no watercourses at or directly adjacent to the site.

6.0 The Referral

6.1. Referrer's Case

6.1.1. Subsequent to the Council's Declaration Joe Bonner Town Planning Consultant has made this Referral on behalf of Bridget O'Neill to An Bord Pleanála as per the provisions of Section 5(3) of the Planning and Development Act, 2000 (as amended). They present the issue for determination by the Board as follows: Whether the construction of a refuse bin storage area for the exclusive use of the adjacent Eurospar shop and the storage of waste therein and on the adjacent public footpath and parking spaces is or is not development and is or is not exempted development. The submission by the owner/occupier is accompanied by supporting material and documentation including photographs and a copy of the Council's decision. The grounds of referral are summarised as follows:

- The assessment made by the planning authority (PA) was based on the closure of an enforcement case in relation to the bin store, the decision had therefore already been made. There are no reports on file from either the Public Realm Officer or Transportation Planning to support the decision.

- The PA link the long going ad hoc storage of bins at this location to support a material change of use for the site and allow for section 4(1)(f) to apply. Section 178 and 179 of the PDA do not give unrestricted powers to the local authority, this is noted.
- The location of the bin store presents a traffic hazard by virtue of its location adjacent to the public road. If permission had been sought for the installation it is likely that permission would have been refused on the basis of endangering traffic safety. It is not clear if the PA determined that the structure causes a traffic hazard or if it does then it doesn't matter because it is exempted development.
- Relevant legal cases include *Byrne v Commissioner of Public Works* – the bin store was not erected on foot of a part 8 process. *Howard v Commissioner of Public Works*. These case all relate to the planning authority's contention that no exemption exists for the bin store, if so than the legal cases above would mean permission is required.

6.2. Planning Authority Response

No further comments to make.

6.3. Owner/ occupier's response

None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

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

7.1.1. Under Section 2(1), the following is the interpretation of 'works':

"...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."

The following definitions are relevant to the subject question:

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 any structure so defined and –

(a) where the context so admits, includes the land on, in or under which the structure is situate...'

and land 'includes any structure ...'

7.1.2. Section 3(1) states as follows:

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

7.1.3. Section 4(1) of the Act states that the following shall be exempted developments for the purposes of this Act:

"(f) 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".

7.1.4. 32.— (1) Subject to the other provisions of this Act, permission shall be required under this Part —

(a) in respect of any development of land, not being exempted development, and

(b) in the case of development which is unauthorised, for the retention of that unauthorised development.

(2) A person shall not carry out any development in respect of which permission is required by subsection (1), except under and in accordance with a permission granted under this Part.

7.1.5. Section 178. (1) The council of a county shall not effect any development in its functional area which contravenes materially the development plan.

(2) The council of a city shall not effect any development in the city which contravenes materially the development plan.

(3) The council of a city and county shall not effect any development in the city and county which contravenes materially the development plan.]

Section 179.—(1) (a) The Minister may prescribe a development or a class of development for the purposes of this section where he or she is of the opinion that by reason of the likely size, nature or effect on the surroundings of such development or class of development there should, in relation to any such development or development belonging to such class of development, be compliance with the provisions of this section and regulations under this section.

(b) Where a local authority that is a planning authority proposes to carry out development, or development belonging to a class of development prescribed under paragraph (a) (hereafter in this section referred to as “proposed development”) it shall in relation to the proposed development comply with this section and any regulations under this section.

(d) This section shall also apply to proposed development which is carried out within the functional area of a local authority which is a planning authority, on behalf of, or in partnership with the local authority, pursuant to a contract with the local authority.

7.2. Planning and Development Regulations, 2001

PART 8 – Requirements in respect of specified development by, on behalf of or in partnership with local authorities.

Article 80 (1) Subject to sub-article (2) and sub section (6) of section 179 of the Act, the following classes of development hereafter in this Part referred to as “proposed development” are hereby prescribed for the purposes of section 179 of the Act-

Of most relevance-

(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.

2(c) This Part shall also apply to development which is carried out within the functional area of a local authority that is a planning authority, on behalf of, or in

partnership within the local authority, pursuant to a contract with the local authority. Article 81-85 considers as to how the council, borough council or urban district council should give notice of the said works and to what bodies.

There are no other provisions of relevance for the referral case.

8.0 Assessment

8.1. Is or is not development

8.1.1. The referrer has asked the question as to whether the construction of a refuse bin storage area is or is not development and is or is not exempted development. The installation can be described as follows:

- A 1.8 metre high, prefabricated concrete panel enclosure, that occupies up to two car parking spaces. The enclosure is brightly painted, with a door/gate that opens across a car parking space. The structure has no roof, and the supporting pillars are set into the cobble lock surface of the car parking spaces.
- The contents of the enclosure are not readily visible from the road or footpath.

8.1.2. The development has been carried out on a lands that had been in use as car parking spaces, for the parking of cars and other vehicles as required. According to the referrer, the development has been carried out on lands owned by the Alderman Dublin City, the road appears to be in public ownership and so do the car parking spaces used to accommodate the structure, Folio 16520F refers. The structure now permanently encloses an area to store bins associated with the adjacent retail premises and can no longer be used for the purpose it was originally designed for.

8.1.3. Having regard to section 2(1) of the Planning and Development Act 2000, as amended, I consider that the proposal involved an act of construction and is therefore 'works', the enclosed area is a 'thing constructed...on...land' and is therefore a 'structure', and that 'land' means land and/ or a structure.

8.1.4. From the above, having regard to section 3(1), as the proposal has involved 'the carrying out of works on...land or the making of any material change in the use of

any structures or other land', I consider the proposal is 'development' within the meaning of the Act.

8.1.5. The planning authority have noted that the area in question has been used on and off for the storage of wheeled waste bins for a long period of time before the erection of the enclosure occurred. The planning authority differentiate between what is considered development, that is 'works' or 'any material change of use', section 3(1)(a) of the 2000 Act refers. The planning authority conclude that works have been carried out, hence 'development' has occurred, but no material change of use has occurred, because the lands have been in use for the storage of waste bins for some time.

8.1.6. In the first instance, it is clear that works have been carried out and so therefore development has taken place, neither referrer nor planning authority disagree with this fact. On the other hand, I disagree with the planning authority with respect to the absence of a material change of use. The lands have been laid out for car parking spaces, irrespective of a long-standing use for the storage of wheeled waste bins this does not change the underlying and intended use of the lands in question. I note that planning permission was granted for a two storey extension to the side and rear of the supermarket, PA Ref: 1528/01 refers. However, I have been unable to ascertain if any conditions were attached with regards to refuse storage or the use of car parking spaces to the front of the store, no documentation is on file or on the Council's website in this respect. Because a use may have been ongoing for some time (ten years is mentioned by the planning authority), it may be immune from successful enforcement action, it does not automatically follow that such a use becomes authorised. In this instance, I consider that there has been a material change in use of the land. I determine this due to there being an actual change in how the land is now used, an altered use from car parking purposes to use as an enclosed storage area for refuse bins. This would be a factual change of use and, because car parking has been permanently removed from use, a greater demand on car parking now results, there would be implications for traffic and pedestrian safety in the area, which are material planning issues. Hence, I am satisfied that a material change of use has also occurred in addition to the carrying of works.

8.1.7. Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended), I consider that the installation of refuse bin storage area on car

parking spaces to the front of the property constitutes works and also entails a material change of use from car parking to the permanent storage of waste bins and is therefore considered to be development.

8.2. Is or is not exempted development

- 8.2.1. As outlined above, I consider the proposal to be two-fold, comprising both construction works, and a material change of use of the land. There are no provisions under the Planning and Development Act 2000 and/ or the Planning and Development Regulations 2001 which would render the development to be exempted development.
- 8.2.2. The planning authority considered the scope of section 4(1)(f) of the Act, determining that such development can be exempted if such development is carried out by or on behalf of a local authority. The planning authority explain that the Public Realm Officer authorised and approved such works to be carried out under contract and as such there is no requirement to obtain permission under section 32 of the 2000 Act. There is no report from the Council's Public Realm Officer, or contract documentation on the file.
- 8.2.3. The crux of the issue is whether the development falls within the exempted development clauses of section 4(1)(f). As is evident in the wording of 4(1)(f) a contract must be entered into by the local authority to avail of the exemption. However, it is evident from the submissions made by the planning authority that a contract may not be in existence, there is no contract on file and reference is made by the referrer to the possibility of a spoken contract not being good enough for the purposes of section 4(1)(f).
- 8.2.4. The term "contract" is not defined in the Planning Acts. Therefore, I have had regard to the definition of contract as per "Murdoch's Dictionary of Irish Law" where it is stated that a contract is a "legally binding agreement...in general for a contract to be valid and legally enforceable, there must be (1) an offer and unqualified acceptance; (2) an intention to create legal relations; (3) consensus ad idem; (4) legality of

purpose; (5) contractual capacity of the parties; (6) possibility of performance; (7) sufficient certainty of terms; (8) valuable conservation".¹

8.2.5. Furthermore, one would typically expect with a contract evidence of costs, details of agreement, waivers etc. However, as no contract has been advanced by the planning authority, I must conclude that no such contract exists. Therefore, I consider that the works do not fall within the scope and context of Section 4(1)(f) of the Planning and Development Act and are therefore not exempted development.

8.2.6. The planning authority make mention of section 178 Restrictions on development by certain local authorities and section 179 Local authority own development of the 2000 Act. These matters are of some relevance, and have a bearing on the matter in hand. Section 178 refers to the development plan for the area and the requirement to comply with its requirements, in this case the matter of a waste bin storage enclosure would not materially contravene the Z3 zoning of the area, being a structure that may improve neighbourhood facilities and therefore open for consideration. With respect to section 179 and local authority own development, the scale of the development carried out would not warrant the need for a Part 8 process for the types of projects listed under article 80 of the 2001 regulations. The planning authority seem to indicate that the works carried out are exempted development under Section 179 of the Planning and Development Act 2000, as amended, and the 2001 Planning and Development Regulations Article 80(1)(k). The effect of Article 80(1)(k) is that any works carried out by or for a local authority which costs less than €126,000 and subject to the clauses of Section 179 are exempted development. However, with reference to the foregoing paragraphs no costs of the said works has been provided at any stage to the Board, hence the clauses and conditions as per section 179 of the Planning Act were not fulfilled with specific reference to the following:

- 179(2)(a) -where no notice of the said works was provided
- 179(2)(c) – no plans of the said works were available for inspection by members of the public

¹ Murdoch's Dictionary of Irish Law by Brian Hunt, 5th edition, published by Tottel Publishing, Page 266.

- 179(2)(d) – there was no opportunity to make submissions regarding the same
- 179(3)(b) – No written report prepared by the Chief Executive of the local authority was provided to the members on the outcome of 179 (2)(a)-(d).

8.2.7. Therefore, in the context of the above, the requirements of section 179 and Article 80(1)(K) were not fulfilled and therefore the said works are not exempted development.

8.2.8. In addition, the planning authority have specifically mentioned article 80(1)(h) the use of land for the disposal of waste, and that the scale and character of the development at stake would not require Part 8. I agree, the development that has been constructed to date would not entail the requirements of section 179 of the 2000 Act. However, as I have already explained, because a contract and for that matter a schedule of costs, has not been advanced by the planning authority the said works cannot be considered to qualify under the restrictions set out by section 4(1)(f) of the 2000 Act and therefore the works are not exempted development.

8.3. **Appropriate Assessment Screening**

8.3.1. Notwithstanding the absence of any legislative provisions under which the development could be determined to be exempted development, and thereby require consideration of section 4(4) of the Act (i.e. if an appropriate assessment is required a development shall not be exempted development), in the interests of completeness I determine the following to be the case.

8.3.2. The proposal has involved the construction of an enclosed open storage area over approximately two ordinary sized car parking spaces, for the storage of commercial refuse bins. I highlight to the Board that the referral case does not include any plans or particulars of the enclosed area, including any information on surface water runoff, design and servicing. There is no technical report from the Water Services Section on the case file. The closest Natura 2000 sites to the appeal site are the South Dublin Bay and River Tolka Estuary Special Protection Area (SPA) (Site Code: 004024) located to the east at Clontarf, and the North Bull Island SPA (Site Code: 004006) and the North Dublin Bay Special Area of Conservation (SAC) (Site Code: 000206), which are both located at Dollymount strand, approximately 4 kilometres to the east.

8.3.3. I note that the site is not located proximate to any watercourses and most likely uses the municipal surface stormwater drainage system located in the public road. Having regard to the nature and scale of the development and the nature of the receiving environment and its location relative to Natura 2000 sites, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect, either individually or in combination with other plans or projects, on a European site.

9.0 Recommendation

9.1. 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 construction of a refuse bin storage area for the exclusive use of the adjacent Eurospar shop and the storage of waste therein and on the adjacent public footpath and parking spaces is or is not development and is or is not exempted development at 129-131 Ballymun Road, Glasnevin, Dublin 11, is or is not development or is or is not exempted development:

AND WHEREAS Bridget O'Neill requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 30th day of March, 2022 stating that the matter was development and was exempted development:

AND WHEREAS Bridget O'Neill referred this declaration for review to An Bord Pleanála on the 24th day of April, 2022:

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

a) sections 2(1), 3(1), and 4(1)(f) of the Planning and Development Act, 2000, as amended,

- (b) Sections 178 and 179 of the Planning and Development Act;
- (c) Article 80 of the Planning and Development Regulations 2001, as amended,
- (d) the planning history of the site, and
- (e) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The said works carried out at 129-131 Ballymun Road, Glasnevin, Dublin 11, constitute works by reference to section 3 of the 2000 Act, and therefore comes within the meaning of “development” in this section
- (b) There is no evidence that a written contract was entered into by Dublin City Council with any party as required by Section 4(1)(f) of the Planning and Development Act 2000, as amended and therefore the said works are not exempted development.

Stephen Rhys Thomas
Senior Planning Inspector

28 February 2023