



**Question**

Is the ancillary use of car park by members and sponsors development and if it is, is it or is it not exempted development within the meaning of the Act.

**Location**

St. Michael's GFC, Ballinure, Mahon, Cork

**Declaration**

Planning Authority

Cork City Council

Planning Authority Reg. Ref.

R441/17

Applicant for Declaration

Park Facilities Management Ltd.

Planning Authority Decision

None

**Referral**

**Referred by**

Cork City Council

**Owner**

St. Michael's GFC

**Occupier**

Park Facilities Management Ltd.

**Observer(s)**

None

**Date of Site Inspection**

24/10/17

**Inspector**

Pauline Fitzpatrick

## 1.0 Site Location and Description

- 1.1. St. Michael's Gaelic Football Club is within the southern Cork suburb of Mahon c. 450 metres to the north-east of Mahon Point Shopping Centre. It is accessed from Ringmahon Road. It is bounded by Ringmahon Rangers Football Club grounds to the north and a small cul-de-sac of houses to south. The N40 Ring Road bounds the site to the east. There is a graveyard on the opposite side of Ringmahon Road.
- 1.2. The club consists of playing fields and a clubhouse/changing facilities served by a surface car park with a barrier controlling entrance and exit. The roadside boundary is delineated by a wall and railing backed with planting. On day of inspection (Tuesday AM 24/10/17) the car park was noted to be approx. two thirds full.

## 2.0 The Question

The question posed to the Planning Authority by Cunnane Stratton Reynolds on behalf of Park Facilities Management Ltd. in a Section 5 application dated 06/03/17 is as follows:

Whether the ancillary use of the car park by members and sponsors is exempted development

The case made in support can be summarised as follows:

- The questions to be determined are:
  - Is the use of the car park by members exempted development
  - Is the use of the car park by sponsors exempted development
  - Is the use of the car park so that it contributes, as an ancillary use, to the upkeep and maintenance of the club exempted development.
  - Is the use of the car park by the City Council/Public at the adjacent cemetery exempted development.
  - Is the barrier to the car park exempted development.

- St. Michael's GFC facility was developed under ref. TP05/29279 for a single storey changing room/club house and ancillary parking facility. There was no condition which prohibited the use of the car park by 3<sup>rd</sup> parties.
- If the Council had intended to limit the use of the car park it would have attached a planning condition as it has done with other permissions in the city eg. TP04/28877(Elysian), Clarion/City Quarter. The absence of such an explicit condition could be interpreted that the reasonable use and management of the car park for club benefit was permissible.
- Park Facilities Management Ltd. is a sponsor of St. Michael's GFC and, on occasion, utilises the car park.
- The car park's use to support club functions is no different to any other club letting out their pitches for use by other clubs and members of the public.
- The recent Pairc Ui Chaoimh consent is relevant in this respect in that the Council accepted that the Cork County Board of the GFC was a charitable organisation. Commercial returns can be generated by GFC facilities for reinvestment into club operations and debt servicing. The revenue generated by the club's sponsorship agreement to park vehicles is used to contribute to the running of the club and a reduction in its debt.
- No change of use has taken place. The car park remains a car park and it is a car park ancillary to the club use. Its use is for the benefit of the club and its members.
- The car park is not used for commercial gain, it is not used by the general public, nor is it used or let on an hourly rate basis.
- Irrespective of the above whilst the Council maintains that a change of use has taken place it is the view that it is immaterial as there is no material impact. The car park remains the same size, the use remains as car parking and there is no impact on the local area. There are no immediate neighbours affected nor is the proposal increasing the volume of trips on the road network. It accommodates traffic and trips that are already in the area due to the offices at City Gate Park.
- The situation is no different in principle to other car parking scenarios that are occurring in the city. The City Council has accepted that remote car parks (UCC

Park and Ride car parks) or car parking used by ancillary users (Sacred Heart Car Park amongst other church car parks) have long been established as an accepted part of car parking in the city.

- Under ref. TP14/35903 the Bons Secours availed of remote parking at the Sacred Heart Church car park. As per TP 08/33205 the said car park had a specific condition limiting its use to parishioners stating that it would not be available for use by general members of the public.
- Car parking for other users on site has occurred mostly at the request of Cork City Council, to facilitate it or other local community or sporting organisations (mobile library and extra space for funerals). These were not deemed to be breaches of planning or change of use. Therefore, it is a reasonable expectation that use of the car park by its sponsors would not be an issue.
- Leen v. Aer Rianta CPT 2003/12 MCA is relevant where the High Court allowed Shannon airport to remain open, despite planning breaches, in the interests of the travelling movements of the general public. Should the Council pursue the matter at this site all other such arrangements throughout the City will have to be pursued. This would have obvious negative impact on travel patterns and commercial attractiveness of the city and attraction of foreign investment
- The barrier system works and is covered under section 4(1)(h) of the Planning and Development Act as amended and Class 9 of the Planning and Development Regulations as amended and is exempted development.
- There is precedent in that the An Bord Pleanála determined that a lifting barrier was exempted development (ref. PL06D.RL2695).
- It is requested that the Council determine that ancillary use of the car park by members and sponsors of St. Michael's GFC is development but is exempted development.

### **3.0 Planning Authority Declaration**

#### **3.1. Declaration**

None

## 4.0 Planning History

TP 05/29279 – permission granted 2005 for single storey changing room/club house and ancillary parking facility.

## 5.0 Policy Context

### 5.1. Cork City Development Plan 2015

Objective 5.1 Strategic Transport Objectives

- b. To reduce the percentage of persons who drive to work to 60% by 2021
- k. To control the supply and price of all parking in the city in order to achieve sustainable transportation policy objectives, while recognising the need to maintain economic vibrancy until more gaps in the existing alternative transportation systems are filled.

The site is within an area covered by zoning objective ZO 13- Sports Grounds. The objective for same is to protect, retain and enhance the range and quality of sports facilities and grounds. Only development that is ancillary to the principle use of the site for sports and which will only affect lands incapable of forming part of the playing pitches, will be considered in these areas. Ancillary uses include other sport and leisure facilities ... and appropriate car parking facilities.

### 5.2. Natural Heritage Designations

The Cork Harbour SPA (site code 004030) is c.350 metres to the east.

## 6.0 The Referral

### 6.1. Referrer's Case

The case has been forwarded to the Board for determination by Cork City Council. The submission can be summarised as follows:

- The site has c.173 parking spaces. It is used by staff employed at the nearby City Gate Business Park. There is a shuttle bus in operation. A conversation

was had with a bus driver. It is open for this purpose between 8am and 8pm. There is a barrier system in operation.

- TP 05/29279 – permission granted for single storey club house and ancillary parking facility. It included 80 parking spaces for ‘ancillary use’. Condition 3 requires the premises to be used solely for the purposes permitted with no change of use to take place without a prior grant of permission. The applicant, in response to a further request during the assessment of the application, stated that the proposed car park is to be used predominately by users of the facility.
- The use contravenes condition 3 attached to TP 05/29279.
- It is not considered that in any reasonable sense the use of the car park for remote parking by employees of a nearby business park can be described as ancillary to the use of the GAA club. It cannot be characterised as minor or trivial. It has no functional connection to operation of the GAA club. The fact that the use is on behalf of a sponsor of the club and that the club is a charitable organisation is immaterial in planning terms.
- In planning terms traffic and other impacts as well as determinations in relation to EIA/Habitats Directives would require assessment.
- The use of the car park as remote parking for employees of a nearby business park does not comply with the open space zoning objective for the site.
- The use constitutes a material change of use and is therefore development within the meaning of the Act.
- There are no applicable exemptions.
- There are no enforcement cases in relation to sites identified in the referrer’s submission. The alleged unauthorised use of these sites does not render the use of the subject site as authorised or has any relevance to the criteria for assessment under sections 3 and 4 of the Act.
- The City Council has not used the car park as overflow for funerals. The mobile library service ceased operation in 2014.

- The legal case *Leen v Aer Rianta* – CPT 2003/12 MCA relates to a significantly different context wherein the remedy proposed for the unauthorised development included the closure of a national airport.
- It is satisfied that the lifting barrier is a gate within the scope of the exempted development provisions.

## 6.2. Occupier's response

The submission by Cunnane Stratton Reynolds on behalf of Park Facilities Management Ltd. refers. It states that it is also retained by Dell EMC which has a requirement for additional staff parking in the area over that available at their location in City Gate Office Park in Mahon.

A number of points made in its submission to the planning authority in its Section 5 application dated 06/03/17, as summarised above, are reiterated. In addition:

- The submission puts forward two questions which it states were originally posed to the City Council. They are as follows:
  1. Is the use of the existing car park facility where authorised for ancillary uses where there is a commercial gain considered development or is it exempted development and the related question of:
  2. Is the use of an existing car park facility where authorised use for ancillary uses where there is no commercial gain considered development or is it exempted development.

It is considered that these original questions remain valid as the Council has not responded to same

The core question is whether the ancillary use of the car park by members and sponsors is exempted development.

- The correspondence issued from Cork City Council demonstrates that it has questions regarding the matter which it did not seek to have clarified. Irrespective of their entitlement to make a separate question this

compromises the occupier's rights to due process. The Board should dismiss the question on procedural grounds.

- No collaborating evidence is presented as to the conversation had with the shuttle bus driver.
- No material change of use has occurred so the Council reference to EIA/AA screening is moot.
- The further information response on file ref. 05/29279 stated that the car park would be predominately for users of the facility. It did not state that it would be exclusively used by members of the club. There is a clear relationship between the club and the users of the car park and the facility is available to be used as presented in the further information response for playing activities. The use has evolved. Uses always evolve
- The Council denies that the other cases presented are relevant on the basis that no enforcement complaints exist in relation to them. This can occur but the uses are ancillary to the parent use and, in that respect, no different to the subject case. The Council are applying the law differently in this instance as it is in receipt of a 3<sup>rd</sup> party complaint.
- There is a particular parallel with the Bon Secours case. The permission at the Sacred Heart Church under ref. TP 08/33205 had a specific condition limiting use to parishioners. In the subject case car parking is not for use by the general public in that there is an actual relationship between the club, its members and their sponsor's use of the car park. If it is acceptable in the Sacred Heart Church car park for the Bon Secours, then the same must apply at the subject site.
- There are other cases in the city (listed in Tables 1 & 2) that will require equitable treatment and control if the Council does not accept this.
- To suggest that car parking at the subject site is either unauthorised by reference to a consent or unauthorised by reference to a change of use or intensification of use is incorrect and at odds with Council acceptance of car parking throughout the city.



- The Council's acceptance that the barrier is exempt is welcomed.
- There is no proven impact or intensification. The Council admits that the number of spaces used is less than that laid out.
- It is not supplanting the primary use.

### 6.3. **Owner's Response**

The submission by Cunnane Stratton Reynolds on behalf of St. Michael's GFC sets out the same points made by Park Facilities Management Ltd. in its submission to the planning authority and to the Board as summarised above. It includes 3 tables of sites in the city where it is considered there are comparable parking scenarios and is accompanied by photographs of examples.

### 6.4. **Further Responses**

The submission from St. Michael's GFC was circulated for comment.

#### 6.4.1. **Park Facilities Management Ltd.**

- The comments previously made are reiterated. The submission includes 3 tables of sites in the city where it is considered there are comparable parking scenarios and is accompanied by photographs of examples.

#### 6.4.2. **Planning Authority**

In addition to reiterating points made in its original referral submission to the Board the following are noted:

- The context of the Elysian development under ref. TP04/28877 and the restrictive condition to car parking is completely different in that it is a large mixed use residential/commercial building adjacent to the city centre as opposed to a sports facility in a suburban location. The terms of TP 04/28877 does not render the use of this car park as 'authorised' or has any relevance to the criteria for assessment under section 3 and 4 of the Act.

- The mobile library service which ceased operation in 2014 was an intermittent social community use which bears no relation to the referral question.

## 7.0 **Statutory Provisions**

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

#### Section 2(1)

In this Act, except where the context otherwise requires -

“unauthorised use” means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change of use of any structure or other land being development other than-

- (a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or
- (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 or 37G of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

#### 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.

### 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 exempt 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)

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....

#### Schedule 2, Part 1 – Exempted Development General

Class 9	Conditions/Limitations
The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.	The height of any such structure shall not exceed 2 metres.

## 8.0 Assessment

At the outset I note that that agent for Park Facilities Management Ltd. is of the opinion that correspondence issued from Cork City Council demonstrates that it has questions regarding the matter which it did not seek to have clarified, irrespective of their entitlement to make a separate question. It is contended that this compromises their right to due process. The question has been referred to the Board by the planning authority for determination. Following same the occupier has been afforded an opportunity to respond to both the planning authority's and owner's submission. I consider that it has been given adequate opportunity to ventilate its case and counter the arguments put forward by the planning authority.

### 8.1. The Question

8.1.1. The request for a declaration under Section 5 by Park Facilities Management Ltd. arose following correspondence had with the planning authority which was of the view that the occasional use of the car park by same is unauthorised. The Planning Authority did not issue a declaration and has forwarded the question to the Board for determination.

8.1.2. The planning authority in its submission states that the submitted question as paraphrased from that submitted with the declaration request is as follows:

**Is the ancillary use of the car park by members and sponsors development and if it is, is it or is it not exempted development within the meaning of the Act.**

8.1.3. The response from Park Facilities Management Ltd. to the Board dated 08/08/17 states that two questions were posed to the Planning Authority in its request for a declaration. The said questions are

**Is the use of an existing car park facility where authorised for ancillary uses where there is a commercial gain considered development or is it exempted development and, the related question of;**

**Is the use of an existing car park facility where authorised for ancillary uses where there is no commercial gain considered development or it is exempted development.**

8.1.4. A copy of the original declaration has been forwarded to the Board in which I could not identify the said two questions. In same it is stated that the core question is whether the ancillary use of the car park by members and sponsors is exempted development. The submission identifies 5 related questions/issues that would have to be determined in considering the section 5 reference.

Taking account of all submissions made up to and including those to the Bord, I consider the question being put to the Board should most accurately be deemed to comprise the following

**Whether the use of ancillary parking facilities serving the changing room/club house at St. Michael's GFC, Ballinure, Mahon, Cork for car parking other than car parking ancillary to the primary function of the site is or is not development or is or is not exempted development.**

8.2. **Is or is not development**

The car park continues to be used for car parking and, in itself, has not required the carrying out of any works. The barrier erected at the entrance does constitute development within the stated definition as set out in section 2 of the Planning and Development Act, 2000, as amended.

I consider that the substantive issue arising in this case is whether there has been a change of use and whether the change of use is material.

Permission was granted in 2005 under planning reference TP 05/29279 for a single storey changing room/club house and ancillary parking facility at the site. 10 conditions were attached to the decision. Condition 3 states that the premises is to solely used for the purposes permitted and that no change of use was to take place without a prior grant of permission, notwithstanding the exempted development provisions of the Planning and Development Regulations 2001. The reason for the condition is so as to safeguard the amenities of the area.

I submit that there is nothing to suggest that the parking use permitted under this permission was anything other than parking associated with the principal use of the site as a sports grounds and the changing room/club house and was an ancillary use.

The fact that Park Facilities Management Ltd. is a sponsor of the club, that the club is a charitable organisation and that any commercial return would be reinvested in the club, in my opinion, is not relevant to the assessment of this determination.

The current car parking use during the week, during working hours is clearly in no way associated with the use of the sports grounds and changing facilities with a wholly different patronage. As per the details on file the site provides additional staff parking for Dell EMC which is located in City Gate Park in Mahon. A shuttle bus is provided to and from the site. The agent for the referrer, whilst querying the veracity of the contact had with a shuttle bus driver, does not deny that such a service is provided. It is reasonable to conclude that the use of the car park for such type parking is a 'change of use'.

It is the determination as to whether the change of use that has occurred constitutes a 'material' change which will determine the 'development' status and the 'exempted development' status of the proposal. This will now be considered.

On the matter of whether or not a change of use is material, I note the findings of Barron J. in the case of Galway CC v Lackagh Rock Ltd. which state:

*"To test whether or not the uses are materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the*

*appointed day or for the present use. If these matters are materially different, then the nature of the use must be materially different.”*

During the assessment of the application for the changing facilities and ancillary parking further information was sought on the intended use of the car park. As per the documentation submitted by way of further information the applicant stated that the car park is to be used predominately by the users of the facility ie. the players, coaches and the parents of the children and that generally the number of supporters at any one game is limited to approximately 10-15 but could increase to c. 40 in the event of an important fixture. It was stated that the car park will be underused and the average number of cars occupying the car park at any one time will be 15-20 cars and possibly a coach. During the summer months the facility will be in use a number of evenings during the week and on Saturday and Sunday. However, in winter months the use will be restricted to the weekends. The agent for the applicant stated that the car park would not be available for use by the adjoining clubs. It is reasonable to suggest that it is on this basis that the application, in terms of the car parking provision and impact on roads and traffic, was assessed by the planning authority.

The fact that the said further information submission stated that it would be *predominately* used by users of the facility cannot reasonably be interpreted as allowing for the remote parking provision for nearby office(s) during working hours.

In my opinion the car park now carries out two entirely different functions. The first is for car parking serving nearby office(s) during the week during office hours and the second being for purposes ancillary to the sports grounds use with associated changing facilities. Contrary to the assertion that the proposal would not have resulted in increased volume of trips in the area over those already on the road network, I submit that there may be a significant intensity of use at certain periods of the day with a different pattern of vehicular movements to that generated by the sports grounds and changing facilities/club house. This may have material effects on traffic movement and patterns for the wider area. I also consider that consideration would be required as to the acceptability of the use in terms of the planning policies for the area as set out in the current City Development Plan in terms of long stay/commuter parking and compliance with the zoning provisions for the area.

8.2.1. I am therefore satisfied that there are a range of potential substantive planning impacts arising from the use of the car park which it would be reasonable for the planning authority to take into account in determining a planning application. I am therefore of the view that a material change of use has occurred in respect of the ancillary car park to the changing facilities/club house and that the use of the site for such purposes does constitute development under the meaning defined under Section 3(1) of the Planning and Development Act, 2000.

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

8.3.1. Development can be exempted from the requirement for planning permission by either (a) Section 4 of the Planning and Development Act, 2000, or (b) articles 6 or 10 of the Planning and Development Regulations 2001.

8.3.2. I am of the view that there no provisions of Section 4(1) (h) which are applicable in the current case.

8.3.3. In relation to articles 6 and 10 of the Regulations, the permitted use is for ancillary parking to changing facilities/club house associated with sports grounds. There is no provision under the Regulations to exempt a change of use to a car park for remote parking for office(s).

8.3.4. I note that the control barrier at the site entrance would come within the provisions of Class 9 Schedule 2, Part 1 of the Planning and Development Regulations 2001, as amended, and would be exempted development.

### **8.4. Other Matters**

8.4.1. I note that both the owner and occupier in their respective submissions make reference to what are considered to be analogous examples throughout the city and state all should be treated equitably. Reference is also made to the High Court case *Leen v Aer Rianta CPT 2003/12 MCA*. These are not matters for comment in this referral case.

8.4.2. In view of the nature and extent of the development and its location within the built up area of Cork City no appropriate assessment issues arise.

## 9.0 Recommendation

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 ancillary parking facilities serving the changing room/club house at St. Michael's GFC, Ballinure, Mahon, Cork for car parking other than car parking ancillary to the primary function of the site is or is not development or is or is not exempted development within the meaning of the Act.

**AND WHEREAS** Park Facilities Management Ltd. c/o Cunnane Stratton Reynolds, Copley Hall, Cotters Street, Cork requested a declaration on the question from Cork City Council on the 6<sup>th</sup> day of March, 2017.

**AND WHEREAS** the said question was referred to An Bord Pleanála on the 7<sup>th</sup> day of July, 2016:

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

- (a) sections 2(1), 3(1) and 4 of the Planning and Development Act, 2000, as amended,
- (b) articles 6 and 9 of the Planning and Development Regulations 2001,
- (c) the planning history of the site
- (d) the report of the Inspector

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

- (a) the permitted use of the land that is the subject of this referral, under planning permission register reference number TP 05/29279, is as ancillary car parking to a single storey changing room/club house that was the subject matter of that planning application,



- (b) the use that is the subject of this referral, constitutes the use of this parking facility for the parking of cars other than for the purposes ancillary to the changing room/club house, therefore, constitutes a factual change of use from the permitted use, since the new use is not ancillary to the use of the permitted changing room/club house, but is independent of it,
- (c) this change of use is materially different by reason of the different functions served, the change in the nature of activities at the site, the change in the pattern of vehicular activity arising therefrom and accordingly constitutes a material change of use, which is, therefore, “development” within the meaning of section 3 of the Planning and Development Act, 2000, as amended and
- (d) the said development does not come within the scope of section 4 of the Planning and Development Act, 2000, as amended, or the Planning and Development Regulations 2001, as amended.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, as amended, hereby decides that the use of ancillary parking facilities serving the changing room/club house at St. Michael’s GFC, Ballinure, Mahon, Cork for car parking other than car parking ancillary to the primary function of the site is development and is not exempted development.

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**Pauline Fitzpatrick**  
**Senior Planning Inspector**

**February, 2018**