



An
Bord
Pleanála

Inspector's Report ABP-301456-18

Question

Whether the operation of an Abrakababra sit in and take away hot food outlet from within existing permitted petrol filling station is or is not development or is or is not exempted development.

Location

Maxol Service Station, Kingsmeadow, Cork Road, Waterford.

Declaration

Planning Authority

Waterford City & County Council

Planning Authority Reg. Ref.

D5201815

Applicant for Declaration

Pat Brennan

Referral

Referred by

Pat Brennan

Owner/ Occupier

Maxol Ltd

Date of Site Inspection

02nd October 2018

Inspector

Colin McBride

1.0 Site Location and Description

1.1 The site is located on the northern side of the Cork Road and to the west of Waterford City Centre. The site is occupied by an existing service station consisting of a forecourt, canopy and associated single-storey retail unit.

2.0 The Question

2.1 Whether the operation of an Abrakababra sit in take away hot food outlet from within the existing permitted filling station forecourt, is or is not development or is or is not exempt development within the meaning of the Act.

3.0 Planning Authority Declaration

3.1 Declaration

On the 05th day of April 2018 a declaration was issued by Waterford City & County Council stating that

The operation of an Abrakababra sit in and take away hot food outlet from within the existing petrol filling station, is development and is exempt development.

3.2 Planning Authority Reports

3.2.1 Planning Reports

Planning report (27/08/18): It is noted that under ref no. PD11/500013 the permitted development included for a 'deli and server counter with a seating area within the unit. It is noted the permitted deli and server area has been relocated closer to the main checkout counter and a separate counter has been provided perpendicular to the rear wall and is trading as Abrakababra. It is noted that the permitted deli and server did not have a condition attached restricting the sale of food hot or cold for consumption off the premises. It would not be uncommon for petrol stations to have branded food outlets. It is noted as the permitted development provided for a deli counter with the unit it is considered that the relocation of the food counter within the

unit does not result in a material change of use. It was recommended that the operation of the sit in and takeaway hot food outlet from within an existing petrol station is development and is exempted development.

4.0 Planning History

15/513: Permission granted for the change of use from retail to retail and off licence use. The Off Licence area (13sq.m) will be subsidiary and ancillary to the main retail use.

11/500013: Permission granted for redevelopment and extension of the existing filling station incorporating; (A) Demolition of the existing shop building (128sqm) and removal of the forecourt canopy & carwash; (B) Decommissioning and removal of 5 No. underground fuel tanks (99,500 Litres); (C) Removal of containers & a portacabin from the rear of the site; (D) Removal of company signs and insignia. (E) Construction of a new convenience store building 293sqm (5m high) with a retail sales area of 100sqm, an ATM room of 7sqm, a cafe seating area of 45 sqm, a hot food deli area of 46 sqm & ancillary areas of 95sqm. (F) New 4 No. 40,000 litre underground fuel storage tanks; (G) New Maxol canopy with illuminated fascia 5.2 metres above forecourt; (H) 6.10m high monolith company sign (illuminated) to replace the existing sign, new corporate signs and insignia and any ancillary contingent works.

5.0 Policy Context

5.1 Development Plan

The relevant Development Plan is the Waterford City Development Plan 2013-2019. The site is zoned

6.0 The Referral

6.1 Referrer's Case

A referral has been submitted by Peter Thomson Planning Solutions on behalf of Pat Brennan.

- It is noted that the Council was incorrect in determining that the development in question constitutes development that is exempted development.
- It is noted that the definition of a shop in the Planning and Development regulations 2001 (as amended) does not include for the sale of hot food for consumption off the premises with the exception where sales are subsidiary to the main retail use.
- It is noted that the Councils' assessment does not refer to the layout permitted under 15/513 and is different from that permitted under 11/500013. This layout under ref no. 15/513 is the one that should be assessed as it is the later permission and included alterations to the deli area and seating.
- It is noted that ref no. 11/500013 did not include a condition restricting sale of hot food off the premises as it was not necessary as such was not proposed and would also require permission unless it was ancillary to the main user.
- The referrer notes that the deli counter permitted under ref no. 11/500013 and 15/513 are ancillary to the main use and that the trade to the deli counter is routed through the main shop (use of the till at the main counter of the shop in the petrol station) with a clear interdependence between the deli counter and the main retail sales are in the petrol station. It is noted that what is being operated (Abrakabara) is an independent business with no functional connection to the petrol filling station (sales counter separate to main retail unit). It is also noted that the permitted deli counter is still existing in the unit and has been repositioned into the retail floor space.

6.2 Planning Authority Response

No response.

6.3 **Owner/ occupier's response**

No response.

7.0 **Statutory Provisions**

7.1 **Planning and Development Act, 2000**

Section 3 provides definition of Development.

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.

Section 4 provides for Exempted Development

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.

4(2) (a) The minister may by regulations provide for any class of development to be exempted development for the purposes of this Act

7.2 **Planning and Development Regulations, 2001**

Article 6 includes provisions under which certain advertisements may be deemed to be exempted development.

Article 9 specifies 'Restrictions on Exemption'

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 ...

Article 10 relates to 'Changes of use'

10(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not –

- (a) involve the carrying out of any works other than works which are exempted development,
- (b) contravene a condition attached to a permission under the Act,
- (c) be inconsistent with any use specified or included in such a permission, or
- (d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

Planning and Development Regulations 2005

These amend the definition of a shop

'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 –

- (a) for the retail sale of goods,
- (b) as a post office,
- (c) for the sale of tickets or as a travel agency,
- (d) for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and 'wine' is defined as any intoxicating liquor which may be sold under a wine retailer's off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw.7 & 1 Geo.5, c.8,
- (e) for hairdressing,
- (f) for the display of goods for sale,
- (g) for the hiring out of domestic or personal goods or articles,
- (h) as a launderette or dry cleaners,
- (i) for the reception of goods to be washed, cleaned or repaired,

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of the Second Schedule applies.

8.0 Precedent cases

- 8.1 RL2179 – In this case the Question was – ‘Whether the use of a portion of the grocery store for the sale of hot food for consumption off the premises at Glendalough Stores, Laragh East, County Wicklow is or is not development or is or is not exempted development.’ The Board concluded (notice dated 18th of November 2004) that: (a) the sale of hot food for consumption off the premises is in this particular case subsidiary to the principal shop use, and (b) the sale of hot food for consumption off the premises to the limited extent which occurs at Glendalough Stores does not on this account result in a material change of use from the use of this shop. In this case it is noted that the Inspector (Par. 8.3) was satisfied that the provisions of Article 9(1)(a)(i) would not apply.
- 8.2 RL2333 – In this case the Question asked was: Whether the partial use of a Spar Retail Unit at Beaufield Shopping Centre, Maynooth as a pizzeria with delivery service is or is not development or is or is not exempted development. The Board concluded (Notice dated 15th of November 2006) that this did not result in a material change of use from the use of this shop and was not development. In that case the Inspector had regard to the planning history and noted that the Board did not re-impose a restrictive condition limiting the use of the shop.
- 8.3 RL2111 – In this case the Question asked was: Whether the provision of a home delivery service at Apache Pizza, Main Street, Lucan is or is not development or is or is not exempted development. The Board concluded (6th of April 2004) the delivery service for the sale of hot food for consumption off the premises contravened a

condition of an earlier permission, constitutes a significant element in the use of the premises and constitutes a material change of use.

- 8.4 RL2590 – In this case the Question was asked as to whether the sale of hot food for consumption off the premises at an existing shop premises in the Athlone area is or is not development or is or is not exempted development. The Board concluded (Notice dated 17th of July 2009) that the sale of hot food for consumption off the premises in this particular case is not subsidiary to the principal shop use and results in a material change of use from the use of this shop for the retail sale of groceries.
- 8.5 RL3402 – In this case a Question was asked as to: Whether the change of use of part of the existing retail premises for sale of hot food in Kilcullen, Co. Kildare is or is not development or is or is not exempted development. The Board conclusion (Notice dated 29th of April 2016) included, that the sale of hot food for consumption off the premises is not subsidiary to the principal shop use and having regard to the definition of ‘shop’ under article 5(1) of the Planning and Development Regulations, 2001, as amended, this has resulted in a change of use within this shop from the main retail use. The referrer also noted that the permitted deli counter has been relocated in the shop and has been retained
- 8.6 RL3495– In this case a question arose as to whether the use of 1.16sq.m. of shop area at GO Kylemore Service Station for the sale of hot food at GO Kylemore Road Service Station, Kylemore Road, Dublin is or is not development or is or is not exempted development. The Board decided that
- (a) the nature and limited scale of the use and its character as an ancillary use to the principal use as a shop,
 - (b) the sale of hot food for consumption on or off the premises resulted in a change of use,
 - (c) the change of use in this case by reason of its limited scale and ancillary nature was not a material change of use, and

(d) the change of use in this case, therefore, was not development as described in section 3(1) of the Planning and Development Act, 2000:

Therefore the Board determined that the change of use of 1.16sq.m. of shop area for the sale of hot food was not development

9.0 Assessment

9.1 The question at issue is whether the operation of an Abrakabara hot food counter from within the existing permitted petrol filling station is or is not development or is or is not exempted development within the meaning of the Act. At the time of the site visit the layout of the shop associated with the petrol station provides for a main retail counter as per the previously permitted layouts, a deli counter serving hot or cold food (paid for at the main retail counter) parallel to the rear wall at the back of the shop but centrally located. To the left of the deli counter is a counter running perpendicular to the rear wall of the shop that operates as an Abrakababra fast food outlet with seating located to the front of the shop in the corner. The layout of the shop unit is different to the last permitted layout under ref no. 15/513. A deli counter selling hot food for consumption off the premises is permitted under ref no. 11/500013 as is the seating area. The permitted layouts are attached.

9.2 Is or is not development

9.2.1 Firstly the question is whether the works in question constitute development. The referral relates to an established retail unit associated with a petrol filling station. The works in question include the provision of a new layout, which includes the provision of a new counter running perpendicular to the rear wall of the unit (previous deli counter was parallel to such in the same location) and provision of new deli counter relocated centrally in the unit as well. The referral relates to the counter which is operating as an Abrakababra hot food outlet. The outlet has an extensive menu of fried food cooked on the premises (fryers installed). I would note that the operation in question takes up a sizeable portion of the unit and is clearly branded separately

from the existing petrol station provider. The operation also has its own point of sale and despite being within the retail unit is functionally separate from the operation of the existing retail unit.

9.2.2 Whether this constitutes development or not requires consideration of what is provided for under the definition of 'shop' in PDR, 2001 (as amended), and by reference to the materiality of any planning implications arising from the hot food offer. At the outset, I would note that the parent permission (11/500013) was not subject to any condition prohibiting the sale of hot food for consumption off the premises. As such, I do not consider that article 9(1)(a)(i) (i.e. restrictions on exemption arising from contravention of conditions attached to an extant permission) applies.

9.2.3 Article 5 of PDR, 2001 (as amended) provides a definition of 'shop' wherein subsection (d) states:

“for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use ...”

Arising from the above, the key issue here is the subsidiarity of the hot food offer. I would consider based on the fact the operation entails cooking/frying of hot food with an extensive menu of fried food on offer, is operated by an independent national fast food chain, is clearly branded separately from Maxol who own and operate the petrol station, I would consider that the operation constitutes a fast food takeaway. I do not consider such to be a subsidiary use, and consider that it would be a trip generator in and of itself and that it would generate custom independent of the shop. As such, I do not consider the hot food offer comes within that which is provided for by Article 5(d).

9.2.4 I consider that the hot food counter operated as an Anrakababra outlet does not come within the definition of 'shop' per Article 5(d) and constitutes a separate take-away use that is not subsidiary to the shop and thus constitutes a material change of use, which is development. Further, it generates different material planning consequences relating to traffic, noise, and disturbance.

9.3. Is or is not exempted development

9.3.1 As noted above I do not consider that the hot food counter operated as an Abrakababra outlet comes within the definition of 'shop' per Article 5(d) and constitutes a separate take-away use that is not subsidiary to the shop and thus constitutes a material change of use, which is development. I would note that there is no exemption for such under the Planning and Development Regulations, 2001 (as amended).

9.4 Conclusions

9.4.1 In considering this referral I have had regard to the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended); to the planning history of the subject site and my observations during site inspection. Arising from this, I conclude that the sale of hot food (Abrakababra counter) at the subject premises is not subsidiary or incidental to the shop use, but is more accurately described as a separate, takeaway use, which is a material change of use for which there is no exemption. Accordingly, I consider the change of use for the sale of hot food is development and is not exempted development.

10. Recommendation

I recommend that the question referred to the Board by Pat Brennan be decided as follows:-

WHEREAS a question has arisen as to whether operation of an Abrakababra sit in take away hot food outlet from within the existing permitted filling station forecourt, is or is not development or is or is not exempt development within the meaning of the Act.

AND WHEREAS the said question was referred to An Bord Pleanála by Pat Brennan on the 19th day of April 2018:

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

(a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended

(b) The definition of 'shop' under article 5(1) of the Planning and Development Regulations, 2001 , as amended by the Planning and Development Regulations 2005

(c) Articles 9 and 10 of the Planning and Development Regulations, 2001-2011

(d) The planning history and internal layout of the premises,

(e) The material planning consequences arising in relation to traffic, noise and general disturbance:

AND WHEREAS An Bord Pleanála has concluded that –

(a) The sale of hot food for consumption off the premises in this particular case is not subsidiary to the principal shop use and

(b) The sale of hot food for consumption off the premises results in a material change of use within this shop.

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 change of use of part of the existing retail premises for the sale of hot food (AbraKabra counter) is development and is not exempted development.

Colin McBride
Planning Inspector

07th December 2018