



An
Bord
Pleanála

Inspector's Report ABP-302188-18

Question

Whether the inclusion of hot pizzas for consumption off the site in the range of products sold from the existing supermarket is or is not development or is or is not exempted development.

Location

Costcutter Supermarket, Lusk, County Dublin

Declaration

Planning Authority

Fingal County Council

Planning Authority Reg. Ref.

FS5/020/18

Applicant for Declaration

Barry Group & Others.

Planning Authority Decision

Is not exempted development

Referral

Referred by

Barry Group & Others.

Owner/ Occupier

Barry Group & Others.

Observer(s)

None.

Date of Site Inspection

21st March 2019.

Inspector

Karen Kenny

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1.0 Site Location and Description

- 1.1.1. The subject referral relates to the 'Costcutter' convenience shop, Main Street, Lusk, Co. Dublin. The shop occupies part of the ground floor area of a larger two storey building. It has a stated ground floor area of 352 square metres. There is a checkout area and service counter inside the shop door, convenience goods are displayed to the front and centre of the shop and there are separate deli and pizza food areas at the rear of the shop.
- 1.1.2. It was evident on inspection that the pizza area is branded separately to the wider convenience store as a "Four Star Pizza" outlet. This area contains a service counter, payment area and food preparation area. Outside the shop, there are 'Four Star Pizza' signs affixed to the shop front and to a boundary wall adjoining the car parking area at the front of the site.

2.0 The Question

- 2.1.1. The question as submitted with the referral is "*whether the inclusion of hot pizza for consumption off the site in the range of products sold from the existing supermarket is or is not development and is or is not exempted development*".
- 2.1.2. The origins of the referral appear to emanate from an Enforcement Notice issued to the First Party by the Planning Authority.
- 2.1.3. I consider, having read the referral file, all associated reports and plans and inspected the site that the question as phrased does not accurately describe the nature and extent of the change of use that has occurred within the site. I recommend that the question be reworded as follows:

"whether the change of use of part of the existing convenience shop for the sale of hot food (pizza) for consumption off the premises is or is not development or is or is not exempted development".

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority on 3rd July 2018 issued a declaration stating that the use is development and that it is not exempted development under Section 5(1) of the Act.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Report of the Planning Authority reflects the declaration issued. The report concluded that the pizza offering is not considered to be a subsidiary use and therefore constitutes a material change of use. The report also concludes that the pizza area fails to come within the definition of a 'shop'.

3.2.2. Other Technical Reports

None.

4.0 Planning History

4.1.1. The following planning history pertains to the site:

PA Ref. ENF15/57A: Enforcement Notice issued in relation to the use of part of the supermarket for the sale of hot pizzas including sale for consumption off the premises.

PA Ref. F08A/1238: Permission granted for off licence (14 sq.m).

PA Ref. F99A/0408: Permission granted for single storey extension to accommodate a post office to the rear of the store.

PA Ref. F96A/0801: Permission granted for alterations and extension to the rear.

PA. Ref. F95A/0114: Permission granted for two shop units with living accommodation over.

5.0 Policy Context

5.1. Development Plan

The Fingal County Development Plan is the relevant statutory plan for the area. The site is zoned 'TC' Town Centre with an objective to protect and enhance the special physical and social character of town and district centres and provide and / or improve urban facilities'.

5.2. Natural Heritage Designations

None.

6.0 The Referral

6.1. Referrer's Case

6.1.1. Documentation submitted with the referral outlines the following case:

- The definition of a 'Shop' in the Regulations allows 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. The definition does not include any use ... 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. Paragraph (d) uses the all-encompassing and unlimited phrase of "sandwiches and other food".
- The "exclusions" paragraph at the end does mention hot food for consumption off the premises, and in effect confirms that "other food" as mentioned in paragraph (d) does include hot food. The 1994 Regulations excluded entirely the "sale of hot food for consumption off the premises" from the definition of a shop. This is given practical effect in modern grocery or convenience shops that have deli counters and sell hot food.
- The law allows for the sale of all foods for consumption off the premises provided the subsidiarity requirement is met.

- Class 1 of Part IV is defined as “Use as a shop”. Article 10.2 (b) does exclude uses from inclusion in the definition of a shop or any other category of use, but these uses are irrelevant to the shop at issue.
- The change is development but is exempted development.
- The pizza section of the shop is subsidiary to the retail use. The floor area at 50 square metres is 14% of the overall floor area of 353 square metres and 7% of the retail floor area. The staffing of the pizza area (3.5 fulltime equivalents) is 12% of the total staff (25.5 full time equivalents). The customers are 6.5% of the overall customer numbers. The turnover is 9% of the overall turnover.
- The Council have argued that the pizza offering is a stand-alone operation. The offering is an integral part of the supermarket with fluid exchange of staff and is no different to e.g. the deli or off-licence or the former Post Office. The use of external signage and other promotional materials is similar to other products sold.
- When a previous Post Office was no longer required the proprietor chose to use it for an enhanced hot food offering.
- Under Article 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” is exempted development.
- Article 10 (1) (a) requires that the development does not involve the carrying out of any works other than works which would be exempted development. We would note that any physical internal works are exempt development by virtue of Section 4(1)(h) of the main Act. Article 10 (1) (c) requires that the development would not be inconsistent with any use specified or included in a permission. Article 10 (1) (d) related to pre-existing unauthorised uses and is not relevant.
- The restrictions on exemptions contained in Article 9 only relate to exemptions allowed in Article 6 and do not affect Article 10 exemptions. Note that the “pizza” use clears all of the provisions of Article 9.

- In relation to the delivery element associated with the Pizza use, the shop has had a delivery service in operation for many years.
- It is alleged (by the Council) that the Pizza offering is a stand-alone operation under the “4-Star Pizza” brand. While the shop uses the brand by licence it also uses other brands such as lotto and pay point that are integrated into the overall shop operation.
- The Council state that the pizzas may be ordered by phone or on line for delivery by the shop. This ignores the fact that many other “convenience” or “ready to consume” product lines are available to order on line.

6.1.2. Planning Authority Response

- The Planning Authority considered that the inclusion of hot pizza for consumption off the site in the range of products sold from the existing supermarket is development and is not exempted development.
- Having assessed and had regard to the referral submission and the original declaration, this remains the opinion of the Planning Authority.

6.2. Further Responses

None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 3(1) of the Act states the following in respect of ‘development’:

“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 Act states that the following shall be exempted developments for the purposes of this Act:

“(h) development consisting of the use 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;

Section 4 (2)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

7.2. **Planning and Development Regulations, 2001**

Article 10(1)

With specific regard to change of use, Article 10(1) provides that any change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development provided that they 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.

Schedule 2 Part 4

This part of the regulations sets out classes of use for exempted development, whereby “shop” is in a class of its own:

CLASS 1: Use as a shop.

Article 5

Article 5 defines “shop” as follows:

‘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 Schedule 2 applies;

8.0 Precedent Cases

RL3495: The question relates to whether the use of 1.16sq.m. of shop area for the sale of hot food at a service station is or is not development or is or is not exempted development. The Board decided that:

- The sale of hot food for consumption on or off the premises resulted in a change of use,
- The change of use in this case by reason of its limited scale and ancillary nature was not a material change of use.

RL3402: The question related to whether the change of use of part of the existing retail premises for sale of hot food is or is not development or is or is not exempted development. The Board determined in respect of the change of use that:

- The sale of hot food for consumption off the premises is not subsidiary to the principal shop use,
- 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,
- Having regard to the potential for material planning consequences in relation to traffic, noise and general disturbance, this change of use is considered to be material in planning terms, and this matter, therefore, constitutes development, and

- This development does not come within the scope of exemptions from the general obligation to obtain planning permission, as provided under planning legislation.

RL2992: The question related to whether the change of use of a shop granted under planning register reference 88/996 to use as a subway premises and the signage / branding changes to the front elevation is or is not development or is or is not exempted development. The Board determined in respect of the change of use that:

- The current use of the premises as a take-away commenced in 2006, is a change of use that is material, and
- There are no exemptions under the current exempted development provisions which would provide for this material change of use.

RL2590: The question related to a shop with a meat counter and cold store, which also had a large counter for a takeaway business at the front of the premises. The Board determined that the sale of hot food for consumption off the premises was development and was not exempted development, as follows:

- The sale of hot food for consumption off the premises in this particular case was not subsidiary to the principal shop use, and
- The sale of hot food for consumption off the premises resulted in a material change of use from the use of this shop for the retail sale of groceries.

RL2432: This case related principally to the use of a retail unit for the sale of hot food for consumption off the premises and also to related external signage. The main issues were the scale and intensity of the subject use vis-à-vis the retail use; whether the subject use could be considered the primary or subsidiary use, and the material planning consequences, if any, arising from the use. The Board declared that the development was not exempted development, concluding that the sale of hot food for consumption off the premises was not subsidiary to the principal shop use, and that it resulted in a material change of use.

RL2333

The referral related to the use of a small part of a shop (c.8 sq m - of a total GFA of 212 sq m) for the preparation and sale of pizzas for consumption off the premises. There was also an element of home delivery involved also (c.70 no.

deliveries per week). The Board decided that the development was not development, concluding that the sale of hot food for consumption off the premises, to the limited extent that was occurring, did not result in a material change of use from the use as a shop.

RL2179: The referral related to an all-purpose grocery shop (including petrol pumps in the forecourt). The shop contained a small heated cabinet and an oven associated with the sale of hot food for consumption off the premises. The Board decided that the use was not development, concluding that the sale of hot food for consumption off the premises was in this particular case subsidiary to the principal shop use; and that the use was of such a limited extent that it did not result in a material change of use of the shop.

9.0 Assessment

9.1. Introduction

- 9.1.1. The subject of this referral relates to a pizza area within an existing 'Costcutters' convenience shop on Main Street, Lusk, Co. Dublin. The pizza area is located to the rear of the shop. It has a stated floor area of 50 square metres within a shop with a stated floor area of 352 square metres and a stated retail floor area of 280 square metres. It was noted at time of site inspection that the pizza area, is additional to a deli area that is dedicated to the sale of hot and cold food for consumption off the premises. The floor area of the deli area is not stated. However, arising from my site inspection and the submitted floorplans, I would estimate that the overall floor area dedicated to the sale of food for consumption off the premises to be close to 90 square metres. The pizza area is branded independently as a "Four Star Pizza" outlet within the shop, externally and online. Furthermore, the advertised opening hours of the pizza outlet differ from the advertised opening hours of the shop¹.
- 9.1.2. The applicant's referral specifically asks, "*whether the inclusion of hot pizza for consumption off the site in the range of products sold from the existing supermarket is or is not development and is or is not exempted development*".

¹ www.costcutterlusk.ie and www.fourstarpizza.ie websites.

9.1.3. I consider, as discussed in Section 2.0 above, that the question does not accurately describe the nature and extent of the change of use that has occurred within the site and recommend that the question be reworded as follows:

“whether the change of use of part of the existing convenience shop for the sale of hot food (pizza) for consumption off the premises is or is not development or is or is not exempted development”.

9.2. **Is or is not development**

9.2.1. In the 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.”

9.2.2. Article 5 (1), Part 2 of the Planning and Development Regulations, 2001 (as amended) provides a definition of a “shop”. A “shop” means a structure used for *inter alia* the retail sale of goods or 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 where the sale, display or service is principally to visiting members of the public. This definition does not include the sale of hot food for consumption off the premises except where the sale of food is subsidiary to the main retail use as described above.

9.2.3. The critical issue with respect to this referral is whether or not the change of use of part of the convenience shop for the sale of pizza falls within the definition of a “shop” and is therefore exempted development or whether a material change of use has occurred. It can be seen from the comparable cases outlined in Section 8.0 above that a determining factor in previous Board decisions has been the scale and intensity of the use, and whether the sale of food was considered subsidiary to the principal retail use or not. Another key consideration in previous cases was whether the use generated material planning consequences. I would consider these to be the critical factors in this referral also.

9.2.4. In this particular case, the sale of hot food for consumption off the premises, arises in respect of the pizza sales and from the deli counter. Given the critical factors for consideration, I consider that the overall food offer is a material consideration in this case. It is a reasonable estimation to state that the overall area selling food for

consumption off the premises (pizza, sandwiches and other hot food), takes up almost one third of the retail floorspace of the premises. Whether this constitutes development or not requires consideration of the definition of 'shop' in the PDR, 2001 (as amended), and by reference to the materiality of any planning implications arising from the food offer.

9.2.5. At the outset, I would note that the parent permission (Reg Ref F99A/0408) was not subject to any condition prohibiting the sale of hot food for consumption off the premises, nor were any later permissions pertaining to the site. 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.

9.2.6. 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 ...”

9.2.7. I consider that the sale of hot food for consumption off the premises in this particular case is not subsidiary to the main retail use of the shop due to the overall extent of floor area dedicated to the sale of hot and cold food relative to the retail floor area. While the pizza area is located within a convenience store, the area given over to pizza sales is more typical of a self-contained take-away and on this basis, I consider that this aspect when considered independently of the deli would not meet the subsidiary test in its own right.

9.2.8. Furthermore, the range of goods and services offered from the pizza outlet, coupled with the independent hours of operation, suggest in my view that the outlet operates as a standalone fast food takeaway outlet and is a separate primary use within the shop that raises new material planning considerations. I consider that it would be a trip generator in and of itself and that it would generate custom independent of the shop and at later hours, resulting in a material change of use. The delivery service is advertised, and this means that custom is not solely reliant on visitors to the shop and is likely to depend significantly on phone orders. I consider that this would have materially different planning implications than those of a retail shop where sale, display or service is 'primarily' to visiting members of the public.

9.2.9. On the basis of the foregoing, I consider that the change of use of part of the shop for the sale of hot food (pizzas) for consumption off the premises in this instance, 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. Given the particulars of the subject case I do not consider that the change of use of part of the shop for the sale of hot food (pizzas) for consumption off the premises comes within that which is provided for by Article 5(d). The development does not, therefore, come within the scope of the exemptions from the general obligation to obtain planning permission as provided for under the planning legislation.

9.4. **CONCLUSION**

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 inclusion of hot pizza for consumption off the site in the range of products sold from the existing supermarket 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 of part of the shop for the sale of hot food (pizzas) for consumption off the premises is development and is not exempted development.

10.0 **Recommendation**

10.1. 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 change of use of part of the existing convenience shop for the sale of hot food (pizza) for

consumption off the premises is or is not development and is or is not exempted development:

AND WHEREAS Barry Group & Others requested a declaration on this question from Fingal County Council and the Council issued a declaration on the 3rd day of July, 2018 stating that the matter was development and was not exempted development:

AND WHEREAS Barry Group & Others referred this declaration for review to An Bord Pleanála on the 27th day of July, 2018:

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

- (a) The definition of ‘shop’ under article 5(1) of the Planning and Development Regulations, 2001, as amended by the Planning and Development Regulations 2005,
- (b) Articles 9 and 10 of the Planning and Development Regulations, 2001-2011,
- (c) The planning history and internal layout of the premises,
- (d) The material planning consequences arising in relation to traffic, noise and general disturbance, and
- (e) The pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The sale of hot food (pizza) for consumption off the premises in this particular case is not subsidiary to the principal shop use,
- (b) The sale of hot food (pizza) for consumption off the premises in this particular case, is considered to have the potential for material planning consequences, and
- (c) 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 the shop from the main retail use,

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 is development and is not exempted development.

Karen Kenny
Senior Planning Inspector

13th May 2019