



An
Bord
Pleanála

Inspector's Report RL18.RL3585.

Question

Whether the breaking out and remaking of a concrete service yard in order to stabilise an existing subsiding concrete slab is or is not exempted development.

Location

Monaghan Shopping Centre,
Monaghan, Co. Monaghan.

Declaration

Planning Authority

Monaghan County Council.

Planning Authority Reg. Ref.

EX17-14.

Applicant for Declaration

Tesco Ireland Limited.

Planning Authority Decision

Refuse.

Referral

Referred by

Tesco Ireland Limited.

Owner/ Occupier

Tesco Ireland Limited.

Observer(s)

None.

Date of Site Inspection

24th August 2017.

Inspector

Karen Kenny.

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1.0 Site Location and Description

- 1.1.1. The site of the proposed development is located to the Tesco Store in the Monaghan Shopping Centre and comprises an existing service yard. The service yard is enclosed by a forticrete blockwork wall with a small section of wooden fencing on the south elevation and two vehicular entrances with roller gates. The height of the boundary wall varies relative to ground level and is between c. 2.56 metres to c. 2.99 metres higher than the external ground level. The yard is bounded by public roadways and car parking to the east and south.

2.0 The Question

- 2.1.1. Tesco Ireland seeks the Board's determination as to "*Whether the breaking out and remaking of a concrete service yard in order to stabilise an existing subsiding concrete slab*" at Tesco, Monaghan Shopping Centre, is or is not exempted development under the Planning and Development Act 2000 (as modified) and the Regulations made thereunder.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. The planning authority decided on the 26th of April 2017 on foot of a request from Tesco Ireland for a declaration under Section 5 that the "*breaking out and remaking of an existing Tesco service yard*" at Monaghan Shopping Centre is not exempted development by reference to the provisions of Article 9 (1) (a) (i) of the Planning and Development Regulations 2001 (as amended) as the proposed works would contravene Condition 1 of an extant permission P16/267.

3.2. Planning Authority Reports

- 3.2.1. Planning Reports

The Report of the Planning Authority reflects the decision to refuse the declaration.

3.2.2. Other Technical Reports

None.

4.0 Planning History

5.0 The following planning history relates to the site:

PA Reg. Ref. 16/267

Permission granted for (a) removal of existing masonry wall and replacement with a 2-metre-high Buan close Boarded timber panel fence with galvanized steel posts at 2.4 metre centres mounted on a 500mm high concrete wall base; and (b) raising of the existing service yard levels and the regrading at access/egress from the service yard to the public road; (c) a new pedestrian entrance gate adjacent to entrance off access road and (d) all associated alterations and development works. Condition no. 1 of this permission states that *“No infilling shall take place within the site and all yard levels shall be maintained as existing. Reason: To ensure that the proposed development would not cause or exacerbate flooding in the area”*.

6.0 Policy Context

6.1. Development Plan

The site is zoned Town Centre in the Monaghan Town Development Plan 2013 – 2019.

6.2. Natural Heritage Designations

None.

7.0 The Referral

7.1. Referrer's Case

The purpose of this request is for a declaration to confirm whether or not the proposed works as given in the question above are exempted development. Documentation submitted with the referral outlines the following:

- Section 2 (1), 3 (1) and 4 (1) (h) of the Planning and Development Act 2000 (as amended) are relevant.
- The land is experiencing subsidence and this has led to sections of the service yard experiencing a reduction in levels compared to the shopping centre building which has pier foundations.
- A planning application was made to Monaghan County Council to seek the replacement of the boundary wall as well as to address the subsidence of the service yard (PA Reg. Ref. 16/267). Permission was granted with a condition that “no infilling shall take place within the site and all yard levels shall be maintained as existing”. The level changes were to resolve a health and safety issue.
- Tesco Ireland engaged with the Council on preparing a revised application and were advised that due to on-going flood assessments and proposals for road works adjacent to the site, that any individual Flood Risk Assessment for the site would not be considered accurate. On this basis the view was taken that if the yard was repaired, this could be considered exempted development.
- The proposed breaking out and reinstatement of the service yard, whilst comprising works to the exterior of the Tesco unit at Monaghan Shopping Centre, would not materially affect the external appearance of the building so as to render the appearance inconsistent with the character of the adjoining or surrounding structures. The minor level changes that would result from the proposed works are being undertaken to resolve a health and safety issue.
- The service yard is not visible from the main road as the yard is currently surrounded by a boundary wall. The service yard is not and will not, therefore be visible from the access road. Furthermore, the materials of the yard will be

consistent with those which already exist and as such the appearance of the yard will remain the same.

- The works include the introduction of a dogleg ramp to allow for the safe manual transfer of goods from the upper section of the service yard and lower sections. The works have been designed for a best repair within the constraints of the existing subsided slab levels and for this reason the ramp is required.
- The works should be considered as a repair as it is not intended to raise the existing slab levels to the extent previously applied for under PA Ref. 16/267. The proposal will result in the remaking of the existing slab with the required structural stiffening to arrest the ongoing subsidence issue. The proposed works are also intended to render the service yard safe for the receiving and marshalling of goods. The changes in levels would not render the yard visually different from the surrounding area and will remain consistent with surrounding road levels.
- The proposed development would rely on the exempted development provisions under the Planning and Development Act 2000 (as amended) and as such the provisions of Article 6 of the Regulations, which de-exempts development that contravenes a condition of a permission, are not applicable. Tesco Ireland have chosen never to implement Planning Reg. Ref. 16/267, which would essentially result in condition no. 1 never applying to the subject site.

7.2. Planning Authority Response

None.

7.3. Further Responses

None.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000

Section 2 (1): “structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or 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.

Section 2 (1): “works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

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

Section 4 (1) of the Act: The following shall be exempted developments for the purposes of the 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”.

8.2. 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.

Article 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.

9.0 **Assessment**

- 9.1.1. The referral seeks a determination in relation to *whether the breaking out and remaking of a concrete service yard in order to stabilise an existing subsiding concrete slab*, is or is not exempted development under the Planning and Development Act 2000 (as modified) and the Regulations made thereunder.
- 9.1.2. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the breaking out and remaking of the concrete service yard in respect of the proper planning and sustainable development of the area, but rather whether or not the matter is question constitutes development, and if so falls within the scope of exempted development.

9.2. **Is or is not development**

- 9.2.1. The question of whether the proposed breaking out and reconstruction of the service yard slab is ‘development’ needs to be addressed in the first instance. Having regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) I consider that the breaking out and remaking of a concrete service yard, constitutes “works” as defined under Section 2(1) of the Act, and as such is “development”, as defined under Section 3(1) of the Act. This is not contested by any of the parties.

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

- 9.3.1. Development can be considered exempt under either Section 4 of the Planning and Development Act or Article 6 of the Planning and Development Regulations. Section 4 (1) of the Act sets out the provisions in relation to exempted development and is separate to, and has primacy over the exempted development provisions of the Regulations. For that reason, I will consider the ‘question’ with reference to Section 4 (1) of the Act in the first instance.

- 9.3.2. The referral argues that the works are exempted development under Section 4 of the Act. The referral states that the proposed breaking out and reinstatement of the service yard, whilst comprising works to the exterior of the Monaghan Shopping Centre, should be considered as a repair and would not materially affect the external appearance of the building so as to render the appearance inconsistent with the character of the adjoining or surrounding structures. A written description of the works and drawings have been provided. It is proposed to break out the existing concrete slab and reinstate it with a reinforced concrete slab that will result in minor alterations to existing ground levels. It is also proposed to provide a new ramp and steps to address level differences between the service yard and the store entrance. The existing boundary wall and gates are to be retained. The yard forms part of the shopping centre complex and provides for the receiving and marshalling of goods to the Tesco unit in the Shopping Centre.
- 9.3.3. The first question to be considered is whether the works are for “*the maintenance, improvement or other alteration*” of the structure. The submitted details state that the works are required to address a subsidence issue which has led to sections of the service yard experiencing a reduction in levels compared to the main shopping centre building. I therefore consider that the works are ‘maintenance and improvement’ works under Section 4 of the Act.
- 9.3.4. The works are not works ‘*which affect only the interior*’ of the structure. The service yard is external to the shopping centre and as such, the breaking out and reinstatement of the service yard slab would comprise of works to the exterior of the structure. It will therefore be necessary to determine whether or not the works would “*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*”. The works would not be visible from outside of the service yard and effectively reinstate the existing concrete slab with a reinforced slab, and new ramp and steps to address level differences. The existing boundary walls and gates are to be retained. Having regard to the nature and scale of alterations and the screening provided by the existing boundary wall, I am satisfied that the works would not be visible from outside of the shopping centre complex and as such, would not materially affect the external appearance of the shopping centre or render the appearance inconsistent with the character of neighbouring structures. On the basis

of the foregoing, I agree with the case put forward by the referrer that the works fall within the exemptions set out under Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

9.3.5. The Planning Authority in assessing the referral determined that the proposed works are not exempted development, as they would contravene a condition attached to a permission under the Act. Article 9 (1) (a) (i) of the Planning and Development Regulations states that development that is exempted under Article 6 and the various Classes in Schedule 2 is de-exempted if it would contravene a condition of a permission. A condition of an extant permission on the site (PA Reg. Ref. 16/267) states that “*No infilling shall take place within the site and all yard levels shall be maintained as existing*”. The Planning Authority determined that the proposed works would alter the levels of the yard and as such contravene this condition.

9.3.6. I do not agree with the view of the Planning Authority. The referral relies on the exempted development provisions set out in Section 4 (1) (h) of the Planning and Development Act. The limitations set out in Article 9 relate specifically to the development classes set out in the Planning and Development Regulations (Part 1, Schedule 2) and do not apply to exempted development provisions set out under the Act. I would also note that the classes of development outlined under Column 1 of Part 1 of Schedule 2 of the Regulations contains no classes of relevance to the question under consideration. The limitations of Article 9 are not therefore, considered to apply in this instance.

9.4. **Restrictions on exempted development**

The proposed development would not require an EIS. Having regard to the nature and scale of the development proposed and to the nature of the receiving environment, namely a fully serviced town centre site, no appropriate assessment issues arise.

10.0 **CONCLUSION AND RECOMMENDATION**

In this case the proposed works would occur at the exterior of a structure. I consider that the proposed works relate to the “maintenance and improvement” of the structure and that in view of the scale of the alterations and screening provided by the existing boundary wall that the works would not materially affect the external

appearance of the structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures. I would therefore conclude that the structure is considered development, and is considered exempted development under Section 4 (1) (h) of the Planning and Development Act.

11.0 Recommendation

11.1. 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 breaking out and remaking of a concrete service yard in order to stabilise an existing subsiding concrete slab at Tesco, Monaghan Shopping Centre, Monaghan, Co. Monaghan is or is not development or constitutes exempt development.

AND WHEREAS the said question was referred to An Bord Pleanála by Tesco Ireland Limited, Gresham House, Marine Road, Dun Laoghaire, under the provisions of Section 5(3)(a) of the Planning and Development Act, 2000 on the 22nd Day of May 2017.

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

- (a) Sections 2(1), 3(1) and 4(1)(h) of the Planning and Development Act, 2000 (as amended),
- (b) Articles 6 and 9 of the Planning and Development Regulations 2001 (as amended).
- (c) Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended).
- (d) The planning history of the site, and
- (e) The location of the development within an existing service yard.

AND WHEREAS An Bord Pleanála concluded that –

- (a) The works constitute development, being works which come within the scope of section 3(1) of the Planning and Development Act 2000 (as amended).
- (b) The works come within the scope of section 4(1)(h) of the Planning and Development Act 2000 (as amended), being works to the exterior of the structure that 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.

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 said works are development and constitute exempted development, by virtue of the nature of works proposed, the location within an existing service yard and to the limited scale of the development. Therefore, it is considered that the breaking out and remaking of a concrete service yard in order to stabilise an existing subsided concrete slab is exempted development.

Karen Kenny
Senior Planning Inspector

17th November 2017