



An  
Bord  
Pleanála

## Inspector's Report RL3569 2

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### Question

Whether the erection of an internally illuminated billboard sign in place of a static tri-vision advertising panel at the location below is development or is exempted development.

### Location

Timmy Martin's licensed premises, 23 Sarsfield Street, Limerick.,

### Referral

### Referred by

Limerick City and County Council

### Planning Authority Reg. Ref.

DC-412-15

### Owner/ Occupier

JC Decaux Ireland Ltd/ Timmy Martin

### Date of Site Inspection

6 July 2020

### Inspector

Brendan Wyse

## 1.0 Introduction

- 1.1.1. This referral was first lodged with the Board on 7 April 2017. Parallel legal proceedings in relation to the advertising structure the subject of the referral included a High Court stay on its' determination. That stay was vacated on 22 June 2020. An Inspector's Report, dated 23 June 2017, and draft Board Order are still on file.
- 1.1.2. Given the considerable lapse of time the Board decided, in the interests of justice, to invite further responses from the relevant parties – see Board Direction dated 28 January 2020.
- 1.1.3. This resulted in a submission on behalf of JC Decaux Ireland Ltd, the owner/occupier of the subject advertising structure, referring to both legal (seeking the dismissal of the referral) and substantive matters. No other submissions were received.
- 1.1.4. As per Board Direction dated 19 June 2020 the Board decided:
  - (a) Not to dismiss the referral, and
  - (b) To seek a full report and recommendation from the Inspectorate in light of the documentation on file, including both the Council's request and the arguments put forward on the substantive issues on behalf of JC Decaux Ireland Ltd.
- 1.1.5. This report addresses item (b) above.

## 2.0 Site Location and Description

- 2.1. Timmy Martin's licensed premises is located on the corner of Sarsfield Street and Liddy Street in Limerick City Centre. The building is largely 3 storey in height with a gable end to the Liddy Street frontage.
- 2.2. The subject advertising billboard is located at third floor level on the gable end. Documentation on file indicates that it is 6m wide by 3m in height. I estimate the depth of the box to be about 500mm. The housing appears to be of metal construction (most likely aluminium). The 'screen' element is internally illuminated and displays static advertisements.
- 2.3. There is further signage at a lower level on the Liddy Street gable.

### 3.0 The Question

- 3.1. *Whether the erection of an internally illuminated billboard sign in place of a static tri-vision advertising panel at the gable wall of Timmy Marin's licensed premises at 23 Sarsfield Street, Limerick is development or is exempted development.*

### 4.0 The Referral

#### 4.1. Referrer's Case

- 4.1.1. This is a referral by Limerick City and County Council under Section 5. Planning and Development Act 2000, as amended, in relation to the above question.
- 4.1.2. The referral, as lodged 7 April 2017, includes the following:
- The Council in considering the question had regard particularly to;
    - (a) Sections 2, 3 and 4 Planning and Development Acts 2000-2015.
    - (b) Article 6 of Part 2 of Schedule 2 Planning and Development Regulations 2001, as amended.
    - (c) The history of the site and the advertising structure thereon.
  - A 6m by 3m static tri-vision billboard sign was erected on the site in 1992 following a grant of planning permission, Ref. 92/770088 (granted 10 April 1992) [relevant documentation enclosed, including photograph].
  - The sign remained in place until a date unknown in 2015.
  - It was noted by the Council in December 2015 that the sign was replaced by an internally illuminated 6m by 3m static billboard sign [daytime and night time photographs enclosed].
  - It is the opinion of the Council that this change to the sign and the resultant increase in the intensity of light which emits from the sign is not appropriate in this location and may be a traffic hazard.
  - Details of enforcement proceedings issued by the Council.

- A letter from JC Decaux Ireland Ltd, in response to a Warning Letter, that includes:
  - In recent times, relatively minor modifications have been undertaken, which have removed the movement (tri-vision) features from the display, making a static image. Our advice is that this is a de-intensification of use. The position and display size of the unit has not changed.

## 4.2. Owner/Occupier Response

4.2.1. I note that the earlier responses submitted on behalf of JC Decaux Ireland Ltd were of a legal nature only.

4.2.2. The response received on 2 March 2020 on behalf of JC Decaux Ireland Ltd, in so far as it refers to the substantive question, includes the following:

- Development can either amount to the carrying out of works in, on or under land or, in the alternative, the making of any material change to the use of any structure or other land.
- There is no question of works and no works have been carried out in respect of this sign. The Council do not suggest at any time that any works are being carried out.
- The replacement of a sign with another sign could never amount to works and could never be such as to fall within the definition of 'works' contained in Section 2 of the Planning and Development Act. No works have been carried out and there is no assertion that any such works are relied on by the Council in this reference.
- It would appear, therefore, that the only element which the Council could ever rely on in respect of development is the second category namely a material change in the use of the structure or other land.
- The Council acknowledges that the sign was lawfully erected and remained in place without complaint for almost 25 years.

- It also acknowledges that the sign itself was a billboard sign, was of precisely the same dimensions and had precisely the same use as the previous sign, namely an advertising sign.
- It could never be concluded that the sign amounts to a change of use because the use is already established and the use has not changed. The Council confirm that the use is the same.
- However, the test is not whether the use is a change of use but whether it is a material change of use which imposes a far higher standard. Material change can only be applied once there is a change of use.
- The Council, therefore, have no basis whatsoever to assert that the referral falls within the definition of development.
- A billboard sign by its nature will as an inherent part of its use require alterations in terms of the advertising content. There is no limitation as to the frequency which the image may be changed, over a number of days or within any one day. The use of the sign as it currently operates and has always operated is identical in planning terms.
- A billboard sign, of necessity, is used to display different messages and in a way that attracts the attention of the public. That is the nature of what is permitted when a sign is permitted. If it was to be held that any alteration to a sign amounts to a material change of use then every billboard, once the image is changed, would be an unauthorised development. This would be a most profound and erroneous approach to the very nature and essence of such signs.
- In circumstances where there is no development the question of exempted development does not arise.

#### **4.3. Further Responses**

- 4.3.1. Circulation of the above submission to Limerick City and County Council and to Timmy Martin (the owner/occupier of the building to which the advertising structure is fixed) did not result in any further responses.

## 5.0 Planning History

### 5.1.1. PA Ref. 92/77088

1992 grant of permission for the erection of a tri-vision sign in place of existing sign. Condition 1 of the permission required that the lighting to the sign be solely of the reflective type and that such 'trough' lighting be so fixed as to be capable of solely shining inwards onto the sign. The reason referred to proper construction and development particularly in view of the location of the proposed sign and in the interests of amenity.

Note: The Google Maps image from 2014 submitted with the Council's referral (Appendix 2) illustrates the sign as erected on foot of this permission. That sign is also illustrated on the drawing included as Appendix C of that submission.

### 5.1.2. PA Ref. DC-412-15

Warning Letter and Enforcement Notice issued in January 2016 and June 2016 respectively.

## 6.0 Policy Context

### 6.1. Development Plan

#### 6.1.1. Limerick City Development Plan 2010-2016 (extended pending the making of a new Limerick City and county Development Plan)

The referral site is located within an area zoned 1 (A,B,C) City Centre Area. It is also located within the designated City Centre Retail Area.

The property to which the sign is fixed is not a Protected Structure or otherwise subject to any conservation objectives.

### 6.2. Natural Heritage Designations

The River Shannon within the city boundaries is variously designated an SAC, SPA and NHA.

## 7.0 Statutory Provisions

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

#### 7.1.1. Section 2, Interpretation, includes:

*“advertisement” means any word, letter, model, balloon, inflatable structure, kite, poster, notice, device or representation employed for advertisement, announcement or direction.*

*“advertisement structure” means any structure which is a hoarding, scaffold, framework, pole, standard, device or sign (whether illuminated or not) and which is used or intended for use for exhibiting advertisements or any attachment to a building or structure used for advertising purposes.*

*“exhibit”, in relation to an advertisement, includes affix, inscribe, print, paint, illuminate and otherwise delineate.*

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

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

#### 7.1.2. Section 3, Development, includes:

*Section 3(1) 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, Exempted Development, includes:

*Section 4(1) The following shall be exempted developments for the purposes of this Act-*

*(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of*

*the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.*

*Section 4(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.*

## **8.0 Relevant Referral and Legal Cases**

### **8.1.1. ABP Ref. RL2004 (2003)**

The question in this case included reference to the alteration and extension of a single 6m x 3m freestanding billboard to form a double 12m x 3m billboard at Ballyhale, County Kilkenny.

The Board decided that the change was development and not exempted development. It also decided that the removal of the additions to the billboard sign, to revert to the original advertising structure (and which was proposed), would be development and would not be exempted development.

### **8.1.2. ABP Ref. RL 2892 (2011)**

The question in this case was whether the erection of a static billboard with overhead lighting on a side gable at 6 Fairville, College Road, Cork was or was not development or was or was not exempted development.

An original static advertising structure, in place pre-64, was removed and replaced with a tri-vision billboard with overhead lighting. Following a refusal of planning permission to retain the latter, a new static advertising structure with overhead lighting was erected on the site. The question related to this structure.

The Board decided that the erection of the new static advertising structure, following the removal of the tri-vision billboard approximately 14 months after the removal of the original advertising structure, involved works which constituted development and which were not exempted development.



### 8.1.3. **ABP Ref. RL 3570 (2018)**

The question in this case was whether the erection of an internally illuminated static billboard sign in place of a tri-vision billboard sign on the gable wall of 105 O'Connell Street, Limerick was or was not development or was or was not exempted development.

The tri-vision advertising sign had been the subject of a 5 year planning permission which had expired.

The Board decided that the works to provide the internally illuminated advertising billboard would not come within the scope of Section 4(1)(h), Planning and Development Act 2000, as amended, not being works for the maintenance, improvement or other alterations of an existing structure, but rather the provision of a new structure substantially replacing the pre-existing structure, or, in the alternative, if the works involved modification of the pre-existing structure rather than its complete replacement, the subject billboard, by reason of the design and form of illumination, materially affects the external appearance of the structure so as to render the appearance inconsistent with the character of the structure being altered or replaced and, therefore, would not be exempted development pursuant to Section 4(1)(h).

While the Board also noted that the subject billboard would not come within the scope of any exemptions under the Planning and Development Regulations 2001, as amended, it decided that the provisions of Article 9(1)(a)(iii) [of those Regulations] applied as the development in question, by reason of its scale, illuminated nature and location adjoining a busy road junction, would result in a traffic hazard by reason of distraction of road users at or adjoining this junction.

### 8.1.4. **Dublin Corporation v. Lowe and Signways Holdings Ltd [2000] IEHC 161 and [2004] IESC 106**

The relevant element of this case concerned the question of whether the removal of an advertising hoarding on the side of a building and its replacement with a similar hoarding (owned by a different company) was authorised. The Applicants, Dublin Corporation, had sought Court Orders requiring the discontinuance of the unauthorised use of the flank wall of the premises for advertisement purposes and the removal of the advertising hoarding.

In the High Court Judge Morris considered that, although the period between removing the original structure and replacing it was short, amounting to no more than a few days, the relevant consideration was that the structure was removed deliberately and that what was erected in its place was not the original but a new structure owned by a different company.

The Judge determined that whatever permission or immunity existed prior to the removal of the hoarding (and which did not include a planning permission but may have included an established use of the flank wall of the premises for the display of an advertising hoarding since before 1 October 1964) perished with its removal. He considered that, in planning terms, there must be a significant difference between the temporary removal for repair and maintenance with the intention of reinstatement and the removal of such a structure with no such intention by its owner but the replacement of a different (or be it similar) structure by a third party. He further considered that it is irrelevant that the new structure corresponded in all respects with the original. He concluded that the removal of the original hoarding (by the original owner) without the intention on their part of replacing it must be regarded as an abandonment of any rights which they may have acquired up to that time.

The Respondents in the case successfully appealed this decision to the Supreme Court.

The appeal process involved the Supreme Court remitting the matter back to the High Court which subsequently dismissed the original application (effectively upholding the Respondents appeal). The Applicants (Dublin Corporation) then appealed this decision to the Supreme Court – this being the case referenced above.

The sole issue considered by the Supreme Court in this final appeal was the effect of the removal of the original advertising structure and its replacement by a new hoarding of identical dimensions (this fact having been established). It was noted that the Respondents in the case had accepted that what took place was not maintenance or improvement but had contended that it was alteration.

Judge McCracken determined that the operation constituted “works” and that it was “development”. By reference to Section 4(1)(g), Local Government Planning and Development Act 1963, as amended (the relevant operative legislation at the time of the development), and in consideration that the planning unit in the case consisted of

the gable wall with the hoarding attached to it, the Judge determined that there had been an alteration to the planning unit by the substitution of one hoarding by another. The Judge also held that the word “alteration” must apply to something wider than a mere visual alteration.

The Judge concluded that what the Court was concerned with was the alteration of the hoarding by the substitution of a new hoarding and he was of the view that, in itself, this could not possibly be said to have materially affected the external appearance of the premises.

Accordingly, the Court dismissed the appeal. So, in effect the replacement advertising hoarding was deemed to be exempted development.

#### **8.1.5. Fingal County Council v. Crean and Signways Holdings Ltd [2001] IEHC148**

This case concerned the replacement/repair of a freestanding advertising structure and the erection of an additional similar structure, all of which were unauthorised structures.

Judge O’Caoimh found, on the basis of the evidence in the case, that at least a portion of the structure erected was not in anyway in replacement of or repair of a pre-existing structure and this could not be authorised. Further it was found that, as the original structures were unauthorised the exemption contended for under Section 4(1)(g), Local Government Planning and Development Act 1963, as amended, (the relevant operative legislation at the time of the development), did not apply.

## **9.0 Assessment**

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

9.1.1. Contrary to the submission on behalf of JC Decaux I am satisfied that the erection of the subject internally illuminated billboard sign does fall within the definition of ‘works’ as provided for under Section 2 of the Act.

9.1.2. Whether the creation of the subject billboard involved alterations/modifications to the original structure or involved the complete replacement of the original structure it would, in my view, have clearly involved acts of construction, alteration and/or renewal.

- 9.1.3. By reference to the works element of the definition of development, as provided for under Section 3 of the Act, development, therefore, has occurred.
- 9.1.4. In so far as the question of a material change of use is concerned, I concur with the position as put on behalf of JC Decaux. No change of use has occurred, the use still being that of an advertising structure for the purposes of advertising, and, as the point is well made, the very nature of an advertising structure is that the message/image will change from time to time for the very purpose of attracting the attention of the public.
- 9.1.5. In so far as the change in the method of illumination, from external to internal, might be considered to represent an intensification of use (and, therefore, constitute a material change of use) I also concur with the position as put on behalf of JC Decaux. It could equally be argued that the change from a tri-vision sign, where the images are constantly changing, to a static sign is de-intensification. Also the change from external illumination to internal does not, in my view, necessarily point to an intensification. An intense external illumination could, for example, generate greater illumination than a low or moderate level of internal illumination. In this regard it is worth noting that while the permission granted under PA Ref. 92/77088 specified (Condition 1) external lighting solely to shine towards the sign there was no limit placed on the intensity of such lighting.
- 9.1.6. I am satisfied, therefore, that no change of use, or material change of use, has occurred.
- 9.1.7. In conclusion, I consider that the erection of the subject advertising billboard involved works and, therefore, constitutes development.

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

- 9.2.1. By reference to the relevant statutory provisions (Section 7.0 above) the only avenue by which the subject development could be considered to constitute exempted development is under Section 4(1)(h) of the Act.
- 9.2.2. In considering this it is important to clarify the nature of the works that were carried out. The evidence on file in relation to this matter, and in particular on the part of JC Decaux, is not as clear as it might be. The question focusses on whether the works

involved alterations/modifications to the original advertising structure or involved a complete replacement.

- 9.2.3. I consider that the evidence points to at least a very substantial replacement of the advertising structure.
- 9.2.4. I conclude this, in particular, by reference to the Council's Appendices A, B and C (which include photographic and drawing illustrations of the original structure) and their Appendix D (which is a photograph of the current structure) and on the basis of my observations during site inspection (see Section 2.0 above). While the height and width dimensions have remained the same, 6m x 3m, there is quite a difference in the depth of the box. I estimate the depth might have doubled to about 500mm. The 'screen' element is also clearly different as is the 'frame'. The overhead external lighting has obviously been removed. Of course it is possible that the backing structure and/or fixing brackets of the original structure remain but JC Decaux have not provided any details in relation to this.
- 9.2.5. So, the question is can works of this nature and scope be considered to fall within Section 4(1)(h)?
- 9.2.6. The terms of Section 4(1)(h) refer to works for the maintenance, improvement or other alteration of any structure. These words are not defined in the Act (the definition of 'alteration' not being of assistance in this instance). However, by reference to the common use of the words, and by reference to various dictionaries (example, Cambridge English Dictionary and Collins English Dictionary), I am satisfied that they do not encapsulate the substantial replacement of the advertising structure that has occurred in this case. This interpretation is consistent with the Board's decision under ABP Ref. RL3570 (2018) in so far as that decision refers to the works in question being the provision of a new structure substantially replacing the pre-existing structure attached to a gable wall (see Section 8.1.3 above).
- 9.2.7. However, the Supreme Court case of Dublin Corporation v. Lowe and Signways Holdings [2004] IESC 106 (see Section 8.1.4 above), also involving very similar circumstances, invites a different approach. This suggests that the appropriate planning unit in cases such as these is not the advertising structure itself but rather the gable wall of the premises/building to which the structure is fixed. In this context the judgement is clear. The replacement of one advertising structure with another of

similar type and identical dimensions did constitute an alteration and was one that could not be deemed to materially affect the external appearance of the premises. While for reasons already alluded to the subject advertising structure is not identical to the original, I am satisfied that the same conclusion can be reached in this case. The resulting appearance of the gable wall at Timmy Martin's licensed premises is not altered to a degree that materially affects its external appearance so as to render it inconsistent with the character of the structure or neighbouring structures (that is, by reference to its appearance prior to the erection of the new advertising structure). For clarity, and for the reasons already set out at paragraphs 9.1.4 and 9.1.5 above, I also do not consider that the change from tri-vision to static or from external to internal illumination give rise to such material effects either, in the context of the planning unit as under discussion here. In the context of the wider planning unit it occurs to me that the works carried out could also be considered to fall within the terms of the word improvement in the sense that the new sign could be seen as an upgrade to the existing structure.

- 9.2.8. This issue of the planning unit was considered by the Inspector under ABP Ref. RL 2892 (2011) (See Section 8.1.2 above). The Inspector concluded that as the Act contains a separate definition for 'advertisement structure' the structure exists in planning terms in its own right. The Boards decision did not refer to the matter. I am not inclined to the view that there is necessarily a direct connection between such a definition in the Act (or in the Regulations) and the determination of a planning unit in any given case.
- 9.2.9. Given the judgement of the Supreme Court in a case that is substantially similar, and my conclusions in relation to the slight matters of difference, I consider that the approach of the Court is the correct one to adopt in this case. I conclude, therefore, that the works in question do fall within the scope of Section 4(1)(h) of the Act.
- 9.2.10. As indicated Section 4(4) of the Act essentially means that any development otherwise considered to be exempted development cannot be so if it requires environmental impact assessment (EIA) or appropriate assessment (AA). I am satisfied, given the very minor nature of the works in this instance, that neither of these requirements arise.

- 9.2.11. I conclude, therefore, that the subject development constitutes exempted development.
- 9.2.12. The Board should note that referral ABP Ref. RL 2004 and legal case Fingal County Council v. Crean and Signways Holdings Ltd are not directly relevant to the subject case and are included for completeness only given that they are referenced in previous cases. They both refer to freestanding advertising structures and involved the erection of new, additional, structures
- 9.2.13. As a final matter, and noting the reference in the Councils referral, the Board will note that, as there are no relevant exemption provisions in the Regulations for advertising structures of the type under consideration here, the provisions of Article 9 of the Regulations (de-exempting development that might otherwise be exempt under Article 6 of the Regulations, for example, on grounds of traffic hazard) are not engaged in this case.

## 10.0 Recommendation

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

**WHEREAS** a question has arisen as to whether the erection of an internally illuminated billboard sign in place of a static tr-vision advertising panel at the gable wall of Timmy Martin's licensed premises, 23 Sarsfield Street, Limerick is or is not development or is or is not exempted development:

**AND WHEREAS** the said question was referred to An Bord Pleanála by Limerick City and County Council on the 17th day of April 2017:

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

- (a) Section 2(1) and 3(1), Planning and Development Act, 2000, as amended,
- (b) Section 4(1)(h), Planning and Development Act, 2000, as amended,
- (c) the planning history of the site,

(d) relevant case law, including in particular, Dublin Corporation v. Lowe and Signways Holdings Ltd [2004] IESC 106, and

(e) the submissions on file and the report of the Planning Inspector;

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

(a) The erection of the subject internally illuminated billboard involves works within the meaning of Section 2 of the Act and, therefore, constitutes development under Section 3 of the Act,

(b) In the context of the appropriate planning unit being the gable wall of the premises to which the advertising structure is fixed, the works carried out, comprising the substantial replacement of the original externally illuminated tri-vision billboard with an internally illuminated static billboard of very similar dimensions, fall within the scope of Section 4(1)(h) of the Act, and

(c) No requirement for environmental impact assessment or appropriate assessment arises.

**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 erection of an internally illuminated billboard sign in place of a static tri-vision advertising panel at the gable wall of Timmy Martin's licensed premises, 23 Sarsfield Street, Limerick is development and is exempted development.

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Brendan Wyse  
Assistant Director of Planning

21 July 2020