



An
Bord
Pleanála

Inspector's Report ABP-304204-19

Question

Whether the change of use from car dealership to retail sale of convenience goods is or is not development or is or is not exempted development at Pollamore Near, Dublin Road, Cavan

Location

Pollamore Near, Dublin Road, Cavan

Declaration

Planning Authority	Cavan County Council
Planning Authority Reg. Ref.	Enf 18-092
Applicant for Declaration	Cavan County Council.
Planning Authority Decision	No declaration

Referral

Referred by

Cavan County Council.

Owner/ Occupier

Dennis Nixon (owner); Tempside Ltd (occupier).

Observer(s)

None.

Date of Site Inspection

Thursday 17th September 2019.

Inspector

Deirdre MacGabhann

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1.0 Site Location and Description

- 1.1. The subject site lies to the south east of Cavan Town in the townland of Pullamore Near. It lies north of the R212 and comprises a retail shop 'Polonez' in the front ground floor of an existing two storey building. Cavan Hire, a plant and tool hire centre, occupies the rear of the building. Access to the site is from the adjoining R212. To the east of the site is Lakeland retail park with Supervalu, Costa, Dealz, Sports Direct etc. A roundabout junction with the N3 and N55 lies c.600m to the east of the site. The R212 as it passes the site is a single carriageway road with one lane in each direction, a turning lane into the subject site and footpath and cycle lanes on both sides of the road.
- 1.2. Internally the subject site comprises a small supermarket operated on a self-service basis with the sale of fresh fruit and vegetables, bread, a delicatessen counter, beverages and other food items.

2.0 The Question

- 2.1. The question before the Board is *'whether change of use from car dealership to retail sale of convenience goods is or is not exempted development'*.

3.0 Planning History

- 3.1. The following applications are relevant to the subject site:
 - PA ref. **PL 99/1401** - Permission was granted by the planning authority (15th February 2000) on the subject site to *'erect new serviced dealership unit with associated site works and signage and connection to public mains'*. The permission was subject to 39 no. conditions dealing with general matters e.g. servicing, lighting, external materials and development charge.
 - PA ref. **PL 07/1980** - Permission was granted to *'retain change of use of workshop unit granted under PI. Reg. No. 99/1401 to machinery and plant hire (Cavan Hire) Unit and permission to retain entrances as constructed at Cavan Daewoo'*. From the information on file, it would appear that this permission related to approximately one quarter of the car showroom building granted and constructed under PA ref. 99/1401 above (at the rear of the

premises). The permission was subject to 24 no. conditions, with the majority again dealing with general matters. Condition no. 7 required *'Use of the premises to be confined to the use specified in the documentation lodged with the Planning Authority i.e. as a machinery and plant hire. No unit to be used for the sale of convenience foods'*.

- PA ref. PL 18/317 and ABP-303029-18 – Permission refused for *'the change of use for part of previously approved retail unit from retail to retail and off licence sales area'*. The planning application referred to the front portion of the car dealership building. Reasons for refusal were (1) retail shops expressly not permitted in the land use zone (Existing Retail and Retail Warehousing), (2) development would result in a traffic hazard, and (3) application premature. The planning authority's decision under PL 18/317 was appealed to the Board but the application was withdrawn (8th February 2019).
- PA ref. PL 16/30 – Permission granted *'to erect advertisement sign and associated works'*. Plans for the development indicate signage to relate to 'Cavan Hire'.

3.2. The following referral cases raise similar questions to those raised here:

- RL3539
- RL3486
- RL2989

4.0 Policy Context

4.1. The statutory for the subject site is the Cavan Town and Environs Development Plan 2014 – 2020. It zones the site for 'Existing Retail and Retail Warehousing'. The objective of the zoning is *'to acknowledge existing retail and retail warehousing that has occurred in the plan area outside of the town core area. All of these sites are currently operating as retail and/or retail warehouses. Proposals in this zoning shall be in compliance with Retail Planning Guidelines with regard to type of goods for sale and all proposals shall be assessed by their impacts on the vibrancy and importance of Cavan Town Centre'*.

- 4.2. Retail warehouses are permitted in principle within the zone, subject to the Retail Planning Guidelines and the County Retail Strategy, but retail shops are not.

5.0 The Referral

5.1. Planning Authority's Case

- 5.2. In their submission to the Board, the planning authority set out the planning history of the site (summarised above), the uses observed in the front part of the building (subject site) and enforcement action taken:

Observed Uses (front part of original dealership building) 2008 to 2017.

- February 2008 to October 2010 - Carpet and furniture sales (photograph attached to submission).
- February 2011 to October 2012 - Kitchen/bedroom and fitted furniture sales (no photograph).
- January 2014 to September 2017 – Performance fuels and feeds and retail pet shop, equestrian and pet supplies (photograph attached to submission).

Enforcement Action

- PA ref. Enf. 14-014 – Enforcement file opened in respect of use of the premises as a retail pet shop, however, file closed after investigation and conclusion that the change of use fell within the scope of exemptions provided for the permitted motor retail unit (Class 14(a) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 as amended).
- PA ref. 18-092:
 - Warning letter issued (4th January 2019) to owner and occupier of the front half of the original dealership building due to opening of an unauthorised shop.
 - Response to warning letter made by occupier (28th January 2019) Templestide Ltd and stating that (i) the premises had been in retail use for more than 7 years and therefore that enforcement action could not be taken, and (ii) the original change of use from motor sales to retail was exempted under Article 6, Class 14 of Part 1 of Schedule 2 of the

Planning and Development Regulations 2001 as amended. The recent occupation of the unit by Polonez representing a continuation of a legally established retail use (i.e. from pet shop to convenience shop), (iii) The latter change of use being within a class of use allowed under Article 10 Class 1 of Part 4 of Schedule 2 being 'use as a shop', and (iv) Article 9 restrictions on exemption cannot be applied to Article 10 development.

- Response to warning letter by owner of premises (1st February 2019), Denis Nixon, referring the planning authority to the occupier of the premises, to whom the property is leased.
- Letter from planning authority to occupant and owner (21st February 2019). Maintains that the Warning Letter previously issued still applies. Refers to the owner's statement that the retail use has been legally established since 2008 and states that no Section 5 application has ever been granted by the planning authority or the Board. It also draws attention to condition no. 7 of the permission under PA ref. 07/1980 which precludes use of the unit for the sale of convenience goods.
- Response to the above by occupier (6th March 2019), Templeside Ltd. It states that (a) Section 5 is an optional procedure whereby a Declaration may be sought from a planning authority and the absence of such has no bearing on a person's right to avail of a legitimate exemption, (*Fingal CC v William P. Keeling & Sons Ltd, 2005*) and (b) Condition no. 7 of the permission granted under PA ref. 07/1908 refers to the floor area for which retention permission was sought (the rear of the premises). It does not apply to the entire premises or therefore the car sales premises. Planning conditions must be interpreted in their complete form and in the context of the development described in the planning application (*Treacy v An Bord Pleanála, Lanigan v Barry and South Tipperary County Council*). The change of use from car sales to retail was properly availed of within the provision of the Planning and Development Act and Regulations.

5.3. Owner/ occupier's response

5.3.1. The occupier of the subject site makes the following points in his response to the referral:

- Procedural matters – The material submitted by the planning authority does not comply with the requirements of section 127(1) of the Planning and Development Act 2000, as amended, as has been considered in case law (*Heatons Limited & Offaly County Council [2013] IEHC 261*). The referral is invalid under section 127(2) of the Act.
- The Question – The question posed by the planning authority '*To ascertain whether the change of use from car dealership to retail sales of convenience goods is or is not exempted development*' is inappropriate as it ignores the intervening history of retail use established since 2008. The question posed has no basis in fact and should be rejected.
- Section 5 and Enforcement – The referral premises are subject to enforcement proceedings. It is inappropriate to place an enforcement file before the Board, over which the Board has no jurisdiction (*Heatons Limited & Offaly County Council [2013] IEHC 261* and *Roadstone Provinces Ltd. v ABP [2008] IEHC 210*).
- Planning permission conditions – Condition no. 7 of PA ref. 07/1980 wrongly seeks to control activity outside of the premises to which the planning application/permission applied. Planning conditions must be interpreted in their complete form and in the context of the development as described in the planning application (*Treacy v ABP* and the decision of the Supreme Court in 2016 in *Langan v Barry and South Tipperary Council* dealing with the proper interpretation of a planning permission). It is wrong to suggest that condition no. 7 '*relates to the overall site*'.
- Planning history and occupancy of unit – The building within which the subject development is located was originally granted under PA ref. 99/1401 for a '*serviced dealership unit with associated site works and signage*'. The initial change of use from motor sales to retail (February 2008, front part of building became occupied by a carpet and furniture retailer), was exempted development under Article 6, Class 14 of Part 1 of Schedule 2. The recent

occupation of the unit by Polonez represents a continuation of a legally established retail use, most recently from pet shop to convenience shop. It is a change of use within a class of use allowed under Article 10 Class 1 of Part 4 of Schedule 2 being '*use as a shop*'. Article 9 restrictions cannot be applied to Article 10 development. In 2014 the planning authority confirmed that the retail use was legally established within the subject part of the premises and exempt under Class 14.

- Established retail use – Having regard to the occupancy of the unit, retail use has been established since 2008, a period of almost 11 years. The February 2008 change of use from car dealership to retail was exempted development under Article 6 of the Planning and Development Regulations 2001, as amended, and Class 14, Part 1 of Schedule 2 of the Exempted Development Regulations. None of the Article 9 restrictions on exemptions at the time of change of use from motor sales to shop were considered to occur in 2008.
- Article 10 Changes of Use - The retail unit has a gross floor area of c.370sqm and complies in this way, and all other ways, with the restrictions on Changes of Use set out in Article 10 of the Planning and Development Act, 2000, as amended. It is a change of use within a class of use allowed under Article 10, being '*use as a shop*' and is not a material change of use.
- Article 9 – Restrictions on exempted development under Article 9 apply only to exemptions under Article 6. Article 9 exemptions cannot be applied to Article 10 changes of use. Notwithstanding this, no traffic hazards or obstructions to road uses do not arise (see attached report by traffic consultant).

5.4. Further Responses

5.4.1. The planning authority make the following points in response to the owner/occupier's submission (above):

- Refers to an attached Traffic Report which raises concerns regarding vehicle access from the subject site onto the existing road (especially right turning manoeuvres), interaction between vehicles and pedestrians/cyclists at the junction and between vehicles accessing/egressing Cavan hire and additional

traffic for retail unit, and possible unforeseen negative impacts due to intensification of traffic on existing road. It recommends that a site layout plan is provided to clarify parking arrangements and further information on circulation routes for all forms of traffic and to demonstrate how the development meets car parking standards, requirements for visibility splays and a road safety audit.

- States that the exemption applied for is to create a new retail convenience unit on site. In the event that the Board grant the exemption, consider that a more intensive retail convenience use could become established on the site.
- Refers again to condition no. 7 of the permission granted under PA ref. 07/1980
- Requests the Board to consider the previous uses on the site which may be considered to be retail warehouse use classification rather than convenience use.
- Refers the Board to PA ref. 18/317, where permission was refused by the planning authority for the change of use for the front portion of the retail building (subject site) for change of use of '*previously approved retail unit from retail to retail and off licence sales area*' (see Planning History above).

5.4.2. The owner of the property raised no new matters in his response to the referral received on the 11th June 2019.

6.0 Statutory Provisions

6.1. Planning and Development Act, 2000

- Section 3 – Development.
- Section 4 – Exempted development, in particular sub-section (2).
- Section 5 – Declaration and referral on development and exempted development, in particular sub-section (4).
- Section 127 – Provisions as to making of appeals and referrals, in particular sub-section (1) and (2).

6.2. Planning and Development Regulations, 2001

- Part 2. Exempted development. Article 5(1) – Interpretation for this Part.
 - Defines ‘shop’ as 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..(f) for the display of goods for sale’.
- Article 6 – Exempted Development, in particular sub-section (1) and Class 14(a) of Schedule 2, Part 1 (Change of use).
- Article 9 – Restrictions on exemption, in particular sub-section (1)(i), (iii) and (viii).
- Article 10 – Changes of use, in particular sub-section (1) and (2) and Class 1 of Part 4 of Schedule 2.

7.0 Assessment

7.1. Validity of the Referral

- 7.1.1. The owner of the subject site argues that the planning authority’s referral should be invalidated as it fails to set out the reasons, consideration and arguments upon which it is based in accordance with section 127(1)(d) of the Planning and Development Act, 2000 (as amended) (‘the Act’).
- 7.1.2. In this instance, the planning authority has sought the Board’s view on ‘*whether change of use from car dealership to retail sale of convenience goods is or is not exempted development*’. The planning authority has taken enforcement action against the owner/occupier on the grounds that the authority is of view the that the development referred is not exempted development. Reasons, considerations and arguments are consequentially set out in correspondence with the owner and occupier of the site and are further addressed in their further response to the Board.
- 7.1.3. Whilst I am mindful of caselaw, referred to by the occupier (Heatons Ltd. v Offaly County Council [2013] IEHC 261), I consider that the planning authority has therefore set out, albeit in correspondence with the occupant, why they formed the

view that the change of use referred to does not comprise exempted development. I do not consider, therefore, that the occupant is at a disadvantage or that the referral should be invalidated.

7.2. The Question, Section 5 and Enforcement Action

- 7.2.1. The planning authority seek the Board's view on '*whether the change of use from car dealership to retail sales of convenience goods is or is not exempted development*'. I would accept the occupier's view that the current use of the subject did not directly comprise a change of use from car dealership, but rather it has occurred consequent to uses of the premises in the interim, typically for the sale of bulky goods, with the most recent change from Performance fuels and feeds and retail pet shop, equestrian and pet supplies. I note in this regard that enforcement file was opened in respect of the use of the subject site as a pet shop. However, it was concluded that the use fell within Class 14(a) of Part 1 of Schedule 2 of the Planning and Development Act 2000 (as amended). It was also concluded that the change of use to use as a shop was not affected by any of the restrictions on development set out in Article 9 of the Regulations and was exempted development.
- 7.2.2. In my assessment below, I have regard to this wider context, but I am also mindful that the Board has no jurisdiction in matters of enforcement and I confine my assessment accordingly.

7.3. Change of use from Car Dealership to Retail Sales of Convenience Goods

7.4. Is or is not development

- 7.4.1. The permitted use of the site, under PA ref. PL 99/1401 is a car dealership unit i.e. for the display and sale of cars (goods). From my inspection of the subject site, it is currently in use as a small supermarket, as defined by the Retail Planning Guidelines, '*Single level, self service store selling mainly food, with a net retail floorspace of less than 2,500m²*'.
- 7.4.2. Section 2(1) of the Planning and Development Act, 2000 (as amended), defines the term 'shop' as use of a structure for the retail sale of goods and for the display of goods, where the sale, display or service is to visiting members of the public. Uses

referred to include post office, travel agency, food and wine for consumption off premises, hair dressing, laundrette etc.

- 7.4.3. I would infer from the above that the current use of the site, as a small supermarket, falls within the definition of a shop, set out in the Act. With regard to the sale of motor vehicles, this use is not specifically mentioned, and I note that elsewhere in the Act (see below) reference to a 'shop' specifically excludes uses for sale or display of motor vehicles. In addition, a car showroom and convenience supermarket have different attributes e.g. in terms of vehicle trips generated and patterns of use. I would be of the view, therefore, that the change of use from car showroom to retail convenience store is a material change of use and therefore comprises development under section 3(1) of the Act. This is not disputed.

7.5. Is or is not exempted development

Legislation

- 7.5.1. Article 6(1) provides that subject to Article 9 development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development provided it complies with the conditions and limitations specified in column 2. Class 14 of Part 1, Schedule 2 provides that development consisting of a change in use from the display or sale of motor vehicles to use as a shop is exempted development. No conditions or limitations are set out in column 2 of the Class (in respect of this change of use).
- 7.5.2. Article 9 sets out a number of instances under which development in Part 1 is not exempted development. Notably for this referral these include:
- Where development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
 - Endanger public safety by reason of traffic hazard or obstruction of road users, and
 - Consist of or comprise the extension, alteration, repair, renewal of an unauthorised structure or a structure the use of which is unauthorised.

- 7.5.3. Article 10(1) of the Planning and Development Regulations 2001 (as amended) provides that 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, subject to certain limitations. Class 1 of Part 4 of Schedule 2 refers to 'Use as a shop'. Restrictions on exempted development set out under Article 10 include:
- Article 10(1) - That the development does not contravene a condition attached to a permission.
 - Article 10(2) – That nothing in any class in Part 4 of the Schedule shall include any use for the sale or leasing or display of motor vehicles; use as a supermarket, where the total net retail sales space exceeds 3,500sqm.

Consistency with Article 6.

- 7.5.4. Having regard to the above, I consider that the referred use, change of use from car dealership to retail sale of convenience goods falls within Class 14 of Part 1, Schedule 2 and in principle comprises exempted development.

7.5.5. **Limitations.**

a. Condition of a permission.

- 7.5.6. The planning authority refer the Board to condition no. 7 of the permission granted under PA ref. 07/1980 for the retention of the change of use of the workshop unit granted under PA ref. 99/1401 to machinery and plant hire (gross floorspace 255.56sqm) and permission to retain entrances as constructed. The application site comprises the car showroom unit and surrounding car park. However, the area to be retained is to the rear of the premises and this is identified in the plans submitted. Condition no. 7 states '*Use of the premises to be confined to use specified in documentation lodged with Planning Authority i.e. as machinery and plant hire. No unit to be used for the sale of convenience goods*'.

- 7.5.7. I would accept that the first part of condition no. 7 clearly relates directly to the premises subject of the change of use. The second part of the condition could be construed as relating to the entire application site (red line boundary), which included the subject site. However, I am mindful of the Development Management Guidelines which, in section 7.3.2, which, amongst other things, require conditions to relate directly to the development to be permitted and that the condition be expedient for the purposes of or in connection with the development authorised by the permission.

The second part of condition no. 7, if it relates to the entire premises would not comply with these requirements. I consider that it would therefore be *ultra vires* to determine the referral on the grounds that it contravenes this condition.

b. Traffic Hazard

- 7.5.8. The subject site is situated on the R212 a busy regional road providing access to the N3 and N55. The speed limit on the R212 at the junction of the site is 50kph. There is good visibility at the junction of the site and regional road and a ghost island junction for vehicles turning left into the site.
- 7.5.9. As stated above, the use of the subject site as a convenience supermarket is likely to result in different pattern of vehicle trips using the site from the permitted use as a car showroom. In their response to the referral to the Board, the occupier submits a report on the safety and efficiency of traffic movements at the entrance to the site. It predicts a relatively small number of vehicle trips based on the size of the premises and demonstrates that the access to the site complies with DMURs (including sightlines, geometry and junction layout).
- 7.5.10. Notwithstanding the above, the planning authority remain concerned that the development will give rise to road safety issues arising from, for example, vehicle access onto the existing road, interaction between vehicles, pedestrians and cyclists, interaction with Cavan car hire traffic and possible negative effects due to intensification of traffic on existing road. In order to address these matters, they recommend a layout plan to clarify routes/parking/management of interactions, data on staff, customer and vehicle trips arising and provision of parking bays.
- 7.5.11. At the time of site inspection, there were few vehicle movements associated with subject site. Further, the subject site has a small floor area (restricting any intensification of use) and is focused at a niche market and is unlikely to generate substantial vehicle trips over and above those predicted. Parking bays were demarcated at the entrance to the shop (albeit faintly) and there was a clear point of access and egress for the Cavan Hire business to the rear of the site. The footpath and cycle lane are clearly delineated alongside the road and a dropped kerb warns users of the access to the site. There is also is good visibility of the footpath and cycle lane for vehicles entering and exiting the site and from the footpath/cycle lane of the site entrance.

7.5.12. Having regard to the above, I do not consider that there are significant issues or impediments which could give rise to traffic hazard.

c. Unauthorised Use

7.5.13. The Planning and Development Act 2000 (as amended) defines the term 'unauthorised use' as a use which is a material change in the use of any structure or land, being development other than exempted development, development which is the subject of permission.

7.5.14. As set out above, the permitted use of the subject site is as a car showroom. I note the changes of use have taken place on site, notably for carpet and furniture sales, kitchen/bedroom and fitted furniture sales and performance fuels etc., with the last use subject to enforcement action and deemed to be authorised i.e. falling within Class 14 of the Planning and Development Regulations 2001 (as amended). The current use of the site is the subject of this referral and has enforcement action has not been completed. Consequently, therefore, currently the use of the site has not been deemed to be unauthorised.

7.6. **Other Changes of Use on Site**

7.7. The planning authority and occupier refer to the uses of the site since 2008, referred to above. The occupier argues that the change from car show room to these uses was made under Class 14 of Part 1 of Schedule 2 of the Regulations, which provide an exemption from development for changes of use from the sale or leasing or display of motor vehicles to a shop. They also argue that the current change of use to retail shop, falls under Article 10 of the Regulations which provides an exemption for development which consists of a change of use within one of the Classes set out in Part 4 of the schedule i.e. use as a shop.

7.8. Having regard to the foregoing, I would accept that the subject site has been used as a shop since 2008, largely selling bulky goods. Further, the most recent use (preceding the current use) was considered to be authorised by the planning authority. Notwithstanding this, Article 10(2)(b)(iii) of the Regulations specifically excludes the sale or display of motor vehicles from Part 4 of Schedule 2. Therefore, whilst the previous use of the premises for the sale of pet supplies, has been determined to be authorised, as a consequence of the parent permission, for the

same reason (the nature of the parent permission), I do not consider that this extends to uses as shop exempted under Article 10.

8.0 Recommendation

8.1. 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 from car dealership to retail sale of convenience goods is or is not development or is or is not exempted development:

AND WHEREAS Cavan County Council requested a declaration on this question to An Bord Pleanála on the 10th day of April, 2019:

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

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) article 5, 6 and article 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Parts 1 and 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) the planning history of the site,
- (e) the pattern of development in the area,
- (f) the arrangements for access to and within the site,
- (g) the submission on file,
- (h) the Inspector's report.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the proposed change of use pertaining to the former car sales premises would generally come within the scope of the exemption provided in Class 14 (a) of Part 1 of Schedule 2 to the Planning and Development Regulations, as amended;
- (b) the said change of use to a shop is not subject to any of the restrictions on exemption set out in Article 9 of the Planning and Development Regulations, 2001 (as amended).

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the change of use from car dealership to retail sale of convenience goods is development and is exempted development.

Deirdre MacGabhann
Planning Inspector

10th October 2019