



An  
Bord  
Pleanála

## Inspector's Report PL29N.RL3581

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<b>Question</b>	Whether the use of a Parcel Motel Facility as a placement for deposit/ temporary storage unit is or is not development or is or is not exempted development.
<b>Location</b>	The Goat, Lower Kilmacud Road, Dun Laoghaire, Co. Dublin.
<b>Planning Authority</b>	Dun Laoghaire Rathdown
<b>Planning Authority Reg. Ref.</b>	2817
<b>Applicant for Declaration</b>	Nightline Logistics Group
<b>Planning Authority Decision</b>	Is not exempted development
<b>Date of Site Inspection:</b>	2 <sup>nd</sup> August 2017
<b>Inspector</b>	Emer Doyle

## **1.0 Site Location and Description**

1.1. The subject site is located within the car park of 'The Goat' public house at the junction of Lower Kilmacud Road and Taney Road in Dublin 14. The 'Parcel Motel' structure is located close to a bottle bank and provides for a large number of letter boxes to which parcels are delivered to and then collected by the person to whom they are sent.

## **2.0 The Question**

2.1. Whether the use of a Parcel Motel Facility as a placement for deposit/ temporary storage unit is or is not development or is or is not exempted development.

## **3.0 The Referrer's Submission**

3.1. A submission was submitted to the Board on behalf of Nightline Logistics Group which can be summarised as follows:

- The previous Section 5 which has been determined on the site did not address the matter of Section 4(1)(h) of the Planning and Development Act.
- A material change of use has not taken place given the commercial nature and context of the site. The unit does not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or the neighbouring structures and it is therefore submitted that the use can be considered as exempt under Section 4(1)(h).
- Referral RL3233 determined that the replacement of four underground storage tanks with four larger underground fuel tanks
  - (a) does not result in intensification of use, and
  - (b) does not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure of neighbouring structures and, therefore, comes within the scope of section 4(1)(h) of the Planning and Development Act 2000.

It is therefore considered that new structures can be allowed and can be consistent with the provisions of Section 4(1)(h) of the

3.1.1. Permission 1409/05 proposed 313no. spaces with 257no. for residential use.

Condition no. 3 of the permission required that at least one car space would be assigned permanently to each residential unit and that a parking management plan would be submitted to the Council. The property owners advise that 159no. spaces are in residential use and 67no. spaces are under the control of a receiver. Of those 67no. spaces, 21no. are being leased for commercial use. It is submitted the allocation of additional commercial car parking at the expense of residential spaces is in breach of condition no. 3.

3.1.2. It is submitted that the use of the spaces by commercial business is a material change of use from residential use and therefore constitutes development. Under article 9 of the Planning and Development Regulations development which would contravene a condition of a permission shall not be exempted development. The use of the 21no. spaces in the basement as commercial contravenes condition no.3 and is not exempted development.

3.1.3. **Planning Report:** The use of 21 no. car spaces at basement level is not in compliance with condition no. 3(a) of reg. ref. 1409/05 as the condition required a Parking Management Plan to be prepared for the site indicating how the spaces would be assigned and segregated by use. The use of the spaces is therefore not exempted development.

## 4.0 Planning History

4.1.1. There is a significant planning history attached to the subject site, but of relevance to the question at hand is the following:

- Planning Authority reg. ref. **1409/05**: Planning permission was granted for modifications to previously approved mixed use commercial and residential development (Plan No. PL 29N 124260, Reg. Ref. 3084/00, 4021/02, 2531/03, 2580/03, 5031/03 and 4059/04 at Sheriff Street Upper, Castleforbes Road and Mayor Street Upper, Dublin 1. Modifications comprised a new carpark extension of 1036sqm below 'New Road' providing 42 additional parking spaces with

vehicular access from previously approved basement carpark on southern portion of the site. Condition no. 3 of the decision stated:

*“The following requirements of the City Council's Roads and Traffic Planning Division shall be fully complied with in the development: (a) At least one car parking space shall be assigned permanently to each residential unit and shall be solely reserved for this purpose. A Parking Management Plan shall be prepared for the site and submitted for the written agreement of Dublin City Council. This shall indicate how spaces will be assigned and segregated by use and how use of the car parking will be continually managed. (b) Footpath and kerb to be dished and entrance to basement car park provided to the requirements of Roads Maintenance Department. New street and footpath to be constructed to the standards of the Roads and Traffic Department. (c) All costs incurred by Dublin City Council, including any repairs to the public road and services necessary as a result of the development, shall be at the expense of the developer. Reason: To ensure adequate parking provision for the residential units and to restrict commuter parking and to ensure a satisfactory standard of development”.*

## **5.0 The Referral**

### **5.1. Referrer's Case**

- It is submitted that the question posed to the City Council is a question of compliance and not a matter for a section 5 referral.
- It is submitted that this falls outside of the function of the Board under s5(4) as set out in *Roadstone Provinces v An Bord Pleánala* (2008) where the Court held that the “respondent has no jurisdiction on a reference under s5(4) of the Act to determine what is or is not unauthorised development.... It may only determine what is or is not development”.
- It is acknowledged that the provision of the subject 21 no. spaces is development and that it is development permitted by DCC as part of a permitted underground car park.
- It is submitted that the question of whether this development is exempted development or not does not arise as there has not been any material change of

use. The permitted car park included parking for residents and commercial with no designation or illustration of which spaces would be assigned to each use.

- The Finlay Geoghegan judgement states that determination of what is or is not unauthorised development will most likely be determined by the Courts where a dispute arises on an application under s.160 of the Act.
- It is submitted that the Planning Authority has the right to comment on whether a use is in compliance with a permission but there is no basis for the introduction of the concept of exempted development.

## **5.2. Planning Authority Response**

- The reasoning on which the Planning Authority's decision was based is set out in the comprehensive planning report which deals fully with all the issues raised and justifies its decision.

## **5.3. Owners Response**

- The property management company was explicitly directed by the Enforcement Officer of DCC to lodge a section 5 declaration on the issue as on-going enforcement proceedings indicated that the matter was not a compliance matter.
- The applicant has never questioned the issue of compliance, only the use of the 21 no. spaces. This was the basis of the section 5 referral and the subsequent declaration by DCC.
- Proof has been submitted that the spaces are being used for commercial purposes. A case has been made as to why this constitutes development.
- The section 25 certificate DD291 refers to a completely separate area of the basement in question.
- The Board is requested to declare that the development in question is not exempted development.

## **6.0 Statutory Provisions**

### **6.1. Planning and Development Act, 2000**

6.1.1. The following statutory provisions are relevant in this instance.

6.1.2. Section 2(1): In this Act, except where the context otherwise requires

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

"**structure**" means any building, structure, excavation or other thing constructed or made on, in or under any land, or any part of a structure so defined.

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

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

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

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

## 6.2. **Planning and Development Regulations, 2001**

6.2.1. Article 6(1) of the Planning and Development Regulations, 2001 states that "Subject to Article 9 development of a class specified in Column 1 and Part 1 of Schedule 2 shall be exempted development for the purposes of the Act".

6.2.2. Article 9(1) of the same Regulations provides for restrictions on exemption, and states:

"9(1) Development to which Article 6 relates shall not be exempted development for the purposes of the Act.

(a) If the carrying out of such development would:

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

## 7.0 Assessment

- 7.1.1. The referrer to the Board has submitted that the Board has no jurisdiction in determining planning compliance. That submission is correct. The Board has no remit in assessing or determining compliance with a planning condition. Planning enforcement is a matter for the planning authority and does not fall within the jurisdiction of the Board.
- 7.1.2. The referrer quotes the judgement of Justice Finlay Geoghegan which states that a Planning Authority cannot under s5(4) determine unauthorised development or unauthorised works. Again, this submission is correct, neither the Planning Authority nor the Board have the right under s5 of the Act to determine that certain development is unauthorised.
- 7.1.3. The background to the subject referral is slightly unclear. At no point in any of the documentation submitted to the Board or the Planning Authority has any of the parties identified the subject 21 no. car parking spaces for the apartments (or other use) they are associated with. The original referral to the Planning Authority refers to 67 no. car parking spaces being in control of a receiver and that of those 67 no. spaces, 21 no. spaces are being let commercially and will be offered for sale. Is the Board to infer that the receiver is in control of a number of the apartments associated with those spaces? And that instead of allowing the spaces to be used for the apartments (as conditioned by condition no. 3 of reg. ref. 1409/05), the receiver is leasing the spaces – or allowing the spaces to be leased?
- 7.1.4. If that is the case, the issue is indeed one of compliance with a planning permission. I draw the Boards attention to PL06FL.RL3326, in which the Board was requested to determine “whether the provision of 29 number car parking spaces at Collegewood, Castleknock, Dublin was or was not development or was or was not exempted development and whether the said 29 number car parking spaces were permitted under planning register reference numbers F00A/0854 (An Bord Pleanála appeal reference PL06F.124586) and F02A/1374 (An Bord Pleanála appeal reference PL06F.201694)”. In that case the Board stated that the provision of the car spaces in question was development and was not development but that the second part of the question was concerned solely with whether the provision of the spaces was in compliance with a permission granted. The board noted in their direction that as s5 of the Act relates only to the question as to what, in any particular case, is or is not

development or is or is not exempted development, it considered that it had no function or remit in deciding whether the provision of 29 number car parking spaces was or was not materially at variance with a planning permission or planning permissions granted. The Board stated that having regard to the nature of this element of the referral, the Board was satisfied that, in the particular circumstances, this element of the referral should not be considered by it. As the first part of the question came within the scope of s.5 the Board did not dismiss the referral however.

- 7.1.5. The question posed to the Board in this instance however, is framed in a more general context. The question to the Board is whether the use of 21 no. unidentified spaces is or is not exempted development, having regard to the provisions of the permission. The referrer on behalf of the statutory receiver Danniger, has under 5(3)<sup>1</sup> of the Act requested the Board to review the declaration of the City Council. Section 5 of the Act specifically allows the Board to declare on a question of whether a particular case is or is not development or is or is not exempted development within the meaning of the Act.
- 7.1.6. To be clear, neither the referral to the Planning Authority nor the review request submitted to the Board requested that either authority make a declaration of unauthorised development. As stated above, that is not the remit of the Board and is not within the jurisdiction of the Board. The Board has not been asked to make a declaration of unauthorised development nor would it presume to do so. I fail to see the relevance of the Roadstone Provinces judgement therefore.
- 7.1.7. The referrer requests that the Board confirm that the question posed to the Planning Authority was an inappropriate use of s5 and that the Board reject the referral currently before the Board. Based on the above, I am satisfied that the review of the Planning Authority's declaration submitted to the Board is one upon which the Board can issue a declaration and I recommend that the request to reject be denied.

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<sup>1</sup> 5(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration



## 7.2. Is or is not development

- 7.2.1. The referrer has acknowledged that the provision of the 21 no. car spaces in question is development and is permitted development, being permitted under a series of permissions providing for the underground car park. The question before the Board however, does not relate to the provision of the spaces in question, but to their use and whether a change in use of the car spaces from residential use to commercial use would be development by virtue of being a material change of use.
- 7.2.2. Whether change of use amounts to a material change in use is considered to be a question of fact as is explained in *Monaghan County Council v Brogan* [1987] I.R. 339, and means assessing not only the use itself but also the effects of such a use. The materiality in terms of planning purposes must be considered “in accordance with the current planning considerations relevant for the area”. These require consideration of the impact of the change in the adjoining area, for example traffic generation by residents of the associated apartments who do not have a designated space, the impact of such residents parking in the wider area etc. I note the planning report of the Council that quotes the Roads and Traffic Department of the Council stating that “it is important that the quantum of parking provided relate to the uses in the development. The Roads and Traffic Planning Division is concerned that excessive car parking may be available to the office element of the development thereby encouraging commuting by private car which would be unacceptable and contrary to Dublin City Council policy.” The Planning Authority in their decision to grant and the attachment of condition no. 3 were of the view that the proper planning and sustainable development of the area was served by each residential unit having a designated parking spot. The subject 21 no. spaces were permitted on the basis of the needs of the permitted residential uses, and conditioned to be allocated on that basis.
- 7.2.3. In view of the above, and having regard to the nature and extent of the permitted development, in particular clarity of the proposal and the requirements of the planning authority regarding car parking provisions it is my considered opinion that there has been a material change in the use of 21no. spaces within the car park from that conditioned by the planning permission.

### 7.3. Is or is not exempted development

- 7.3.1. As noted above, condition 3 of the planning permission reg. ref. 1409/05 required that at least one car parking space be provided for each residential unit. The referral submitted to the Planning Authority states that under 1409/05 the development was permitted to have a total 313<sup>2</sup> no. car parking spaces, 257 no. of which were to serve residential use and approx. 50 no. were to serve the other permitted uses. That submission also states that 159 no. spaces were being made available to residential units with 56 no. spaces. Notwithstanding the lack of clarity regarding the specific spaces and indeed the overall number of spaces in the basement, the allocation of spaces conditioned to be used for residential to a commercial use is contrary to a condition attached to the permission 1409/05.
- 7.3.2. Article 9(1) of the Regulations provides for restrictions on exemption, and states: “9(1) Development to which Article 6 relates shall not be exempted development for the purposes of the Act, (a) If the carrying out of such development would (i) contravene a condition attached to a permission under the Act, or be inconsistent with any use specified in a permission under the Act. The use of car parking spaces which were conditioned to be allocated to a residential use and which are in use for a commercial use contravenes condition no. 3 of the permission reg. ref. 1409/05 and therefore the use is de-exempted by virtue of article 9(1)(a)(i) of the Regulations.

## 8.0 Recommendation

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

**WHEREAS** a question has arisen as to whether the use of 21 no. spaces at basement level having regard to specific conditions attached to reg. ref. 1409/05 or is or is not exempted development:

**AND WHEREAS** Brock McClure Consultants on behalf of Castleforbes Square Management requested a declaration on this question from Dublin Council and the Council issued a declaration on the 7th day of December, 2016 stating that the matter was not exempted development:

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<sup>2</sup> I note that the car parking numbers in section 3.9 and section 4.1 of the referrals submission to the Planning Authority add up to 307no. and not 313no. This serves to further add to the lack of clarity around the allocation of car parking.

**AND WHEREAS** referred this declaration for review to An Bord Pleanála on the 10th day of January, 2017:

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

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) article 6(1) and article 9(1)(a)(i) of the Planning and Development Regulations, 2001, as amended, and
- (c) the planning history of the site,

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) the use of 21no car parking spaces at basement level in Castleforbes Square having regard to specific conditions attached to reg. ref. 1409/05 is not exempted development

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the use of 21no car parking spaces at basement level in Castleforbes Square having regard to specific conditions attached to reg. ref. 1409/05 is not exempted development.

*Gillian Kane*

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Gillian Kane  
Planning Inspector

07 April 2017