



An
Bord
Pleanála

Inspector's Report ABP-304519-19

Question

Whether the alterations to the internal layout of the permitted forecourt shop are, or are not, development and are, or are not, exempted development.

Location

Maxol Filling Station, Glasheen Road, Wilton, Cork.

Declaration

Planning Authority

Cork City Council

Planning Authority Reg. Ref.

R514/19

Applicant for Declaration

The Maxol Group

Planning Authority Decision

Development that is not exempted development

Referral

Referred by

The Maxol Group

Owner/ Occupier

The Maxol Group

Observer(s)

None

Date of Site Inspection

2nd October 2019

Inspector

Hugh D. Morrison

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1.0 Site Location and Description

- 1.1. The site is located to the north east of the Wilton Roundabout on the south eastern side of Glasheen Road (R849). This site lies in a predominantly residential area and it is accessed off both the said Road and Summerstown Road.
- 1.2. Within the site of the Maxol Filling Station, the area, which is the subject of the referral, is 128.8 sqm of floorspace within the single storey forecourt building, i.e. the majority of floorspace in the north eastern and central portions of this building.

2.0 The Question

- 2.1. The referrer has asked the following question:

Whether the alterations to the internal layout of the permitted forecourt shop are, or are not, development and are, or are not, exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority's answer to the above cited question is that the alterations are development that is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

See declaration.

3.2.2. Other Technical Reports

None.

4.0 Planning History

- **07/32534:** Redevelopment of Wilton Service Station including
 - Demolition of existing building, forecourt canopy and all associated structures,

- Provision of new two-storey forecourt building with 99.64 sqm retail shop, 47.84 sqm food hall/deli-counter, offices, stores and toilet facilities,
- Sale of hot and cold food for consumption of the premises from food hall/deli-counter area,
- Off-licence area in the retail shop,
- Forecourt layout, including new forecourt canopy, petrol pumps, automatic roll-over car wash, plant room, bin compound, and
- Ancillary signage, both illuminated and non-illuminated.

Permitted at appeal **PL28.230442**, subject to conditions, which included the one that:

- Omit the proposed first floor, which would have been used as an office and a storage area,
- Conventional pitched roof to be specified,
- Vacated stairs and lift area to be used as a storage area,
- Shop not to be used as an off-licence or for the sale of hot food for consumption off the premises, and
- Compressor plant building not to be used for storage associated with the shop.

Reason: In the interest of visual amenity in this residential area.

- **09/34163**: Extension and refurbishment to include:
 - New freezer room (4.40 sqm), cold room (4.33 sqm), food prep area (26.54 sqm) deli-counter, sit-down coffee area (13.47 sqm), store (88.12 sqm), solid fuel store (14.36 sqm), relocated external ATM unit (3.95 sqm) with refurbished shop, office, toilet facilities and staff canteen,
 - Increase in overall height of forecourt building of 450 mm,
 - Alterations to all elevations of the building,
 - New illuminated shop-front signage,
 - Provision of visi-screen type roller shutters to front elevation glazing and solid fuel opes of forecourt building,

- Raise canopy of roof structure by 600 mm to provide 4.50m clearance over forecourt surface,
- Sale of hot food from deli-counter for consumption on and off the premises,
- Refurbished forecourt layout, including new petrol pumps, car wash, service area and enclosed bin compound,
- All associated site works, including low boundary wall with steel railing over and incorporating a time-controlled sliding gate to Summerstown Road boundary,
- Raise rear boundary wall to houses on Wilton Lawn by 750 mm, and
- Provision of ancillary signage, both illuminated and non-illuminated.

Permitted at appeal **PL28.237319**, subject to conditions, which included one (condition no. 2) that:

- Required a reduction of 10 sqm in the area of the retail/deli building by omitting 1m of its length, and
- No seating for the public in the deli/coffee area/retail area.

Reason: In order to reduce the intensity of the development in order to avoid overflow parking onto nearby roads.

- **18/37727**: Retention of the extension and alterations to the forecourt building:
 - The extension is a rear single storey lean-to structure (c. 68 sqm), which is used for ancillary food preparation and storage space, and
 - The alterations comprise the removal of internal partition walls, the relocation of the ATM and the change of use of c. 39 sqm of permitted storage space to retail (shop and deli/café) use with consequent changes to the front elevation and signage.

Refused at appeal **ABP-301333-18** on the grounds that the shop would be significantly in excess of 100 sqm of net retail floorspace and thus contrary to the CDP and the Retail Planning Guidelines, existing parking/manoeuvring problems would be exacerbated leading to overspill parking/traffic hazard, and facilities to the rear would adversely affect residential amenity.

- **E7871:** An enforcement notice was served on 29th April 2019 with respect to the following:
 - Unauthorised erection of a single storey lean-to structure forming an extension to the rear of the forecourt building, and
 - Unauthorised material change of use of c. 39 sqm of storage space to retail floor area within the forecourt building.

5.0 Policy Context

5.1. Development Plan

Under the Cork City Development Plan 2015 – 2021 (CDP), the site is zoned ZO 4, wherein the Objective is “To protect and provide for residential uses, local services, institutional uses and civic uses...”

Under Development Management, the CDP addresses fuel filling stations as follows:

Applications for petrol stations including refurbishments to existing premises will be required to have a high standard of design and layout. To take account of same, standard corporate designing may need to be modified as required. Consideration will be given to the following:

...Any shop being provided shall be ancillary to the principal use of the premises as a filling station and shall be a maximum size of 100 sqm excluding storage.

5.2. Natural Heritage Designations

- Cork Harbour SPA (site code 004030)
- Great Island Channel SAC (site code 001058)

6.0 The Referral

6.1. Referrer’s Case

- Exempted status of the works

Internal partitions have been removed and resited and so development has occurred. However, as this development is wholly internal to the building, Section 4(1)(h) of the Planning and Development Act, 2000 – 2019, applies and so it is exempted development.

The referrer has submitted a legal opinion to support its above cited conclusion that the development undertaken is exempted development. This opinion notes that the works undertaken have altered the interior of the building with only insignificant consequences for the exterior, i.e. slightly larger signage. It also notes that the footprint of this building would be unaffected and that the net retail floorspace would be less than the permitted 154 sqm, at 129 sqm.

- Exempted status of the proposed use
- The appropriate quantum of net retail floorspace:

Under 07/32534 & PL28.230442, a shop and food hall with a total net retail floorspace of 148 sqm was authorised.

Under 09/34163 & PL28.237319 for the refurbishment and extension of the redeveloped filling station, a shop (114 sqm), a deli (34 sqm), and a café (16 sqm) with a total net retail floorspace of 164 sqm was authorised, subject to conditions, which amongst other things, required the reduction of the net retail floorspace by 10 sqm to 154 sqm. The subsequent compliance drawings showed a total net retail floorspace of 144 sqm.

Thus, if the net retail floorspace does not now exceed 144 sqm, then it can be concluded that no intensification of retail use has occurred and hence no material change of use.

- The nature of the permitted use:

Under condition 3 attached to the permission granted to 09/34163 & PL28.237319, the use of the permitted shop was explicitly linked to the definition of a shop set out under Article 5(1) of the Planning and Development Regulations, 2001 as amended.

Under condition 2(b) of the aforementioned permission, no seating for the public is allowed in the deli/coffee/retail area.

Provided the aforementioned conditions are complied with and Section 4(1)(h) is adhered to, then there is scope for the internal layout of the building to be rearranged.

- Interpretation of the Retail Planning Guidelines

Under the 2005 edition, where a forecourt shop exceeded 100 sqm of net retail floorspace, a sequential test applied. (Net retail floorspace was defined as “the area of a shop or store which is devoted to the sales of retail goods (including the checkouts”). This approach was thus undertaken when the two permitted applications for the subject site were assessed.

Under the 2012 edition, the definition of net retail floorspace has been revised to exclude cafes. Consequently, “areas used for cafes, delicatessen, food preparation, and circulation within the store are treated as gross rather than net and may be provided in addition to the permitted net retail floorspace.”

The referrer cites 4 examples that illustrate that this is the Planning Authority’s approach to the question of gross and net retail floorspace under the 2012 edition Guidelines.

6.2. Planning Authority Response

None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1) states the following:

In this Act, except where the context otherwise requires –

“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;

“land” includes any structure and any land covered with water (whether inland or coastal);

“planning authority” means a local authority,

“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.

Section 4(1) states the following:

The following shall be exempted developments for the purposes of this Act –

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

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,

7.2. Planning and Development Regulations, 2001

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 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;

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.

Class 1 of Part 4 of Schedule 2 to Article 10 states:

Use as a shop.

7.3. Other

Under the original Retail Planning Guidelines (2005), net retail floorspace was defined as follows:

The area of a shop or store which is devoted to the sales of retail goods (including the checkouts).

Under the revised Retail Planning Guidelines (2012), net retail floorspace was defined as follows:

The area within the shop or store which is visible to the public and to which the public has access including fitting rooms, checkouts, the area in front of checkouts, serving counters and the area behind used by serving staff, areas occupied by retail concessionaries, customer service areas, and internal lobbies in which goods are displayed, but excluding storage areas, circulation space to which the public does not have access to, cafes, and customer toilets.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. Under Section 3(1) of the Planning and Development Act, 2000 – 2019, (hereafter referred to as the Act), development is defined as “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.” Under Section 2(1) of this Act, “works” are defined as including “alteration”, “land” is defined as including “any structure”, and “structure” is defined as including “any building”. Furthermore, “use” is expressly distinguished from “works”.
- 8.1.2. The referrer’s case addresses the question of alterations to the forecourt building under the headings of both works and use. Its question as asked however refers to the former rather than the latter and so I consider that it should be augmented to ensure that both works and use are referred to, as follows:

Whether (a) the alterations to the internal layout of the permitted forecourt shop and (b) its ensuing use are, or are not, development and are, or are not, exempted development.

- 8.1.3. The referrer has submitted a building floor plan (drawing no. 01-11). This plan shows the existing layout of the forecourt building. A plan of the layout of this building, as authorised by condition no. 2 attached to the permission granted to application 09/34163 at appeal PL28.237319, is not to hand. However, drawing no. P0925-06D shows this layout, albeit not as amended by this condition, i.e. it is 1m longer and seating is shown in the coffee area. Nevertheless, for the purpose of tracking the alterations that have occurred, it illustrates the changes that have taken place. Likewise, this drawing shows the authorised front elevation, which can be compared with that which pertains now.
- 8.1.4. The referrer acknowledges that the alterations made to the layout of the forecourt building have changed this layout from that which was authorised under the aforementioned permission. It thus accepts that these alterations come within the definition of development and so they do constitute development.
- 8.1.5. The referrer reviews the planning history of the site and, in particular, the permission granted to application 09/34163 at appeal PL28.237319. Under condition no. 3, the use of the forecourt building as a shop was explicitly linked to the definition of a shop under Article 5(1) of the Planning and Development Regulations, 2001 – 2019, (hereafter referred to as the Regulations). Under condition no. 2 of this permission, a net retail floorspace of 144 sqm was authorised, none of which was to be laid out as seating for the public. The referrer, thus, contends that, if no increase in the net retail floorspace has occurred as a result of the alterations, then no material change of use can be said to have arisen as a result of intensification of the retail use of the forecourt building.
- 8.1.6. The referrer has submitted a building floor plan (drawing no. 01-11) on which is highlighted the “retail area: 128.8 sqm”, i.e. less than 144 sqm. This area encompasses the publicly accessible shop, including a coffee dispensing area and a wine display, and the till area. It excludes the delicatessen and accompanying “Chopped” area, i.e. both their display cabinets and the accompanying preparation

areas. If these excluded areas are included, then I estimate that the area would increase to 169 sqm, i.e. greater than 144 sqm.

- 8.1.7. The referrer draws attention to the definition of net retail floorspace that was set out in the Retail Planning Guidelines (2005), which would have been extant when the Board determined PL28.237319. This definition does not refer to cafes, whereas the replacement definition in the Retail Planning Guidelines (2012) expressly excludes cafes. The referrer goes on to infer from this exclusion that areas in use as a delicatessen and for food preparation are likewise excluded and so its depiction of 128.8 sqm of net retail floorspace on drawing no. 01-11 is valid. It cites four examples of cases wherein the Planning Authority made this distinction.
- 8.1.8. I note that under condition no. 3, the use of the forecourt building as a shop is to be in accordance with the definition of a shop set out in Article 5(1) of the Regulations. Under item (d) of this definition, the sale of food for consumption on the premises, as distinct from off the premises, is excluded, explicitly in the case of restaurants, but cafes, too, can reasonably be regarded as being excluded. Under condition 2(b), seating for the public was expressly excluded and so any semblance of a café was excluded.
- 8.1.9. (I note, too, in passing that the four examples cited by the referrer all entail seating and so they are thus not directly comparable with the forecourt building).
- 8.1.10. Given that the aforementioned definition of shop was current when the Retail Planning Guidelines (2005) were adopted, I do not attach the importance to the exclusion of cafes from the definition of net retail floorspace in the revised 2012 Guidelines that the referrer appears to do. Rather I see the new definition in this respect as amplifying its predecessor.
- 8.1.11. Critically, the definition of net retail floorspace refers to “serving counters and the area behind used by serving staff”. This reference clearly encompasses the till area on drawing no. 01-11. However, it also encompasses the delicatessen and food preparation areas, which come within the definition of shop, i.e. item (d) the sale of sandwiches or other food for consumption off the premises.
- 8.1.12. Based on the aforementioned understanding, my estimated net retail floorspace of 169 sqm is the relevant one, i.e. c. 40 sqm (31.06%) greater than the referrer’s 128.8 sqm and 25 sqm (17.36%) greater than the 144 sqm authorised under PL28.237319.

I, therefore, consider that an extension in the net retail floorspace has occurred, the extent of which is significant and so has resulted in an intensification in the use of the shop in the forecourt building.

8.1.13. Whether the said intensification of use would constitute a material change of use and thus development hinges on the test for materiality established by the legal case of *Monaghan v Brogan*, i.e. whether, if the intensification in use were to be the subject of a planning application, material planning considerations would arise beyond those that occurred in determining any previous permission, i.e. in this case PL28.237319.

8.1.14. I consider that the following material considerations would arise:

- Under the Retail Planning Guidelines (2012) and the Development Management Chapter of the Cork City Development Plan 2015 – 2021, the net retail floorspace would exceed 100 sqm and so the sequential test would need to be re-run to explore whether such excess could be justified, and
- Under condition 2 attached to PL28.237319, the risk of overspill car parking from the filling station site to the surrounding residential area was cited as a reason for the reduction of the area of the forecourt building and the omission of public seating from within it. The additional net retail floorspace would necessitate a re-examination of the implications for car parking provision.

8.1.15. In the light of these considerations, I conclude that intensification in use does constitute a material change of use and so development has occurred.

8.2. Is or is not exempted development

8.2.1. The referrer draws attention to the provisions of Section 4(1)(h) of the Act. It contends that the alterations in question “affect only the interior of the structure” and the consequential alterations to the front elevation “do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure”.

8.2.2. I note that the referrer in the conclusion to its case explicitly states that the development permitted under PL28.237319 was carried out and completed in accordance with the permission granted. Any subsequent development can, therefore, potentially be exempted development.

8.2.3. I note, too, the referrer's reliance upon the provisions of Section 4(1)(h) of the Act. I consider that, on the basis of the plans available to me and my site visit, such reliance is justified.

8.2.4. The Regulations do not provide for exempted development in situations wherein a material change of use has occurred as a result of intensification in use.

8.3. **Restrictions on exempted development**

8.3.1. Insofar as the alterations that have been undertaken to the physical fabric of the forecourt building are exempted development, such exemption is not restricted by any of the provisions of Article 9(1) of the Regulations.

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 (a) the alterations to the internal layout of the permitted forecourt shop and (b) its ensuing use are, or are not, development and are, or are not, exempted development:

AND WHEREAS The Maxol Group requested a declaration on this question from Cork City Council and the Council issued a declaration on the 27th day of May, 2019, stating that the matter was development and was not exempted development:

AND WHEREAS The Maxol Group referred this declaration for review to An Bord Pleanála on the 22nd day of May, 2019:

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

(a) Section 2(1) of the Planning and Development Act, 2000, as

- amended,
- (b) Section 3(1) of the Planning and Development Act, 2000, as amended,
 - (c) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
 - (d) articles 5(1), 9(1), and 10(1) of the Planning and Development Regulations, 2001, as amended,
 - (e) Parts 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, and
 - (f) the planning history of the site:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The alterations to the forecourt building constitute development, which under Section 4(1)(h) of the Planning and Development Act, 2000, as amended, is exempted development.
- (b) The ensuing use of the forecourt building entails a significant increase in the net retail floorspace of this building beyond that which was authorised under application 09/34163 and appeal PL28.237319.
- (c) The significant increase in net retail floorspace has led to an intensification in the use of the forecourt building as a shop, under Article 5(1) of the Planning and Development Regulations, 2001, as amended, and this intensification has resulted in a material change in use and so development has occurred, which is not 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 (a) the

alterations to the internal layout of the permitted forecourt shop and (b) its ensuing use are development which in the case of (a) is exempted development and which in the case of (b) is not exempted development.

Hugh D. Morrison
Planning Inspector

9th October 2019