



Question

Whether the provisions of two delis, in place of one permitted deli (of the same floor area) within a Maxol Filling Station is or is not development or is or is not exempted development.

Location

Maxol Station, Kingsmeadow, Cork Road, Waterford, X91 EY4E

Declaration

Planning Authority

Waterford City and County Council

Planning Authority Reg. Ref.

D5/201927

Applicant for Declaration

Maxol Limited

Planning Authority Decision

None

Referral

Referred by

Maxol Limited.

Owner/ Occupier

Maxol Limited.

Observer(s)

None.

Date of Site Inspection

1st May, 2020.

Inspector

Stephen Kay

1.0 Site Location and Description

- 1.1. The site of this referral is located in the Kingsmeadow area of Waterford, c.1.5km to the south west of the city centre. The site is located on a corner at the junction of Ashe Road and the Cork Road in a busy location that is generally commercial / retail in nature. With the exception of a single dwelling that is located opposite the site on the Cork Road, the closest residential properties are located approximately 100 metres to the north of the site on Ashe Road. Immediately to the north east of the site is located an Aldi supermarket. The site is currently occupied by a Maxol Filling station comprising fuel sales forecourt area and single storey forecourt building.
- 1.2. The forecourt building as constructed on the site comprises a general retail area of stated floor area of 97.8 sq. metres inclusive of an area for off licence sales. The building as constructed also incorporates a seating and circulation area located at the southern end of the floorplan which is indicated on the permitted layout as having a floor area of 49 sq. metres and seating for 24 no. persons. The balance of the public area of the building comprises hot food sales areas that are divided into two distinct areas. The first is located at the south east corner of the building footprint, adjoining the seating area, and comprises an Abracadabra hot food take away. The second is a normal deli counter area located on the wall opposite the entrance to the building. On the submitted drawing (Drg No.M-MKA-AS-01.01) these two areas are indicated as being separated by an area that is laid out for food preparation / storage.

2.0 The Question

- 2.1. The question as posed by the Referrer is as follows:

Whether or not the provision of two deli counters (46 sq. metres in area) instead of one deli counter (46 sq. metres in area), within a rearranged petrol filling station forecourt building which has permission for inter alia a 'hot food deli', 'café seating area' and 'retail shop' constitutes exempted development under the provisions of the Planning and Development Act, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).

2.2. The question as posed by the referrer does not make any specific reference to the fact that one of the deli counter areas is in use as a fast food restaurant (operated by Abrakebabra) and, on the basis of the case set out by the referrer in their submission to the Board, it is evident that what is sought is a declaration as to whether the existing internal layout of the forecourt building is or is not exempted development and also whether the existing use of the building, and specifically the use of the food server areas one of which currently accommodates an Abrakebabra outlet, is or is not exempted development. The detail of the referrers case is set out at 6.1 of this report below, and the implications for the relevant question to be determined by the Board is discussed further in the assessment at 9.1.

2.3. In view of the above, it is considered appropriate that the wording of the question would be amended to the following:

Whether the alteration of the internal layout of a permitted petrol filling station forecourt building to provide two deli counters with a combined area of 46 sq. metres instead of one deli counter of 46 sq. metres and the use of one of these deli counter areas as a fast food outlet (Abrakababra) for the sale of hot food for consumption both on the premises, in a dedicated seating area, and off the premises is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority did not issue a declaration on the question which was referred to them by the referrer on 30th September, 2019.

4.0 Planning History

Referral Cases

Waterford City and County Council Ref. D5201815; ABP Ref. ABP-301456-18 – Referral on the subject of whether the operation of an Abrakebabra sit in and take away hot food outlet from within an existing permitted petrol filling station is or is not development and is or is not exempted development. The decision of the Board in this case was that this was development and was not exempted development and in its decision the Board determined that the change of use would result in an intensification of the authorised use which would lead to potential for traffic noise and general disturbance which would be material in planning terms and that the development would not be subsidiary to the authorised use.

Planning Applications

Waterford City and County Council Ref. 11500013 – Permission granted by the Planning Authority for the redevelopment of the existing filling station incorporating demolition of the existing shop building (128 sq. metres), removal of the forecourt canopy and car wash, decommissioning of 5 no. underground fuel storage tanks. Redevelopment of the site incorporating the construction of a new convenience store building with a floor area of 293 sq. metres incorporating a retail sales area of 100 sq. metres, an ATM room of 7 sq. metres, a café / seating area of 45 sq. metres, a hot food / deli area of 46 sq. metres and ancillary areas of 95 sq. metres. New underground fuel storage tanks, new canopy and signage.

The submitted floorplan for the forecourt building included, at the southern end of the floorplan, an area identified as ‘deli and servery’ running along the wall opposite the entrance and an area identified as ‘seating’ in the south west corner. It is noted that the elevation drawings do not indicate any air extraction or handling equipment. The public notices associated with this application make reference to ‘.....(E)

Construction of a new convenience store building 293 sq. m. (5 metre high) with a retail sales area of 100 sq. m., an ATM room of 7 sq. m., a café seating area of 45 sq. m, a hot food deli area of 46 sq. m and an ancillary area of 95 sq. m....’. No conditions which prescribe or limit the uses within the forecourt building are attached to this grant of permission.

Waterford City and County Council Ref. 13500036 – Permission granted for revisions to approved layout under Ref. 11500013 incorporating reduction in forecourt footprint, adjustment in site location of canopy and sales building, revisions to boundary treatment and building layout and facades and other ancillary works. Under this permission, the basic internal layout of the forecourt building remained the same. Noted that Condition No. 2 attached to this permission stated that *‘the retail sale of convenience and other goods associated with the forecourt shop shall take place solely within the confines of the permitted retail sales area of the retail building’*.

Waterford City and County Council Ref. 15513 – Permission granted for change of use of part of the permitted retail sales area to retail and off licence use with the off licence area of 13 sq. metres ancillary and subsidiary to the main retail use. The submitted floor plan shows the location and size of the deli counter is approximately as per the previous permissions and a stand alone / island tea / coffee display is also indicated adjoining the deli counter. A smaller deli seating area is indicated at the south west corner of the building.

Details of these applications and the relevant drawings / floor plans are on the file.

5.0 Policy Context

5.1. Development Plan

The site is located within the administrative area of Waterford City and County Council. The relevant development plan is the *Waterford City Development Plan, 2013-2019* (as extended) and the site is zoned Objective C6 (Industrial) under the provisions of this plan with the stated objective ‘to provide for industrial, employment and related uses’.

5.2. Natural Heritage Designations

The site is not located within or close to any European site

6.0 The Referral

6.1. Referrer's Case

The following is a summary of the main issues raised in the case submitted by the Referrer.

- The context in which the referral is being made is set out at section 1.2 and notes the previous decision of the Board (Ref. ABP-301456-18) that the operation of an Abrakababra sit in and take away hot food outlet from within an existing permitted petrol filling station is development and is not exempted development. It is contended that this decision was made by the Board without the full information and without the input of the owner of the site (Maxol). It is stated that the purpose of the current referral is *'to seek a new declaration of the land uses on site based on accurate and detailed information to ensure an appropriate query is considered by the Board.'*
- That the description of the development permitted under Ref. 11500013 makes clear that within the convenience store building there was proposed to be, inter alia, a retail sales area of 100 sq. metres, a café seating area of 45 sq. metres and a hot food deli area of 46 sq. metres. Contended therefore that the permitted use is not only a 'shop' as defined in Art. 5(1) of the Planning and Development Regulations, 2001 (as amended).
- That section 4(1)(h) of the Act provides for the carrying out of works for the alteration of any structure being only works that affect only the interior of the structure and which do not materially affect the external appearance of the structure.
- That the definition of 'shop' as set out in the *Planning and Development Regulations, 2001* (as amended) includes for *'the retail sale of goods'* and *'for the sale of sandwiches or other food ...for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use....'*, *subject to the restriction that such usesassociated with the sale of hot food for consumption off the premises except under paragraph (d)'*.

- That there are a wide range of products and services retailed at the site and that the building also accommodates a deli counter operated by Maxol and an Abrakebabra counter that sells hot and cold foods for consumption off the premises.
- That the existing uses at the site correspond with the permitted uses, namely retail, café seating area and hot food deli area.
- That the development and internal layout was completed in accordance with the permissions granted under ref. 11500013 as amended by Refs. 13500036 and 15513. The site opened in 2014. Revisions to this layout were undertaken in 2018 under the provisions of s.4(1)(h) of the Planning and Development Act. These alterations included the division of the hot food deli area into two counters with a coffee dock and table. The floor areas associated with these sub divided areas equals the originally permitted hot food deli area. There is therefore no change to the quantum of hot food deli provided in the building.
- Submitted that no change of use has occurred and that the hot food deli use is entirely consistent with the permitted hot food deli use with café seating area. Critically, the public notices associated with the parent permission (Ref. 11500013) specifically refer to '*hot food deli area and café seating area*', because those elements of the proposed development did not seek to rely on the definition of 'shop' under Art. 5(1) of the Regulations which would only allow for subsidiary sale of hot or cold food for consumption off the premises.
- Noted that the hot food deli area and seating area combined are approximately the same size as the retail shop area.
- That it is considered that the inspector in assessing the previous referral erred in assessing the scheme as a '*shop*' (thereby limiting the sale of hot food for consumption off the premises to that which would be subsidiary to the shop use) when the wording of the statutory notices made it clear that this was not the case.
- That hot food sales account for only 28 percent of overall sales on site (excluding fuel and car wash) and a much lower percentage again if these

sales are included. Therefore notwithstanding the assessment as to whether the hot food element is required to be subsidiary to the retail sales, it is clear that they are.

- Regarding the limitations on extension as per Article 9, there were no conditions attached to any permission which restrict the sale of hot food for consumption off the premises or on site, nor are there conditions that require the hot food deli to be run by the same operator as the rest of the development or that the entire uses be served by one point of sale.
- That, given the on site seating, it is not the case that the majority of hot food purchased is for take away. It is also not the case that the majority of trips to the hot food area are separate or independent from other uses at the site (such as fuel sales).
- Submitted that the independent branding of part of the deli area as Abrakebabra is not a planning issue. Submitted that this counter operates exactly the same as the other deli counter. The Abrakebabra outlet / counter is operated by staff of the overall facility and cannot operate independently of the other uses given that it shares an access.
- That contrary to the assessment of the Board inspector in Ref. ABP-301456-18 the operation of the Abrakebabra counter does not generate material planning considerations in terms of noise, traffic and disturbance. It should be noted that there are no residential properties in close proximity to the site and that the Cork Road is a busy route and that the filling station operation on site is also a potential generator of noise and traffic.
- That no AA or EIA issues arise in the development.

6.2. Planning Authority Response

No response received from the Planning Authority within the time period specified.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 3 provides definition of 'Development'.

s.3(1) - 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 2 provides a definition of 'works':

s.2(1) - In this Act "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.'

Section 4 provides for Exempted Development

s.4(1) 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.

s.4(2)(a) The minister may by regulations provide for any class of development to be exempted development for the purposes of this Act.

7.2. Planning and Development Regulations, 2001

Article 6 includes provisions under which certain advertisements may be deemed to be exempted development.

Article 9 specifies 'Restrictions on Exemption'

9 (1) Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) if the carrying out of such development would-

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act ...

Article 10 relates to 'Changes of use'

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, 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.

Part 4, Schedule 2 - Exempted development- Classes of Use

CLASS 1

Use as a shop.

Under the Planning and Development Regulations 2005, the definition of a 'shop' is 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),

(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 the Second Schedule applies.

8.0 Precedent Cases

The following cases are noted and are considered to be of relevance to this assessment:

Subject Site

ABP-301456-18 – In this case the question asked was – ‘*Whether the operation of an Abrakabra sit in and take away hot food outlet from within existing permitted petrol filling station is or is not development or is or is not exempted development*’.

The Board concluded that the change of use from the authorised use of portion of these premises to use as a sit in and take away food outlet would result in the intensification of the authorised use that would have the potential for traffic, noise and general disturbance which would be material in planning terms and would therefore, constitute development. This development would not be exempt as it would not be subsidiary to the use authorised by Planning Permission Reference No: 11/500013 as amended by Planning Permission Reference No: 15/513.

Other Referral Cases

RL2333 – In this case the Question asked was: '*Whether the partial use of a Spar Retail Unit at Beaufield Shopping Centre, Maynooth as a pizzeria with delivery service is or is not development or is or is not exempted development*'. The Board concluded (Notice dated 15th of November 2006) that this did not result in a material change of use from the use of this shop and was not development. In that case the Inspector had regard to the planning history and noted that the Board did not impose a restrictive condition limiting the use of the shop.

RL2590 – In this case the Question asked was '*whether the sale of hot food for consumption off the premises at an existing shop premises in the Athlone area is or is not development or is or is not exempted development*'. The Board concluded (Notice dated 17th of July 2009) that the sale of hot food for consumption off the premises in this particular case is not subsidiary to the principal shop use and results in a material change of use from the use of this shop for the retail sale of groceries.

RL3402 – In this case the Question asked was: '*Whether the change of use of part of the existing retail premises for sale of hot food in Kilcullen, Co. Kildare is or is not development or is or is not exempted development*'. The Board concluded (Notice dated 29th of April 2016) that the sale of hot food for consumption off the premises is not subsidiary to the principal shop use and 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. The referrer also noted that the permitted deli counter has been relocated in the shop and has been retained

RL3495– In this case a question arose as to whether the use of 1.16sq.m. of shop area at GO Kylemore Service Station for the sale of hot food at GO Kylemore Road Service Station, Kylemore Road, Dublin 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 which, by reason of its limited scale and ancillary nature, was not a material change of use, and that the change of use in this case, therefore, was not development as described in section 3(1) of the Planning and Development Act, 2000.

9.0 Assessment

9.1. Introduction / The Question

- 9.1.1. The question as referred by the owner of the property is whether or not the provision of two deli counters (46 sq. metres combined area) instead of one deli counter (46 sq. metres in area), within a rearranged petrol filling station forecourt building which has permission for inter alia a 'hot food deli', 'café seating area' and 'retail shop' constitutes exempted development under the provisions of the Planning and Development Act, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).
- 9.1.2. It is my opinion that the question as worded by the referrer requires some amendment to clarify what is being considered in this case. Specifically, the circumstances of the subject case are that the originally permitted hot food / deli counter has been sub divided into two separate areas, and that one of these areas is now occupied by an Abrakababra fast food outlet which provides fast food for consumption both on the premises in a dedicated seating area and for consumption off the premises. The wording as proposed by the referrer makes reference to the sub division of the hot food / deli counter area but does not make specific reference to the fact that one of these areas is now occupied by the Abrakababra fast food outlet, instead stating that the forecourt building has permission for inter alia a 'hot food deli', 'café seating area' and 'retail shop'. However, the issue as to whether the Abrakababra fast food outlet comes within the scope of the uses permitted on the site forms a central part of the case made by the referrer in their submission to the Board and, in the interests of clarity and comprehensiveness, it is therefore considered appropriate that the wording of the question would be amended to the following:

Whether the alteration of the internal layout of a permitted petrol filling station forecourt building to provide two deli counters with a combined area of 46 sq. metres instead of one deli counter of 46 sq. metres and the use of one of these deli counter areas as a fast food outlet (Abrakababra) for the sale of hot food for consumption both on the premises, in a

dedicated seating area, and off the premises is or is not development and is or is not exempted development.

9.1.3. At the time of the site visit the layout of the shop associated with the petrol station provides for a main retail area and counter (including alcohol sales area) as per the previously permitted layouts. A deli counter serving hot or cold food (paid for at the main retail counter) is located at the rear wall at the back of the unit but in a more central position than the permitted location. To the right (east) of the deli counter is an enclosed / screened food preparation area which connects with a further food server counter that runs perpendicular to the rear wall of the shop. This second counter operates as an Abrakababra fast food outlet. To the front of the Abrakebabra counter are free standing counters that provides coffee / tea / hot snacks and bakery / deli. There is a seating area located in the south west corner of the unit, immediately to the right on entering the main door which is smaller than that originally permitted.

9.1.4. Copies of the permitted layouts are on file.

9.2. Is or is not development

9.2.1. The issue of whether or not development has occurred has, in my opinion two components. The first of these relates to works undertaken to the unit to result in the altered internal layout from that which was the subject of the grants of permission (Ref. 11/500013 as amended by Refs. 13/500036 and 15/513) and, secondly, whether a change of use of the permitted forecourt building has occurred, and if so, whether such a change of use is material.

Internal Alterations to Layout

9.2.2. Firstly, as specifically identified in the question posed by the referrer and in the revised wording recommended, the originally permitted deli counter area of 46 sq. metres has been sub divided into two separate areas. These areas comprise a traditional convenience store deli counter selling sandwiches and reheated / hot food, and a second area that is located at the south east corner of the unit and at

right angles to the permitted deli area, which is currently occupied by the Abrakebabra outlet. The circumstances are therefore that internal works in the form of construction and alteration of the originally permitted layout have occurred, such that development has taken place.

Change of Use – Extent of Floorspace Allocated to Individual Uses

- 9.2.3. I note the fact that the current allocation of floor area between the originally stated and permitted uses, namely retail sales area, café seating area and hot food deli area, does not clearly reflect the areas as originally permitted on site under Ref. 11/500013. Specifically, while the referrer states that the floor areas associated with these sub divided deli areas equals the originally permitted hot food deli area (46 sq. metres), and that there is therefore no change to the quantum of hot food deli provided in the building, observations on site and reference to the submitted as constructed floorplan (Drg. No. M-MKA-AS-01.01) shows the area of the deli counters to be restricted to just the counter areas and the immediate areas behind, together with a free standing display in the floor and a coffee server area on the section of wall connecting the two deli areas .
- 9.2.4. I note that the extent of the coffee server area along the wall opposite the entrance appears to be larger than that indicated on the submitted floor plan and also that there are two stand alone deli / display areas on the floor, titled 'Hot Bar' and 'Bakery' in the attached photographs. The public area immediately adjoining these stand alone displays is hatched red on the submitted floorplan, indicating '*seating / circulation space*'. The listed permitted uses as per the planning permissions on site are, however retail sales, hot food deli area and café seating area with no reference to circulation space. In my opinion the layout as constructed is such that the extent of the seating area is reduced from that permitted and that the area to the front of the deli counters and surrounding the free standing deli / display area is most appropriately 'hot food deli' rather than seating / circulation space. It therefore appears to me that the overall extent of 'hot food deli' floorspace has increased beyond the 46 sq. metres permitted and such that a change of use and therefore development has occurred.

Change of Use – Operation of Abrakebabra Use from Hot Food Deli Area

- 9.2.5. With regard to the use of one part of the deli counter area as an Abrakebabra outlet, the referrer contends that no change of use has occurred. The referrer highlights that the original grant of permission under Ref. 11/500013, and the associated public notices, made specific reference to a number of individual uses of the forecourt building, including 'retail sales', 'hot food deli' area and 'café seating' area. The referrer contends that the previous referral case on the site erred in that the inspector assessed the Abrakebabra use in the context of whether it was ancillary to the overall use of the unit as a 'shop'. Rather, it is contended by the referrer that the permission granted under Ref. 11/500013 makes specific reference to 'hot food deli' as a use separate to the retail sales area that was limited to 100 sq. metres, and that the Abrakebabra use is consistent with this permitted hot food deli use.
- 9.2.6. On the issue as to whether it is appropriate that the hot food uses be assessed as per the definition of 'shop' as defined in the Planning and Development Act, I note the point made by the referrer that separate reference is made in the public notices and description of the use of the forecourt building and that the café seating area and deli are given a floor area and referenced separately from retail sales. I also note that section (E) of the description of development makes reference to '*construction of a new convenience store building 293 sq. m with retail sales area of 100 sq. m., an ATM room of 7 sq.m., a café seating area of 45 sq. m., a hot food deli area 46 sq. m. and ancillary areas of 95 sq. m.*' The reference to '*convenience store building*' could indicate that the overall building is most appropriately considered to be a shop. There are however clear uses and floor areas specified in the public notices and drawings permitted on the site, such that reallocation of floorspace within the permitted uses and areas is in my opinion development which is exempted development. As noted above, however I am not clear that the permitted 46 sq. metres of 'hot food deli' floorspace has not been exceeded in the layout as constructed.
- 9.2.7. The question therefore arises as to whether the uses / outlets which occupy the hot food deli areas, and specifically that occupied by Abrakebabra can be considered to be consistent with the permitted 'hot food deli' as referenced in the grant of

permission for the site. A normal deli use in a convenience store or forecourt unit such as that on the appeal site would be expected to serve a range of hot baguettes, wedges and other similar foods which can be characterised as being the subject of heating on site. The nature of the Abrakebabra outlet however is that it entails the cooking and frying of hot food, with the usual range of Abrakebabra fried food available. The nature of the Abrakebabra outlet operated at the site is therefore that of a fast food take away and is, in my opinion, very different from that of a hot food deli in terms of the nature of the process used in the preparation of the food, the potential for nuisance in terms of noise and odour and the potential for the use to attract persons to the site. Notwithstanding the fact that the Abrakebabra use is accessed via the same entrance as the rest of the building and is not located in a primarily residential area, I therefore consider that a change of use has occurred and that, for the reasons outlined above regarding the potential for trip generation, noise and general disturbance, I consider that this change of use is material in planning terms and therefore constitutes development.

- 9.2.8. In the event that the Board do not agree that the parent permission authorises a specific extent of 'hot food deli' floorspace and consider that the use falls to be assessed under the definition of 'shop', it is my opinion that notwithstanding its limited scale, the Abrakebabra outlet is a fast food take away which would be a trip generator and that would generate trade independent of the other uses on site and therefore not such as to be clearly subsidiary to the main retail use of the site. For these reasons I do not consider that the operation of the Abrakebabra outlet at the site comes within the scope of what is covered by Article 5(d) of the Regulations and that therefore a change of use has occurred. By virtue of the potential for trip generation and resulting potential for noise and general disturbance I consider that this change of use is material in planning terms and therefore constitutes development.

9.3. Is or is not exempted development

Internal Works / Alterations to Internal Layout

- 9.3.1. With regard to the sub division of the sub division of the deli area into two separate counters or areas, the referrer contends that these works are exempted development by virtue of s.4(1)(h) of the Planning and Development Act, being works which only affect the interior of the structure and 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. In principle, I would agree with the referrer that the works for the sub division of the permitted deli counter into two separate areas are works that are exempted development under section 4(1)(h) of the Act.
- 9.3.2. As set out at 9.2 above, I note the fact that the sub division of the floor area between the originally stated and permitted uses, namely retail sales area, café seating area and hot food deli area, does not clearly reflect the areas as previously permitted on site and that the extent of the hot food deli floorspace would appear to be greater than that indicated on the submitted floorplan (Drg. No. M-MKA-AS-01.01). It is not therefore clear to me that this specified floor area (46 sq. metres) has not been exceeded in the layout as constructed and that the layout as constructed is in accordance with the permission granted.

Change of Use

- 9.3.3. In the event that the original permission is considered to have granted permission for a separate use comprising 'hot food deli', I consider that the nature of the Abrakebabra outlet is such that it is clearly different to what would normally be considered to constitute a hot food deli use. I therefore consider that a change of use has occurred and that, by virtue of the potential for trip generation, noise and general disturbance, I consider that this change of use is material in planning terms and therefore constitutes development for which there is no exemption provided for in either the Planning and Development Act, 2000 (as amended) or the Planning and Development Regulations, 2001 (as amended).

9.3.4. In the event that the Board do not consider that the hot food counter operated as an Abrakebabra outlet comes within the definition of 'shop' as set out in Article 5(d) of the Regulations as it is not subsidiary to the main retail use of the site and thus constitutes a material change of use which is development for which there is no exemption provided for in either the Planning and Development Act, 2000 (as amended) or the Planning and Development Regulations, 2001 (as amended).

9.4. **Restrictions on exempted development**

9.5. Regarding the limitations on extension as per Article 9, there were no conditions attached to any permission which restrict the sale of hot food for consumption off the premises or on site, nor are there conditions that require the hot food deli to be run by the same operator as the rest of the development or that the entire uses be served by one point of sale.

9.6. **Appropriate Assessment**

9.6.1. Having regard to the nature and scale of the development which is the subject of this referral and its location relative to Natura 2000 sites, no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect either individually or in combination with other plans or projects on a European site.

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 alteration of the internal layout of a permitted petrol filling station forecourt building to provide two deli counters with a combined area of 46 sq. metres instead of one deli counter of 46 sq. metres and the use of one of these deli counter areas as a fast food outlet (Abrakababra) for the sale of hot food for consumption both on the premises, in a dedicated seating area, and off the premises is or is not development and is or is not exempted development:

AND WHEREAS the question was referred to An Bord Pleanála by Maxol Limited on the 25th day of November 2019:

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

- (a) Sections 2(1), 3(1) and 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (b) The definition of ‘shop’ under Article 5(1) of the Planning and Development Regulations, 2001 as amended by the Planning and Development Regulations, 2005,
- (c) Article 6, 9 and 10 of the Planning and Development Regulations, 2001, as amended, and Class 1 of Part 4 of the Second Schedule to the Planning and Development Regulations, 2001 as amended.
- (d) The planning history of the site, including the description of the development and the layout of the forecourt building permitted under Waterford County Council Ref. 11/500013 and amendments granted under Waterford County Council Refs. 13/500036 and 15/513,

- (e) The nature of the Abrakebabra outlet operated on site which is considered to constitute a fast food take away use,
- (f) The observations of the referrer and of the inspector in respect of the internal layout of the premises and the nature of the uses undertaken on site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the authorised use of these premises is as set out in planning register reference number PD11/500013, as amended by planning register reference numbers 13/500036 and 15/513,
- (b) the sub division of permitted hot food deli floorspace would constitute development being works to the permitted structure and that these works would be exempt under s.4(1)(h) of the Act being works which only affect the interior of the structure,
- (c) that the Board is not however satisfied that the permitted extent of 'hot food deli' floorspace has not been exceeded in the layout as developed,
- (d) that the nature of the Abrakebabra use on site is a fast food outlet which is different from a hot food deli use and constitutes a change of use which gives rise to potential for traffic, noise, odour and general disturbance would be material in planning terms and would therefore, constitute development,
- (e) The fact that there are no exemptions in the Planning and Development Act, 2000, as amended, or in the Planning and Development Regulations, 2001, as amended whereby such development would be exempted development:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(b) of the 2000 Act, hereby decides that the alteration of the internal layout of a permitted petrol filling station forecourt building to provide two deli counters with a combined area of 46 sq. metres instead of one deli counter of 46 sq. metres and the use of one of these deli counter areas as a fast food outlet (Abakabra) for the sale of hot food for consumption both on the premises, in a dedicated seating area, and off the premises is development and is not exempted development.

Stephen Kay
Planning Inspector

27th July, 2020