



Question

Whether the provision of temporary on-sites structures used as site offices is or is not development or is or is not exempted development?

Location

Baumann's Yard, Old Dublin Road,
Stillorgan, Co Dublin

Declaration

Planning Authority

Dun Laoghaire Rathdown County
Council

Planning Authority Reg. Ref.

7022

Applicant for Declaration

KW Investments ICAV.

Planning Authority Decision

Is not exempted development.

Referral

Referred by

KW Investments ICAV.

Owner/ Occupier

KW Investments ICAV.

Observer(s)

No Observers.

Date of Site Inspection

19th of October 2023.

Inspector

Elaine Sullivan

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1.0 Site Location and Description

- 1.1. The subject site is in the urban village of Stillorgan, approximately 9km to the south of Dublin City Centre and approximately 3km to the north of the M50. It is located on the Old Dublin Road, directly to the north of Stillorgan Village, (formerly Stillorgan Shopping Centre). To the north of the site is a row of single storey retail premises with parking to the front and, to the west is the residential development of Woodland Drive. To the east and on the opposite side of the road is a row of two-storey houses on St. Laurence's Park, with Stillorgan College of Further Education to the northeast.
- 1.2. On the occasion of the site inspection, the site was surrounded with wooden hoarding panels. An arrangement of two storey portacabins were clearly visible towards the back of the site, with some additional structures and vehicles in place to the front. Approximately 180m to the south of the site, and on the opposite side of the road, is the Cornerstone construction site which is being developed under ABP 305176-19.

2.0 The Question

- 2.1. Whether the provision of on-site structures used as site offices and associated compound during the construction of the associated development permitted under ABP 305176-19, is or is not development or is or is not exempted development?

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority issued a Section 5 Declaration that the provision of temporary on-site structures to be used as a site office and compound during the construction of a development, (ABP 305176-19), is development and is not exempted development, pursuant to the provisions of Section 3 of the Planning and Development Act 2000, (as amended), and Class 16 and Class 17, respectively, of Schedule 2, Part 1 of the Planning and Development Regulations 2001, (as amended).

3.2. Planning Authority Reports

3.2.1. Planning Reports

The report of the Planning Officer, (PO), dated the 22nd of July 2022 sets out the planning history for the site, the facts of the case, the relevant planning legislation, and their conclusion. The assessment conclusion is summarised as follows:

- The proposal in question constitutes development as per Section 3(1) of the Planning and Development Act 2000, (as amended), hereinafter referred to as 'the Act'.
- The question of whether the development constitutes exempted development is considered under Class 16 and Class 17 of the Planning and Development Regulations 2001, (as amended), hereinafter referred to as 'the Regulations'.
- Both Class 16 and 17 refer to the placing of temporary structures on land adjoining where development is being, or about to be, carried out.
- The applicant argues that the subject site, where the temporary structures are, and the site where development has been permitted, should be considered as being adjoining even though they are 180m apart.
- The PO notes the Oxford English Dictionary definition of 'adjoining' as being 'next to' or 'joined with' and does not consider both sites to be 'adjoining'.
- Therefore, the PO does not consider that the proposal meets the requirements of either Class 16 or Class 17 of the Regulations and is not exempted development.

3.2.2. Other Technical Reports

- No other reports are on file.

4.0 Planning History

4.1. On the subject site –

Enforcement History – ENF 07722 – Enforcement file opened by the PA in relation to the placement of 2-storey block of portacabin type structures within the yard area

of the lands without the benefit of a valid planning permission and that does not constitute exempt development.

D13A/0088 – Planning permission granted by the PA in February 2013 for the provision of a garden centre for a temporary period of five years.

D06A/1757 – Planning permission granted by the PA in July 2007 for a temporary planning permission for a period of four years for the provision of 35 car parking spaces on an unused and enclosed yard space known as Baumann's Yard.

D04A/0826/E – Extension of duration granted in April 2010.

PL06D.209258, (PA Ref. D04A/0826) – Planning permission granted in October 2004 for development comprising a mixed use residential and retail development of 7 x two-storey mews houses, a three-storey building with retail at ground floor and 5 apartments above.

On a site nearby and referenced in the Section 5 Declaration -

ABP-305176-19 – Planning permission granted in December 2019 under Section 4(1) of the Planning and Development (Housing) and Residential Tenancies Act 2016 for the demolition of existing structure and the construction of a mixed-use development to include 232 no. Build to Rent apartments and associated site works.

4.2. **Relevant Board Decisions**

I have searched and examined the Board's database for referrals of a similar nature. There is an extensive list of Section 5 Referrals on the Board's database that relate to similar issues. Whilst the circumstances of each case differ, I consider the following and most recent referrals, to be relevant to the subject referral,

ABP - 301780-18 – The Board generally found that in relation to Class 16 of Part 1 of the Second Schedule to the Planning Regulations 2001, as amended, that the lands subject to the referral did not comprise a development site as no development consisting of works pursuant to a permission or exempted development were currently being undertaken.

RL3607 – The Board generally found that the change of use of the site to a construction compound would constitute development and was not exempted

development under Class 16, Part 1 of the Second Schedule to the Planning Regulations as the land on which the construction compound is located does not constitute land adjoining the land on which the development is being carried out as it is physically separated from that land by a distance of approximately 76m.

RL3312 – The Board generally found that the erection of a temporary storage shed and a portacabin on lands in connection with construction works at Finnstown House, Lucan, a Protected Structure, was development and was not exempted development due to the separation distance from the permitted site and the intervening uses, including a Protected Structure, and the absence of any development works associated with the grant of permission.

5.0 Policy Context

5.1. Development Plan

- The Dun Laoghaire Rathdown Development Plan 2022-2028 is the operative Development Plan for the site.
- The site is located within the boundary of the Stillorgan Local Area Plan 2018-2024.
- The site is zoned objective DC – District Centre, ‘To protect, provide for and / or improve mixed-use district centre facilities’.

5.2. Natural Heritage Designations

- No designations apply to the subject site.

6.0 The Referral

6.1. Referrer’s Case

The issues raised by the referrer can be summarised as follows:

- The referrer is of the opinion that the view of the PA regarding the definition of 'adjoining' is overly restrictive. The subject site forms part of a wider landholding in control of the applicant and separated by a public road. The nature and extent of this landholding warrants consideration of a broader interpretation of 'adjoining' as it relates to Class 16 and Class 17.
- The provision of temporary structures on the subject site in connection with the Stillorgan Leisureplex development site is appropriate given the proximity of residential development to the site and is in the interest of residential amenity.
- The referrer considers that a site-specific approach to the application of the Planning Regulations is warranted and submits that the spirit of the regulations allows for flexibility in their application.
- Previous Referrals are referenced; ABP 301780, RL3607 and RL3063. In all these cases the development was found not to be exempt, and the referrer argues that the circumstances in these cases do not relate to their case.
- The referral contends that the subject case differs as the construction compound is in a dense urban area where land is scarce and would be used in connection with a valid planning permission, (ABP 305176-19). The land is part of a wider landholding and would be restored to its former status on completion of the development.
- For the reasons set out above, the referrer is of the opinion that the development is in accordance with the provisions of Class 16 and Class 17 of the Planning Regulations.

6.2. Planning Authority Response

- No further comments on the Section 5 Referral provided by the PA.

6.3. Further Responses

- No further responses

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2, the following interpretation of “works”:

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

Section 3 (1), states the following:

“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.”

Section 4 (1) (a)- (i) set out what is exempted development for the purpose of the Act

Section 4 (2) (a) states-

“The Minister may by regulations provide for any class of development to be exempted development for the purpose of the Act”.

Section 5 (1) states –

If any question arises as to what, in any 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 a 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.

7.2. Planning and Development Regulations, 2001

Article 6(1) -

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.

Article 9(1) -

Sets out the circumstances whereby development to which article 6 relates shall not be exempted development for the purposes of the Act.

Schedule 2, Part 1:

Exempted Development – Classes of Use

<p>Column 1</p> <p>Description of Development</p>	<p>Column 2</p> <p>Conditions and Limitations</p>
<p>Class 16</p> <p>The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out.</p>	<p>Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such extent as may be authorised or required by a permission under the Act</p>
<p>Class 17</p> <p>The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development (other than mining) is being, or is about to be carried out, pursuant to any permission, consent, approval or confirmation granted under the Act or any other enactment or as exempted development, of temporary on-site accommodation for persons employed, or otherwise engaged, in connection with the carrying out of the</p>	<p>Such accommodation shall be removed at the expiration of the period and the land shall be reinstated save to such an extent as may be authorized or required by the permission, consent, approval or confirmation granted under the Act or any other enactment.</p>

development, during the period in which it is being carried out.	
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8.0 Assessment

8.1. Is or is not development,

- 8.1.1. The first matter to consider is whether the placing of temporary structures on the lands in question comprises development. Drawings submitted with the Section 5 referral show a two-storey structure modular building consisting of several cabins with the overall dimensions of 5.1m in height, 17.14m in width and 12.13m in depth. The documents state that the building is in use as site office and compound. I can confirm that, on the occasion of the site inspection the temporary building was in place on the site and the site was in active use as a compound. The site was also surrounded by hoarding.
- 8.1.2. Section 3(1) of the Planning and Development Act 2000, as amended ('the Act'), states that 'development' means 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. Section 2 of the Act defines 'works' as 'includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'
- 8.1.3. The placing of temporary structures, such as the portacabins in question, on the site is an act or operation of construction and constitutes works, which by definition, is development. The site was also described as an empty site prior to its use as a compound. The use of the site as a construction compound would represent a material change of use in the land and as such, would be development.

8.2. Is or is not exempted development,

- 8.2.1. Section 4(1) of the Act sets out provisions in relation to exempted development. The use of the land as a construction compound does not comply with any of these provisions.

- 8.2.2. Section 4(2) of the Act provides that the Regulations can make provision in respect of exempted development. This is done by Article 6, which provides that development of a class specified in Schedule 2 of the Regulations shall be exempted provided that the conditions and limitations attached to those various classes are met.
- 8.2.3. The applicant argues that the provision of temporary structures on the site for use as a site office and compound during the construction of the 'Cornerstone' development, (permitted under ABP 305176-19), and use of the land as a compound represents exempt development under Class 16 and Class 17 of Schedule 2, Part 1 of the Planning Regulations.
- 8.2.4. Class 16 relates to - *The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out.*
- 8.2.5. Class 17 relates to - *The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development (other than mining) is being, or is about to be carried out, pursuant to any permission, consent, approval or confirmation granted under the Act or any other enactment or as exempted development, of temporary on-site accommodation for persons employed, or otherwise engaged, in connection with the carrying out of the development, during the period in which it is being carried out.*
- 8.2.6. I am satisfied that the use of the site as a compound can be considered under Class 16 and the temporary structures can be considered under Class 17, and that the use of the site as a compound is in connection with development being carried out on the Cornerstone site pursuant to a permission granted under ABP 305176-19.
- 8.2.7. In both Class 16 and Class 17 the exemption is specific to the development being carried out on land 'adjoining' which development is being or about to be carried out. The subject site is approximately 180m to the north of the site under development and both sites are separated by the Old Dublin Road.

- 8.2.8. The Planning Act does not contain a definition for 'adjoining'. I do not consider it to be a legally ambiguous term and therefore, the literal interpretation of the word can be accepted. I note to the Board that previous decisions in referrals of this nature also found this approach acceptable.
- 8.2.9. The Oxford English Dictionary defines 'adjoin' as, '*To be located next to or very near (a thing, place, or person); to be adjacent or contiguous to; (also) to be physically joined...*'. The definition of 'adjoin' in the Cambridge English Dictionary is '*to be very near, next to, or touching*'. Based on the definitions of 'adjoin' I am satisfied that the subject site is not on land adjoining the development site as both sites are physically separated by a public road and are at a remove of approximately 180m from each other.
- 8.2.10. It is argued by the applicant that a more flexible approach to the definition of 'adjoining' should be taken, as the subject site is within the wider landholding of the development site and should be considered as such. Class 16 and 17 make no reference to lands within the wider landholding or to lands within the same ownership, and the wording is specific to the physical context. Therefore, the assertion of the applicant that the site is part of a wider landholding, is not a relevant consideration in the application of the exemption.
- 8.2.11. Having regard to the location of both sites, at a remove of approximately 180m from each other and on the opposite side of a public road, I am satisfied that the temporary structures and use of the site as a compound is not on land adjoining the development site and does not constitute exempt development under Class 16 and/or Class 17 of Schedule 2, Part 1 of the Planning Regulations.

8.3. Restrictions on exempted development

- 8.3.1. Article 9 of the Regulations sets out a number of restrictions on exempted development. I have reviewed these restrictions in relation to the subject development. Should the Board consider that the development is exempted under Class 16 and/or Class 17, I am satisfied that none of the restrictions apply directly to the subject proposal.

8.4. Appropriate Assessment

8.4.1. Having regard to the nature and extent of the development within an established urban area, and that the distance of the site to nearest European site, no appropriate assessment issues arise, and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.5. Environmental Impact Assessment

8.5.1. See completed Form 2 on file. Having regard to the nature, size and location of the proposed development and to the criteria set out in Schedule 7 of the Regulations, I have concluded at preliminary examination that there is no real likelihood of significant effects on the environment arising from the proposed development. EIA, therefore, is not required.

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 provision of on-site structures used as site offices and associated compound during the construction of the associated development permitted under ABP 305176-19, is or is not development or is or is not exempted development:

AND WHEREAS KW Investments ICAV requested a declaration on this question from Dun Laoghaire Rathdown Council and the Council issued a declaration on the 25th day of July 2022 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 18th day of August 2022:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) Section 4(2)(a) of the Planning and Development Act, 2000,
- (e) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (f) Classes 16 and 17 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, and,
- (g) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The placing on land of temporary structures for use as site offices and associated compound constitutes development, as it involves the carrying out of 'works' and is a material change in the use of the lands,
- (b) the lands which are in use as site offices and associated compound are located at Bauman's Yard, Old Dublin Road, does not constitute land adjoining which development is being, or is about to be carried out pursuant to a permission, as it is physically separated from that land by c. 180 metres,
- (c) accordingly, the temporary structures and associated compound does not come within the exempted development provisions of Class 16 or Class 17, Schedule 2, Part 1 of the Planning and Development Regulations 2001, (as amended), and
- (d) does not come within any of the other exempted development provisions of the Act or Regulations.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the placing on land of temporary structures for use as site offices and associated compound is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Elaine Sullivan
Planning Inspector

25th October 2023