



An  
Bord  
Pleanála

## Inspector's Report ABP-301644-18

### Question

Whether the current use of part of the retail unit for the preparation of food for consumption off the premises and associated delivery service in association with "Pizza Hut" at Sweeney's Daybreak, is or is not development and is or is not exempted development.

### Location

Monfieldstown, Rochestown, Co. Cork

### Declaration

Planning Authority

Cork County Council

Planning Authority Reg. Ref.

D/236/18

Applicant for Declaration

Sean Sweeney

Planning Authority Decision

Development that is not exempted development

### Referral

Referred by

Sean Sweeney

Owner/ Occupier

Sean Sweeney

**Observer(s)**

None

**Date of Site Inspection**

26<sup>th</sup> September 2018

**Inspector**

Hugh D. Morrison

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## 1.0 Site Location and Description

- 1.1. The site is located in Monfieldstown in a position off the Rochestown Road (R610) at the mid-point between roundabouts that serve the N28 to the east and the Douglas Shopping Centres to the west. This site lies at the entrance to the Kiltegan Estate, which is a suburban residential area. It is accessed off Kiltegan Park.
- 1.2. The site itself is amorphous in shape and it encompasses a two-storey dwelling house, the front elevation of which is orientated towards the south, and an attached single storey building to the rear, the use of part of which is the subject of the current referral. The dwelling house is served by front and rear gardens and the building is served by a forecourt, which is laid out to provide perpendicular car parking spaces.

## 2.0 The Question

- 2.1. Whether the current use of part of the retail unit for the preparation of food for consumption off the premises and associated delivery service in association with “Pizza Hut” at Sweeney’s Daybreak, Monfieldstown, Rochestown, Co. Cork is or is not development and is or is not exempted development.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

The current use of part of the retail unit for the preparation of food for consumption off the premises and associated delivery service in association with “Pizza Hut” at Sweeney’s Daybreak, Monfieldstown, Rochestown, Co. Cork is development and is not exempted development.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

The Planning Authority concluded the following:

- The sale of hot food for consumption off the premises in this particular case is not subsidiary to the main shop.

- The sale of hot food for consumption off the premises is a material change of use of the shop.
- This material change of use materially contravenes condition 4 of permitted application 05/5960.

### 3.2.2. Other Technical Reports

None

## 4.0 Planning and Enforcement History

- **87/1059 & 87/2806:** Shop attached to the dwelling house No. 7A: Permitted as a “provision shop” to serve the surrounding housing estates + Change of house type and shop unit: Permitted.
- **93/2563:** Alterations and partial change of use of dwelling house to commercial use (chemist, video store, boutique or hairdressing): Refused.
- **00/0008:** Retention of extension to shop: Permitted.

**EF 08/153:** Alleged non-compliance with terms and conditions of 00/0008: Closed.

- **01/4908:** Extension to store room to join with existing shop: Permitted at appeal PL04.127413.
- **05/5960:** Demolition of existing external store, alterations and extensions to shop, partial change of use of dwelling to staff room and toilets and part demolition of front boundary wall to provide 7 car parking spaces: Permitted, subject to conditions, which include the following one:

*The proposed premises shall be used solely for a shop and a change of this use shall not take place without the prior permission of the Planning Authority, notwithstanding the exempted development provisions of the Planning and Development Regulations, 2001, as amended.*

*Reason: To regulate the use of the development in the interests of orderly development.*

- **EF 10/026:** Alleged unauthorised use of shop for the making and sale of piazza: Closed following permitted application 10/8289.

**10/8289:** Retention of variations to 05/5960: alterations to design and layout of roof to shop, relocation and alterations to windows/doors to shop, and extension to bin store: Permitted.

**EF 11/255:** Alleged unauthorised use of part of shop for the preparation of food by “Pizza Hut” + Signage + Non-compliance with terms and conditions of 05/5960 & 10/8289: Live.

- **EF 15/176:** Alleged unauthorised development: Construction of a store area between the house and external boundary wall + Opening of pedestrian entrance onto Kiltegan Lawn: Live.
- **15/4487:** Change of use from permitted retail use to retail use including the sale of alcohol for consumption off the premises, i.e. an off-licence use, where the floor area for the off-licence use is 10 sqm and is restricted within the overall unit and is ancillary to the overall primary retail use: Permitted, subject to conditions, which include the following one:

*The proposed off-licence shall be used solely as that permitted herein and no further change of use of the overall unit shall take place without the benefit of a further planning permission, notwithstanding the exempted development provisions of the Planning and Development Regulations, 2001, as amended.*

*Reason: To safeguard the amenities of the area and in the interests of orderly development.*

- **17/6487:** Retention of a gable-end non-illuminated sign located on side (south-west) elevation of shop and an illuminated free-standing, double-sided, roadside sign: Refused for the following reason:

*It is considered that to permit retention permission for signage advertising an unauthorised use would be inappropriate, would set a most undesirable precedent for other similar proposals, and would be contrary to the proper planning and sustainable development of the area.*

## 5.0 Policy Context

### 5.1. Development Plan

The Ballincollig-Carrigaline Municipal District Local Area Plan 2017 (LAP) shows the site as lying within an existing built up area. Policy Objective ZU 3-1 of the Cork County Development Plan 2014 – 2020 (CDP) states the following:

*Normally encourage through the Local Area Plan's development that supports in general the primary land use of the surrounding existing built up area. Development that does not support, or threatens the vitality or integrity of, the primary use of these built up areas will be resisted.*

### 5.2. Natural Heritage Designations

Cork Harbour SPA (site code 004030)

## 6.0 The Referral

### 6.1. Referrer's Case

- The Planning Authority did not address the question as to the definition of “subsidiary”. Under the definition of “shop” in Article 5(1) of the Planning and Development Regulations, 2001 – 2018, this word is used. It is a rare example of such usage within planning legislation and it should not be confused with other words such as “incidental” and “ancillary”. In company legislation, “subsidiary” is used in the sense of an entity that is secondary rather than primary and so it could refer to a company which has at least half its stock owned by another company. If this ratio is applied to floorspace, then there is no basis for the Planning Authority's position that 15 or 20% of overall floorspace is no longer subsidiary.
- The Planning Authority cites the Board referral case RL2590. However, “subsidiary” was not defined in this case. Instead the floor area and internal layout of the premises in question was examined. While the inspector regarded the floor area at issue as being a significant proportion of the whole, this was not reflected in the Board's Order, which cited the prominence of the

subject use within the layout of the shop (item (c)), i.e. to the front of the shop, next to the shop window, and with accompanying signage. As these characteristics are not paralleled in the current case, the said referral case is not comparable and so it does not provide a precedent.

- The case planner's report is critiqued. Thus, 15.57 sqm or 7.2% of the overall floorspace is included as being part of the floorspace that is subject to the "Pizza Hut" use, and yet 9.28 sqm of this figure is used primarily for the preparation of food for the deli counter and 5.29 sqm is used as the deli counter and other non "Pizza Hut" display counters. Likewise, to apportion the floorspace of the ancillary storage, wash-up areas and cold room facilities to the "Pizza Hut" use on a 50: 50 basis is an exaggeration as this floorspace is shared between the shop, the deli counter, and "Pizza Hut". In practise, the Planning Authority did not proceed on this basis and so an even more inflated floorspace figure was arrived at.

The Planning Authority also undertakes a floorspace calculation on the basis of plans submitted under 15/4487. This calculation is not dis-aggregated and the use of these plans is not explained.

The conclusion that "it is considered that the proportion of floorspace for the preparation and sale of pizzas relative to the overall net retail floorspace is considerable and clearly not ancillary to the main permitted use of the unit as a shop" is critiqued on the following grounds:

- No reason is given for expressing the gross pizza preparation area as a percentage of the net retail area,
  - The pizza area is assessed with respect to the category of "ancillary" rather than that of "subsidiary", and
  - That the floorspace is regarded as "considerable" is not sufficient to establish that it is "not subsidiary".
- The pizza sales area is not evident from outside the shop and from the inside it "reads" as one of several distinct spaces that comprise this shop. Thus, this area is not a separate use as such.



The introduction of the pizza use entailed some changes to the “back-of-house” area rather than to the shop itself, i.e. this use simply replaced a bakery and food preparation area that was previously in-situ. (Under RL3332, the Board confirmed that a change of use from a bagel café to a pizza café was not development).

A scenario wherein the pizza use was severed from the shop and became the sole use is not under consideration. Likewise, external signage is not under consideration.

The on-line advertising of franchises within shops is a trend that is likely to grow, and it is one that should be welcomed insofar as it allows shops to compete more readily with supermarkets.

- The pizza use accounts for between 24 and 25% of the turnover of the overall floorspace.
- The case planner cites Galway County Council v Lackagh Rocks Ltd. However, this case is relevant in situations where what is in dispute is whether a change of use is material. In the current case, the applicant contends that the pizza use comes within the aforementioned definition of “shop” and so any question of a material change of use does not arise. Notwithstanding, this contention, the said case requires the Planning Authority to demonstrate that there would be additional effects on the environment arising from the use at issue. This the Planning Authority has not done.
- The Planning Authority cites the contravention of condition 4 attached to permitted application 05/5960. However, given the applicant’s aforementioned contention, such contravention is not arising.

## 6.2. Planning Authority Response

None

## 6.3. Owner/ occupier’s response

n/a

## 6.4. Further Responses

None

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000 – 2018

Section 2(1) states the following:

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

Section 5(1) 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) 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) 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) 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) 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.*

## **7.2. Planning and Development Regulations, 2001 – 2018**

Article 5(1) states the following:

*“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 laundrette 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 Schedule 2 applies;*

Article 10(1) states the following:

*Development which consist 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.*

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.*

### 7.3. Other

Not applicable

## 8.0 Assessment

### 8.1. Is or is not development

8.1.1. The question to be assessed under the current referral is as follows:

The current use of part of the retail unit for the preparation of food for consumption off the premises and associated delivery service in association with “Pizza Hut” at Sweeney’s Daybreak, Monfieldstown, Rochestown, Co. Cork is development and is not exempted development.

I consider that, provided the word “hot” is inserted before the word “food”, this question is appropriately worded.

8.1.2. Under Section 3(1) of the Planning and Development Act, 2000 – 2018, (hereafter referred to as the Act), the definition of development includes the following statement, “the making of any material change in the use of any structures or other land”, where, under Section 2(1) of the Act, “land” is defined as including any structure, “structure” is defined as meaning any building, amongst other things, and “use”, in relation to land, does not include the use of land by the carrying out of any works thereon”.

8.1.3. In the present case, a change of use of part of a retail unit from use as a shop to use for the preparation of hot food for consumption off the premises and associated delivery service has occurred. The question that arises is whether or not this change of use is a material change of use: The Planning Authority says it is, while the referrer says it is not.

8.1.4. The Planning Authority’s position is that the subject use is not subsidiary to the use of the retail unit as a shop and so the change of use, which has occurred, is a material one, which, furthermore, materially contravenes condition 4 of the permission granted to application 05/5960. Condition 4 requires that the retail unit be used solely as a shop and so any change of use would require planning permission, notwithstanding any exempted development that would otherwise be applicable.

8.1.5. The referrer's position focuses on the use of the word "subsidiary". This is relevant because this word arises in item (d) of the definition of shop cited under Article 5(1) of the Planning and Development Regulations, 2001 – 2018, (hereafter referred to as the Regulations). The relevant parts of this definition are set out below for ease of reference:

*"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 –*

*...(d) for the sale of sandwiches or other food or 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,...*

*But does not include any use...for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d)...*

Use of premises as a shop can thus include one that entails the sale of hot food for consumption off the premises, provided the sale of such food is subsidiary to the main retail use. Accordingly, where subsidiary status is absent, the introduction of the sale of hot food for consumption off the retail premises is not a shop use and so a material change of use occurs from a shop use to a hot food takeaway use.

8.1.6. In the light of the foregoing analysis, the referrer, in focusing on the question of subsidiary status, has identified the key issue in the current referral. He draws attention to the fact that "subsidiary" has a discrete meaning and so it should not be used interchangeably with either "ancillary" or "incidental". He states that this meaning is that of an entity that is of secondary rather than primary importance.

8.1.7. A common definition of "subsidiary" is that of something that is less important than but related or supplementary to something else. Thus, this definition refers to relative importance within the context of a relationship between entities.

8.1.8. During my site visit, I observed that there is a single customer door to the retail premises, which is accompanied by a space that functions as a lobby: to the right of this space is an opening through which the "Daybreak" shop can be accessed, while straight ahead is a continuous space where customers of "Pizza Hut" can place their orders by means of a counter, to the left, that interfaces with the pizza preparation

area. The equipment in and layout of this area is predominantly given over to pizza preparation and shared facilities with the deli appeared to be limited, e.g. one of the two cold rooms that is accessed off the preparation area is shared. I also observed that the deli counter and Costa Coffee apparatus are laid out on the same floorspace as the “Daybreak” shop and that they function as part of this shop.

- 8.1.9. The parties disagree over how much of the building’s 203.66 sqm floorspace should be allocated to the “Pizza Hut” use. The referrer cites 33.04 sqm or 16.2% whereas the Planning Authority cites 45.93 sqm or 22.55%. Both estimates comprise a mixture of dedicated and shared floorspace, which is apportioned. Under either of these estimates, I consider that a significant proportion of the floorspace would be thus allocated, which, in its extent, would be ancillary to the total. Furthermore, the referrer indicates that the “Pizza Hut” use operates as a franchise, which accounts for between 24 and 25% of the turnover of the overall floorspace. Thus, this use accounts for a significant proportion of turnover, albeit of secondary importance to the turnover of the shop.
- 8.1.10. During my site visit, I observed that the hours of opening of the “Pizza Hut” use diverge from those of the “Daybreak” shop. Thus, on Friday and Saturday nights this use continues to midnight whereas the shop closes at 11pm. I also observed signage, which indicates that “Pizza Hut” has its own staff rather than staff which are shared with “Daybreak”. This signage explicitly referred to the recruitment of exclusively “Pizza Hut” delivery drivers and implicitly referred to staff “on-site”. Thus, the divergence of hours of opening and the employment of dedicated staff indicate that the use is a recognisable one in its own right.
- 8.1.11. In the light of the foregoing evidence, I consider that, while the floorspace and turnover aspects of the “Pizza Hut” use point to it being secondary to the main use of the building as a “Daybreak” shop, the diverging hours and dedicated staff distinguish this use from that of the shop. During the said hours the use operates separately from that of this shop. Such separate usage is facilitated by the layout of the customer area, which is accessible from the lobby and entrance door without entry to the shop as such. Furthermore, the delivery service that accompanies the “Pizza Hut” use is exclusive to this use and so it is entirely separate from the shop. Accordingly, I conclude that the subject use is not subsidiary to that of the shop, i.e. it is not related to the shop insofar as it is capable of functioning and it does in fact

function separately from this shop, and so it entails a material change of use of that part of the building within which it operates.

- 8.1.12. I have reviewed previous analogous referral cases dealt with by the Board. My conclusion is consistent with the case that is most similar to the current one, i.e. RL09.RL3402, which involved the sale of hot food for consumption off the premises in circumstances where a delivery service was provided, too.
- 8.1.13. The Planning Authority refers to the case of Galway County Council v Lackagh Rock Ltd in which it was held that where new material planning considerations would arise as a result of a change of use, this is an indication that the change of use is a material one.
- 8.1.14. With respect to the current case, the change of use has led to the building being the subject of longer opening hours on two nights a week and to it being the base for a pizza home delivery service. Both these aspects of the “Pizza Hut” use prompt new material planning considerations in relation to residential amenity and the pattern of traffic movements attendant upon the premises. Thus, they provide supplementary evidence that a material change of use has indeed occurred.
- 8.1.15. The Planning Authority also refers to condition 4 attached to permitted application 05/5960. It states the view that this condition, which requires that the subject premises be used solely for a shop, is contravened by the material change of use in question. I concur with this view.

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

- 8.2.1. Articles 6 and 10 of the Regulations sets out what constitutes exempted development. None of the categories thus identified are relevant to the material change of use in question.

## **8.3. Restrictions on exempted development**

- 8.3.1. Given my commentary on exemption development, the question of restrictions on exempted development 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 the current use of part of the retail unit for the preparation of hot food for consumption off the premises and associated delivery service in association with “Pizza Hut” at Sweeney’s Daybreak, Monfieldstown, Rochestown, Co. Cork is or is not development or is or is not exempted development:

**AND WHEREAS** Sean Sweeney requested a declaration on this question from Cork County Council and the Council issued a declaration on the 27<sup>th</sup> day of April 2018, stating that the matter was development and was not exempted development:

**AND WHEREAS** Sean Sweeney referred this declaration for review to An Bord Pleanála on the 18<sup>th</sup> day of May 2016:

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

- (a) Section 2(1), 3(1), 5 and 127 of the Planning and Development Act, 2000 – 2018,
- (b) Article 5(1), 6, and 10 of the Planning and Development Regulations, 2001 – 2018,
- (c) Part 4 of Schedule 2 to the Planning and Development Regulations, 2001 – 2018, and
- (d) the planning history of the site:

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

- (a) The use of part of the premises for the sale of hot food for consumption off the premises is not subsidiary to the main use of the premises as a shop,
- (b) The said use is not therefore a shop under Part 4 of Schedule 2 to the Planning and Development Regulations, 2001 – 2018,
- (c) The said use raises new material planning considerations,
- (d) The said use thus constitutes a material change of use,
- (e) The said use contravenes condition 4 attached to permitted application 05/5960, and
- (f) No exempted development provisions of either Article 6 or 10 of the Planning and Development Regulations, 2001 – 2018 are applicable.

**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 current use of part of the retail unit for the preparation of hot food for consumption off the premises and associated delivery service in association with “Pizza Hut” at Sweeney’s Daybreak, Monfieldstown, Rochestown, Co. Cork is development and is not exempted development.

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Hugh D. Morrison  
Planning Inspector

30<sup>th</sup> October 2018