



An
Bord
Pleanála

Inspector's Report ABP-303153-18

Question

Whether the change of use of part of a shop for use as a coffee shop is or is not development or is or is not exempted development.

Location

Dunnes Stores, Liffey Valley Shopping Centre, Fonthill Road, Clondalkin, Dublin 22.

Declaration

Planning Authority

South Dublin County Council

Planning Authority Reg. Ref.

ED 18/0035

Applicant for Declaration

Dunnes Stores

Planning Authority Decision

No declaration

Referral

Referred by

South Dublin County Council

Owner/ Occupier

Dunnes Stores

Date of Site Inspection

21st, March 2019

Inspector

Paddy Keogh

1.0 Site Location and Description

- 1.1. The site of the coffee shop (Café Sol) forms a portion (79 sq.m.) of the retail floor space of Dunnes Stores (Gross Sales Floor Area of 5,976 sq.m.), one of the anchor tenants in Liffey Valley Shopping Centre.
- 1.2. Dunnes Stores is accessed via an enclosed internal pedestrian mall within the Shopping Centre.
- 1.3. Café Sol has been created within the ground floor level retail floor space at Dunnes Stores. The café is located immediately on the left-hand side on entering the shop. Café Sol is a Dunnes Stores own brand that has been introduced in a number of Dunnes Stores shops in recent years.
- 1.4. The café is located behind glazing separating the café from a rotunda forming part of the enclosed internal pedestrian mall area in the Shopping Centre. A sign bearing the name and logo of Café Sol has been attached to this glazing. The glazed area is one of three bay features that in combination comprise the entire frontage of Dunnes Stores. The remaining two bays are the pedestrian openings providing access to the store.
- 1.5. The coffee shop kiosk comprises a service counter, a food display area, coffee machine, a fridge, a small oven for heating pre-prepared food etc. There is no kitchen or food preparation area. All food sold from the coffee shop is prepared off site.
- 1.6. The coffee shop is not enclosed and opens directly to retail floor space currently in use as a children's clothes sales area. In addition to the service counter kiosk and food display area, the coffee shop includes a limited seating area comprising small bistro style (one and two person) tables with total seating capacity for 22 persons. There is no separation between the seating area and the retail floor space. The referrer states that this seating area/rest area is available for use by all customers of Dunnes Stores whether or not they purchase coffee or other items from the kiosk.

2.0 The Question

- 2.1. The question has been referred to the Board by South Dublin County Council per letter dated 4th, December 2018. This followed a request by Dunnes Stores (contained in a letter to South Dublin County Council dated 17th, October 2018) that the matter be

referred to the Board for determination. The planning authority had previously commenced enforcement action against Dunnes Stores in the belief that the change of use to coffee shop was unauthorised.

2.2. The question referred by Dunnes Stores to South Dublin Co. Council and subsequently on to the Board is:-

Whether the change of use of part of a shop to a coffee shop at Dunnes Stores, Liffey Valley Shopping Centre, Fonthill Road, Dublin 22 is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

None

3.2. Planning Authority Reports

3.2.1. Planning Reports

A report from the planning authority Senior Executive Planner dated November 2018 includes the following:

- The site is zoned 'MRC' in the South Dublin County Development Plan 2016-2022 – 'To protect, improve and provide for the future development of a Major Retail Centre'.
- Reference to planning history of the Site (extension to Dunnes Stores granted per Reg. Ref. SD06A/0189).
- Quotes various definitions as set out in Section 2(1) and Section 3(1) of the *Planning and Development Act, 2000*, as amended.
- Recommends that (as requested by Dunnes Stores) the question that is the subject matter of the referral be referred on to the Board for determination.

4.0 Planning History

Reg. Ref. SD06A/0189 – Planning permission for an extension comprising a gross floor area of 4,655.97 sq.m. to the rear of Dunnes Stores Liffey Valley was granted by the planning authority.

4.1. Relevant Precedents

RL3444 – The Board decided per Order dated 17th, August 2016 that the part change of use a ‘Penneys’ shop to a coffee shop in Waterford city was not development. (120 sq. m. of a total retail floor space in excess of 5000 sq. m.).

RL2941 – The Board decided per Order dated 28th, February 2012 that change of use of part of a MACE shop in Drogheda Co. Louth from shop to coffee shop was not development.

RL3424, RL3425 & RL3426 – These three cases all related to ‘Starbucks’ coffee shops at different location in Cork city. In each of these cases the Board held (Order dated April 2016) that the change of use from a shop (entire unit) to a coffee shop was development and not exempted development.

RL3481 – The Board held (Order dated October 2016) that the change of use of part of the retail floor area of a toy shop at Airside Industrial Park, Sword, Co, Dublin to a ‘Starbucks’ coffee shop was development and not exempted development.

5.0 Policy Context

5.1. Development Plan

The site of the proposed development is zoned ‘MRC’ in the South Dublin County Development Plan 2016-2022. The stated objective of this zoning is ‘*To protect, improve and provide for the future development of a Major Retail Centre*’.

6.0 The Referral

6.1.1. Referrer’s Case

6.1.2. The works required to install the coffee shop (lighting, seating, tables, flooring etc.) constitute ‘exempted development’ pursuant to the provisions of Section 4(1)(h) of the *Planning and Development Act, 2000, as amended* (‘the Act’).

6.1.3. For a change of use to be 'material' it must be substantial or significant rather than a minor change in activity.

6.1.4. The impact of the coffee shop on the established planning unit (Dunnes Stores) does not significantly impact on its character. In this regard;

- The coffee shop primarily sells coffee which can be consumed on and off the premises. There is no kitchen or food preparation area (none is required). There is no table or waiting service.
- There are no dedicated toilets for the coffee shop.
- The coffee shop (including tables) covers an area of 79 sq.m. which equates to 1% of the overall floor area of Dunnes Stores.
- The coffee shop is not segregated from the main retail floor space.
- There is no separate access to the coffee shop. Access is via the main entrance to the store.
- The coffee shop is only open during store opening times.
- The coffee shop has no kitchen. Issues of odour and noise nuisance do not arise.
- Limited seating is provided next to the coffee kiosk. This seating is available for customer use when consuming coffee and other purchases from the kiosk. However, this seating is also available for use (as a rest area) by all customers of the store whether or not they have made purchases from the coffee kiosk.

The coffee shop has no impact on pedestrian footfall or traffic movements to and from the store.

- The coffee shop is more akin to a retail shop than a café or restaurant use.
- The coffee shop use has no material impact on the store's retail character.

6.1.5. The Board has previously concluded that the part change of use of a Penneys shop in Co. Waterford to an Insomnia Coffee Shop did not result in a material change of use and was not development. In coming to this decision, the Board had regard to the substantial sale of the overall shop (c. 5000 sq.m.) relative to the small sale of the coffee shop (120 sq.m.), the absence of independent access from the street, its

operation only in conjunction with the opening hours of the overall shop and the absence of potential use as an independent unit. (**Referral Ref. RL3444**).

- 6.1.6. The Board has previously determined that the use of part of a MACE Store in Drogheda, Co. Louth was not development as no material change of use occurred. In this instance the front of the shop comprised a small coffee shop with serving counter for food and beverages and c. 8 tables and chairs. (**Referral Ref. RL2941**).
- 6.1.7. The current proposal is similar to Referral Ref. RL3444.
- 6.1.8. The current proposal can be distinguished from three referrals in which the Board held that the change of use from retail to restaurant/café constituted development which was not exempted development. These include **Referrals Ref. RL3424, RL3425 & RL 3426**. These cases related to 'Starbucks' in Cork. Each of these cases related to the use of an entire retail unit as a coffee shop. The Board held that the scale, nature and layout of the coffee shop was more akin to a restaurant in each case which is expressly excluded from the definition of a shop.
- 6.1.9. The current proposal can also be distinguished from **Referral Ref. RL3481**. In this case the Board decided that the change of use of part of a Toy Store to a 'Starbucks' in Swords Co. Dublin was development and was not exempted development. In this case the coffee shop was physically divided from the retail floor area, had a separate entrance from a car park and had its own dedicated toilet facilities.

6.2. **Planning Authority Response**

The planning authority have not responded to the case made by the referrer in their submission to the planning authority. However, the planning authority state that they have no objection to the matter being referred to the Board for determination (as requested by the referrer).

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000, as amended

7.1.1. Section 2(1) (Interpretation) states:

*'In this Act, except where the context otherwise requires-
'works' includes any act or operation of construction, excavation,
demolition, extension, alteration, repair or renewal.....'*

7.1.2. Section 3 (1) states:

*'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.'*

7.1.3. Section 4 (1) (h) states:

*'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.'*

7.1.4. Section 4(4) states:

*Notwithstanding.....any regulations under subsection 2,
development shall not be exempted development if an environmental
impact assessment or appropriate assessment of the development is
required.*

7.2. Planning and Development Regulations, 2001 ('the Regulations')

7.3. Article 5 (1), includes 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 for consumption off the premises, where the sale of such food is subsidiary to the main retail use,*
- (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 for consumption off the premises, except under paragraph (d) above, or any use to which class 2 or 3 of Part 4 of Schedule 2 applies;

8.0 Assessment

8.1. In determining whether or not a proposal/project falls within the remit of the requirement to obtain planning permission under the scope of Planning and Development legislation two tests must be applied:

TEST 1: Is development (as defined under the Planning and Development legislation) involved? If the answer is ‘No’ then the project/proposal falls outside the remit of the requirement to obtain planning permission. If the answer is ‘Yes’ then it is necessary to proceed to Test 2.

TEST 2: Are there any exemptions provided for in the Act or in the Regulations (that are not otherwise de-exempted) that can be availed of in respect of the development?

8.2. Is or is not development?

8.2.1. The submission from the referrer suggests that works have been involved in the creation of the coffee shop at Dunnes Store (viz. - new lighting, seating, tables, flooring etc.). The referrer suggests that these works are not significant and are exempted

from the requirement to obtain planning permission by virtue of the operation of Section 4(1)(h) of the Act.

8.2.2. The definition of development provided for under the Act includes 'works' and/or a 'material change of use'. For development to take place 'works' and/or 'material change of use' must occur.

8.2.3. 'Works' for the purposes of the Act includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

8.2.4. Having considered the documentation of file and having inspected the site I consider that the main elements involved in the creation of the coffee shop are as follows:

- Creation of a small kiosk from which coffees, teas, soft drinks, sandwiches, buns etc. are sold.
- Installation of hanging light and recessed wall light fittings.
- Laying of new floor covering (c. 79 sq.m. in area).
- Placing of small (one and two person) bistro tables with seating capacity for 22 people.
- The addition of glazing incorporating a 'Cafe Sol' logo into one bay of the three bay openings into Dunnes Store from the adjoining shopping mall [I cannot definitively say that the glazing was not previously in place. If the glazing were already in place only the 'Café Sol' logo has been added.]

8.2.5. The above matters are all minor in nature (particularly in proportion to the overall size of the Dunnes Stores unit). Accordingly, it could be argued that they do not constitute an act or operation of construction, excavation, demolition, extension, repair or renewal. However, a definition of 'alteration' is provided at Section 2 of the Act, as follows;

"Alteration" includes –

- (a) Plastering or painting or the removal of plaster or stucco, or*
- (b) The replacement of a door, window or roof,*

that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures.

The items referred to in this definition do not necessarily coincide with the elements involved in the creation of the Dunnes Stores coffee shop. Nonetheless, the definition of 'alteration' provided in the Act make it clear that items of a very minor nature fall within the definition. On this basis, I conclude that the elements involved in the creation of the coffee shop in the current instance fall within the definition of 'alteration' for the purposes of the Act. Accordingly, the elements highlighted at Section 8.2.4 above constitute 'works' and development has taken place.

- 8.2.6. The change of use from retail floor space (shop) to a coffee shop for the sale of coffee and food (sandwiches etc.) including food for consumption off the premises comes within the scope of the definition of a shop as provided under Article 5(2), Part 2 of the Regulations (i.e. shop includes *'(d) for the sale of sandwiches or other food for consumption off the premises, where the sale of such food is subsidiary to the main retail use*). The referrer makes it clear that Café Sol does not include a kitchen or food preparation area. However, the provision under Article 5(2), Part 2 of the Regulations does not include the sale of food for consumption on the premises. On this basis, the use of part of Dunnes Stores (shop) to Café Sol (food for consumption on the premises) constitutes a change of use.
- 8.2.7. Accordingly, the use of the 79 sq.m. of internal floor area that now accommodates Café Sol constitutes a change of use. This fact is not disputed by the referrer. However, in order that the change of use fall within the definition of development provided for under the Act, the change of use must be 'material'.
- 8.2.8. It has been submitted by the referrer that the change of use is not material. This is based in the character of the change including (i) the small area of floor space involved particularly relative to the overall floor area of the store (1%), (ii) the lack of dedicated toilet facilities, (iii) lack of access other than through the main entrance to Dunnes Stores (iv) fact that coffee shop is only open when store is also open etc. The referrer cites Board decisions on previous referrals including **Referral Ref. RL3444** where the Board decided that any change of use was not material. [In the case of latter referral the Board decided that no development had taken place].
- 8.2.9. For a change of use to be material it must significantly alter the character of the property and the change must impact on the proper planning and sustainable development of the area in a way that differs from the previously established use – it

must trigger the need to take account of different planning considerations. In my opinion the change of use of a small area (c. 1%) of the total retail floor area of Dunnes Stores would not significantly alter the character of the property and would not trigger the need to take account of planning considerations that differ from those pertaining to the consideration of the planning applications under which Dunnes Stores was originally permitted and subsequently extended.

8.2.10. Notwithstanding the fact that no 'material' change of use has occurred, 'works' have taken place. Accordingly, I conclude (in relation to TEST I) that the change of use of part of a shop to use as a coffee shop at Dunnes Stores, Liffey Valley Shopping Centre is development.

8.3. Is or is not exempted development?

8.3.1. In my opinion, the works that have taken place (see schedule of items listed at Section 8.2.4 above) are of a minor nature particularly in proportion to the overall scale of the Dunnes Stores unit). I consider that these works constitute exempted development by reason of the operation of Section 4(1)(h) of the Act. i.e. such works which are for the improvement or alteration of a structure and do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure itself or neighbouring structures. In my opinion, the minor works that have taken place do not affect the external appearance of the structure at all. I base this on the opinion that any impact is to the appearance of an enclosed internal shopping mall and not to the exterior of the structure (the Shopping Centre).

8.4. Restrictions on exempted development

8.4.1. The only restriction on the exemption provided under Section 4(1)(h) of the Act, that may apply in the current instance, is the restriction contained in Section 4(4) of the Act. Section 4(4) provides that certain developments requiring Environmental Impact Assessment and Appropriate Assessment cannot avail of certain exemptions otherwise provided for under the Act. The nature of the development in this instance would not require Environmental Impact Assessment or Appropriate Assessment.

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 change of use of a part of a shop to a coffee shop at Dunnes Stores, Liffey Valley Shopping Centre, Fonthill Road, Dublin 22 is or is not development or is or is not exempted development:

AND WHEREAS Dunnes Stores referred this matter to South Dublin Co. Council and requested that the matter be referred to An Bord Pleanála for determination on this question on the 17th day of October, 2018.

AND WHEREAS South Dublin Co. Council referred this matter to the Board for a declaration on the 4th, day of December, 2018:

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

- (a) Section 2(1), 3(1) and 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (b) The definition of a 'shop' provided under Article 5(1) of the *Planning and Development Regulations, 2001*, as amended,
- (c) The planning history of the site,
- (d) The small scale of the coffee shop (c. 79 sq. m.) relative to the scale of the overall shop (c. 5976 sq.m.)

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The use of c. 79 sq.m. of the premises at ground floor level as a coffee shop for the sale of coffee and other items for consumption on and off

the premises does not come within the scope of the definition of a shop as set out in *Article 5(1) of the Planning and Development Regulations, 2001*. This definition does not provide for the consumption of food on the premises. The use as a coffee shop is, therefore, a change of use.

- (b) Having regard to the minor scale of the coffee shop relative to the size of the overall shop, its operation only during the opening hours of and in conjunction with the overall shop, the absence of independent access from the internal shopping mall or from the Shopping Centre car park and the absence of potential for use as an independent shopping unit it is considered that the change of use does not constitute a material change of use.
- (c) The modifications to the physical fabric of the shop constitute alterations to the shop coming within the definition of 'works' provided in Section 2 of the *Planning and Development Act, 2000*. The modifications, therefore, constitute development for the purposes of the Act.
- (d) The alterations to the physical fabric of the shop which are minor in nature fall within the exempted development provisions set out in Section 4(1)(h) of the Act
- (e) Therefore, the change of use from shop to coffee shop constitutes development which is exempted development.

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 change of use of part of a shop to use as a coffee shop at Dunnes Store, Liffey Valley, Fonthill Road, Dublin 22 is development and is exempted development.

Paddy Keogh
Planning Inspector
17th, April 2019