



An
Bord
Pleanála

Inspector's Report RL06D.RL3616

Question

Whether or not the use of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, is or is not development and is or is not exempted development.

Location

Lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin

Declaration

Planning Authority

Dun Laoghaire-Rathdown County Council

Planning Authority Reg. Ref.

8117

Applicant for Declaration

Nightline Logistics Group

Planning Authority Decision

Development that is not exempted development.

Referral

Referred by Nightline Logistics Group

Owner/ Occupier Undisclosed

Observer(s) None

Date of Site Inspection 27th October 2017

Inspector Hugh D. Morrison

Contents

| | |
|--|----|
| 1.0 Site Location and Description | 4 |
| 2.0 The Question | 4 |
| 3.0 Planning Authority Declaration..... | 4 |
| 3.1. Declaration..... | 4 |
| 3.2. Planning Authority Reports | 5 |
| 4.0 Planning History..... | 5 |
| 5.0 Policy Context..... | 5 |
| 5.1. Development Plan..... | 5 |
| 5.2. Natural Heritage Designations | 5 |
| 6.0 The Referral..... | 5 |
| 6.1. Referrer's Case | 5 |
| 6.2. Planning Authority Response..... | 6 |
| 6.3. Owner/ occupier's response (<i>where not the referrer</i>)..... | 7 |
| 6.4. Further Responses..... | 7 |
| 7.0 Statutory Provisions..... | 7 |
| 7.1. Planning and Development Act, 2000..... | 7 |
| 7.2. Planning and Development Regulations, 2001 | 10 |
| 7.3. Other (<i>as appropriate</i>)..... | 12 |
| 8.0 Assessment..... | 12 |
| 8.4. Is or is not development..... | 13 |
| 8.6. Is or is not exempted development | 14 |
| 8.21. Restrictions on exempted development | 14 |
| 9.0 Recommendation..... | 17 |

1.0 Site Location and Description

- 1.1. The subject Parcel Motel was sited beside the south south eastern elevation of the Ballybrack Shopping Centre within a car park to the side of this Shopping Centre. My site visit revealed that it has been removed from the Shopping Centre, although of course it could be reinstalled in the future.

2.0 The Question

- 2.1. The referrer's question is "Whether the use of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group constitutes development at lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin."
- 2.2. It is clear from the referrer's supporting case that they mean for the question of exempted development to be considered as well. Hence, the referral question should be expanded to include this, too. The following wording would thus be appropriate:

Whether or not the use of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority concluded that the siting of the Parcel Motel entailed "works" and so it constitutes "development". This Motel does not come within the scope of Section 254 of the Planning and Development Act, 2000 – 2017, or Article 201 of the Planning and Development Regulations, 2001 – 2017, as it is not sited on a public road. Likewise, the Motel does not come within the scope of Section 4(1)(h) of the Act and, as its siting was not undertaken by An Post, Class 30(c) of Part 1 of

Schedule 2 to Article 6 of the Regulations is not applicable. Thus, this Motel is not exempted development.

3.2. Planning Authority Reports

None

4.0 Planning history

4.1. The Parcel Motel Facility in question is the subject of planning enforcement enquiry ENF 17717, with respect to which a warning notice was issued on 26th May 2017 and an enforcement notice was served on 29th June 2017.

5.0 Policy context

5.1. Development Plan

The operative development plan for the site is the Dun Laoghaire-Rathdown County Development Plan 2016 – 2022 and it shows the site as lying within an area that is the subject of Zoning Objective NC, “To protect, provide for and/or improve mixed-use neighbourhood centre facilities.”

5.2. Natural Heritage Designations

None

6.0 The Referral

6.1. Referrer’s Case

- The Parcel Motel is exempted development under Section 4(1)(h) of the Planning and Development Act, 2000 – 2017, (hereafter referred to as the Act), as its siting in the car park to the Ballybrack Shopping Centre has not resulted in a material change of use of this car park and its appearance is not inconsistent with the character of the same.

Reference is made to RL13.RL3233, wherein the Board held that replacement of 4 underground tanks by larger ones neither constituted an intensification of

use nor, under Section 4(1)(h), was it inconsistent with the character of the site.

Reference is also made to RF3.RF0853, wherein the Board held that the erection of poles and netting on GAA playing pitches was seen as being ancillary to development and so, under Section 4(1)(h), these structures were exempted development.

- The siting of the Parcel Motel is such that it does not pose a traffic hazard and so it is de-exempted under Article 9(1)(a)(iii) of the Planning and Development Regulations, 2001 – 2017, (hereafter referred to as the Regulations).
- Reference is made to Sections 254(1)(g) and (2)(a) and (c) of the Act and Article 201(1)(g) of the Regulations. These provisions allow for apparatus on public lands to be the subject of licencing rather than planning control. The same should apply to private lands.
- Reference is made to Class 30 of Part 1 of Schedule 2 to Article 6 of the Regulations. While this Class refers to An Post, in the light of subsequent legislation, e.g. the Communications Regulation (Postal Service) Act 2011 and the Communications Regulation (Universal Postal Service) Regulations 2012, and the advice under Section 2.5.3 of the Retail Planning Guidelines, which states that the planning system should not inhibit competition, this Class should be given a wider interpretation. Specifically, Section 6 of the Interpretation Act 2005 is of relevance as it states that,

In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of the Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit.

Notwithstanding the question of universal service provision, An Post operates in a competitive market within which it seeks to compete, e.g. the introduction of the “DeliveryBox” and AddressPal, a proxy address service like Nightline’s. In these circumstances, the exemptions afforded to An Post should be extended to its competitors. Thus, Class 30 is applicable to the referrer, too.

6.2. Planning Authority Response

- The Planning Authority has no further comments to make.

6.3. Owner/ occupier's response

- None

6.4. Further Responses

- None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1) of the Planning and Development Act, 2000 – 2017, states the following:

*In this Act, except where the context otherwise requires –
“planning authority” means a local authority,*

Section 5(1) of the aforementioned Act, states the following:

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.

Section 5(3)(a) of the aforementioned Act, states the following:

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.

Section 127(1) of the aforementioned Act states the following:

An appeal or referral shall –

(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,

Section 2(1) of the aforementioned Act states the following:

“land” includes any structure and any land covered with water (whether inland or coastal);

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under 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...

“use”, in relation to land, does not include the use of land by the carrying out of any works thereon;

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

Section 3(1) of the aforementioned Act states the following:

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

Section 4(1) of the aforementioned Act states the following:

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 neighbouring structures;

Section 254(1) of the aforementioned Act states the following:

Subject to subsection (2), a person shall not erect, construct, place or maintain –

(a) a vending machine,

(b) a town or landscape map for indicating directions or places,

(c) a hoarding, fence or scaffold,

(d) an advertisement structure,

(e) a cable, wire or pipeline,

(f) a telephone kiosk or pedestal, or

(g) any other appliance, apparatus or structure, which may be prescribed as requiring a licence under this section,

on, under, over or along a public road save in accordance with a licence granted by a planning authority under this section.

Section 254(2) of the aforementioned Act states the following:

This section shall not apply to the following –

(a) an appliance, apparatus or structure which is authorised in accordance with a planning permission granted under Part III;

(b) a temporary hoarding, fence or scaffolding erected in accordance with a condition of planning permission granted under Part III;

(c) the erection, construction, placing or maintenance under a public road of a cable, wire or pipeline by a statutory undertaker.

7.2. Planning and Development Regulations, 2001

Article 5(1) of the Planning and Development Regulations, 2001 – 2017, states the following:

In this Part –

“repository” means a structure (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than business incidental to such storage”;

“shop” means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public – (b) as a post office”;

Article 6(1) of the aforementioned Regulations states the following:

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(1) of the aforementioned Regulations states the following:

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 –

...

(iii) endanger public safety by reason of traffic hazard or obstruction of road users,

Article 201 of the aforementioned Regulations states the following:

The following appliances, apparatus and structures are hereby prescribed as requiring a licence under section 254 of the Act of 2000 –

(a) a case, rack, shelf or other appliance, apparatus or structure for displaying articles for the purposes of advertisement or of sale in, or in connection with, any adjacent business premises,

...

(c) a coin-operated machine other than a vending machine,

Under Class 30 of Part 1 of Schedule 2 to Article 6 of the aforementioned Regulations, the following development is exempted development:

The carrying out by An Post – The Post Office of development consisting of the provision of –

(a) pillar boxes or forms of letter box,

(b) roadside boxes for the delivery of mail,

(c) deposit boxes for the temporary storage of mail for local delivery, or

(d) machines for the supply of stamps or printed postage labels.

Under Part 4 of Schedule 2 to Article 10 of the aforementioned Regulations, the following Exempted Development – Classes of Use are cited:

Class 1: Use as a shop.

...

Class 5: Use as a wholesale warehouse or as a repository.

7.3. Other

None

8.0 Assessment

8.1. The question under consideration in this referral is as follows:

Whether or not the use of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, is or is not development and is or is not exempted development.

8.2. The question refers to the use of the Parcel Motel Facility. This Facility is a structure, the design of which would only lend itself to its stated use, i.e. as a placement for deposit/temporary storage unit. Thus, the use and the structure are inextricably linked, i.e. the former is dependent on the latter and the latter has no purpose apart from the former. As the structure needs to be insitu for the use to function, whether or not it constitutes development and, if so, whether or not it constitutes exempted development are questions that must of necessity precede the question of use. If the answers to these questions are that the structure is development that is not exempted development, then to repeat these questions for the use would be superfluous.

8.3. In the light of the foregoing paragraph, I consider that the referral question should be recast as follows:

Whether or not the siting of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin is or is not development and is or is not exempted development.

Is or is not development

8.4. The first half of this question is whether or not the siting of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, is or is not development.

8.5. The Parcel Motel Facility is a structure that has been sited within the car park on the south south eastern side of the Ballybrack Shopping Centre. This structure is a freestanding one, which in this case has been sited beside the south south eastern elevation of the Shopping Centre. Its siting would have entailed an act or operation of construction, i.e. manoeuvring the structure into position and ensuring that it is level, as would the provision of an electrical supply to enable it to function. I, therefore, consider that “works” occurred, as defined under Section 2(1) of the Act, and so “development”, as defined under Section 3(1) of the Act, has occurred. The Board has taken the same view previously on RL3221, a comparable referral.

Is or is not exempted development

8.6. The second half of this question is whether or not the siting of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, is or is not exempted development.

8.7. The referrer has set out several ways of looking at the Parcel Motel Facility, which in each case leads them to conclude that it is exempted development.

8.8. Firstly, the referrer contends that the siting of the Parcel Motel Facility in the car park on the south south eastern side of the Ballybrack Shopping Centre has not entailed any material change of use in this car park and, as its appearance is not inconsistent with the character of the car park, it should be considered to be exempted development under Section 4(1)(h) of the Act.

8.9. The use of the Parcel Motel Facility is stated to be “as a placement for deposit/temporary storage unit”. The referrer’s website explains that this Facility offers a “virtual address” to customers to enable them to manage their on-line parcel deliveries, i.e. the collection, return, and sending of parcels. The use of the Parcel Motel Facility is thus essentially a storage use. Under Article 5(1) of the Regulations, ““repository” means a structure (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than business incidental to such storage”. The Parcel Motel Facility is thus a repository and as such

a use that lies within Class 5 of Part 4 of Schedule 2 to Article 10 of the Regulations. In this respect, I understand the description of Class 5 to entail two alternatives, i.e. use as a wholesale warehouse or use as a repository, and so use as a repository is not tied to wholesaling.

- 8.10. I recognise that the Parcel Motel Facility comprises deposit/temporary storage units that are analogous to Post Office boxes and that, under Article 5(1) of the Regulations, “shop” means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public – (b) as a post office”. However, PO boxes are typically only one strand amongst many services that are provided by post offices, whereas the Parcel Motel Facility is a stand-alone use. Accordingly, the determination of the use of a Parcel Motel Facility relates to the evaluation of a single strand of usage rather than multiple ones.
- 8.11. The car park within which the Parcel Motel Facility is sited is ancillary to the Ballybrack Shopping Centre. Thus, as the planning unit, encompasses the footprint of this Shopping Centre and ancillary spaces such as the said car park, it is the subject of retail usage, i.e. shop uses in Class 1 of Part 4 of Schedule 2 to Article 10 of the Regulations.
- 8.12. By contrast the Parcel Motel is a repository use, which lies within Class 5 of Part 4 of Schedule 2 to Article 10 of the Regulations. This use is neither a Class 1 use or an ancillary use to a Class 1 use. Under Article 10, there are no exemptions to uses changing between Class 1 and Class 5 and so the siting of the Parcel Motel Facility in the said car park entails a material change of use.
- 8.13. Turning to Section 4(1)(h) of the Act the works referred to are those that entail “the maintenance, improvement or other alteration of any structure”. The Parcel Motel Facility is a freestanding structure that has been sited within the said car park. The works of construction entailed in its siting do not, therefore, include the works cited in this Section and so no exemption is afforded thereby.
- 8.14. Secondly, the referrer cites Sections 254(1)(g) and (2)(a) and (c) of the Act and Article 201(1)(g) of the Regulations, which make provision for apparatus on public

lands to be the subject of licencing rather than planning control. They state that this provision should extend to private lands, too, and so the Parcel Motel facility would be effectively exempted, i.e. the need for planning permission, as distinct from a licence, would not arise.

8.15. By way of response, the reference to public land is broader than that which is referred to in Section 254(1), i.e. public road, which encompasses both the carriageway and any footways. Thus, the apparatus in view under (g) is typically sited in the public footway. The Parcel Motel Facility is sited in a car park that is ancillary to the Ballybrack Shopping Centre. This car park is not a public road and so the said Section and corresponding Article in the Regulations are not applicable. Clearly, whether these provisions should or should not apply to private roads/lands lies outside the scope of the Board's remit, as it would entail a change in planning legislation.

8.16. Thirdly, the referrer cites Class 30 of Part 1 of Schedule 2 to Article 6 of the Regulations. This Class states that "The carrying out by An Post – The Post Office of development consisting of the provision of – (c) deposit boxes for the temporary storage of mail for local delivery" is exempted development. While it refers explicitly to An Post, the referrer contends that, as the postal market has been opened up to competition, the Nightline Logistic Group should be considered as enjoying this exemption, too. In this respect, the Communications Regulation (Postal Service) Act 2011 and the Communications Regulation (Universal Postal Service) Regulations 2012 are cited, along with the Interpretation Act 2005. Furthermore, the referrer draws attention to innovations of An Post which demonstrate that it is a competitor, e.g. the "Delivery Box" and AddressPal, and so, if the planning system is to avoid inhibiting competition, then the said exemption should apply.

8.17. Section 17 of the Communications Regulation (Postal Service) Act 2011 designates An Post as the sole universal postal service provider up until 2023. Thus, while the referrer and An Post are undoubtedly competitors with respect to certain services, the former is distinguished from the latter under this Act and its corresponding Regulations and so the two are not interchangeable. While this legislation was enacted since the foundational Planning and Development Act 2000 and Planning

and Development Regulations 2001, both the Act and Regulations have been subsequently amended, although not in the manner that the referrer seeks.

- 8.18. Section 6 of the Interpretation Act states that “In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology that may have transpired since legislation was enacted...” While the Board is a quasi-judicial body, it is not a court of law and so this Section is not applicable. Accordingly, the latitude that a court would possibly have to consider extending the ambit of Class 30(c) is not available to the Board.
- 8.19. The referrer is correct in stating that the planning system should not inhibit competition. However, this system is based on statute and so if, as the referrer contends, there are gaps in statute that mean that it is at cross purposes with this objective, then the remedy is to amend the relevant planning legislation.
- 8.20. I, therefore, conclude that the three ways of seeing the Parcel Motel Facility identified by the referrer as providing a basis for considering this Facility as exempted development do not do so. Accordingly, the Facility is not exempted development.

Restrictions on exempted development

- 8.21. The referrer goes onto cite Article 9(1)(a)(iii) of the Regulations, which refers to traffic hazard as a ground upon which any exemption can be de-exempted. However, having concluded that no exemption is afforded by any of the above ways of looking at the Parcel Motel Facility, the question of de-exemption does not arise.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether or not the siting of the Parcel Motel Facility as a placement for deposit/temporary storage unit

operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, is or is not development or is or is not exempted development:

AND WHEREAS Nightline Logistics Group care of Cunnane Stratton Reynolds of 3 Molesworth Place, Dublin 2, requested a declaration on this question from Dun Laoghaire-Rathdown County Council and the Council issued a declaration on the 28th day of July, 2017, stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 14th day of August, 2017:

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

- (a) Sections 2(1), 3(1), 4(1)(h), and 254(1) & (2) of the Planning and Development Act, 2000 – 2017,
- (b) Articles 5(1), 6(1), 9(1), 10, and 201 of the Planning and Development Regulations, 2001 – 2017, and
- (c) The submissions received by the Board and the report of the inspector:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The siting of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, entailed “works” and so it constitutes development, under Section 3(1) of the Planning and Development Act, 2000 – 2017, and

(b) This development is not exempted development under Section 4(1)(h) of the Planning and Development Act, 2000 – 2017, Class 30(a) of Part 4 of Schedule to Article 10 of the Planning and Development Regulations, 2001 – 2017, or any other provisions of these Regulations:

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 siting of the Parcel Motel Facility as a placement for deposit/temporary storage unit operated by Nightline Logistics Group on lands adjacent to Tesco Ireland Ltd, Ballybrack Shopping Centre, Churchview Road, Ballybrack, Co. Dublin, is development and is not exempted development.

Hugh D. Morrison
Planning Inspector

2nd November 2017