



An  
Bord  
Pleanála

## Inspector's Report ABP-307083-20

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<b>Question</b>	Whether the change of use from an off-licence to a pharmacy is or is not development or is or is not exempted development
<b>Location</b>	62 Dorset Street Lower, Dublin 1
<b>Declaration</b>	
Planning Authority	Dublin City Council
Planning Authority Reg. Ref.	0079/20
Applicant for Declaration	Michael Maher
Planning Authority Decision	Is development and is not exempted development
<b>Referral</b>	
<b>Referred by</b>	Michael Maher
<b>Owner / Occupier</b>	Michael Maher / Park's Pharmacy
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	13 <sup>th</sup> July 2020
<b>Inspector</b>	Colm McLoughlin

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## **1.0 Site Location and Description**

1.1. The referral site is situated on the corner of Dorset Street Lower and St. Ignatius Road on the north side of Dublin's inner city. It accommodates a five-storey building with apartments served by terraces above ground floor and a pharmacy trading as 'Park's Pharmacy', operating from the ground floor and with its primary frontage onto Dorset Street Lower. The pharmacy, measuring approximately 71sq.m, is served by a basement storage area. The street to the west along St. Ignatius Road is characterised by red-brick two-storey terraced housing, while the immediate western side of Dorset Street Lower is dominated by a variety of commercial uses at street level fronting onto a deep pavement and a busy thoroughfare. Adjoining to the north is a locksmith's premises and adjacent to the south on the opposite side of St. Ignatius Road is a casino with apartments above it. Ground levels in the area drop very gradually moving east.

## **2.0 The Question**

2.1. The following is questioned by the referrer:

- 'continuation of retail use from off-licence to introduction of retail use as a pharmacy in place of former retail use as an off-licence'.

2.2. Following a review of the submitted information and in the interest of clarity, it is considered appropriate that the question referred to the Board be reworded and addressed by the following question:

- whether the change of use from an off-licence to a pharmacy, is or is not development or is or is not exempted development.

2.3. I intend to proceed with my assessment on the basis of the reworded question.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

3.1.1. Pursuant to Section 5 of the Planning and Development Act 2000, as amended (hereinafter referred to as 'the Act'), on the 20<sup>th</sup> day of March, 2020, the planning

authority declared that a change of use from an off-licence to a pharmacy constitutes a material change of use that is development and that, as there are no exemptions for such a change of use, this development is, therefore, not an exempted form of development.

## **3.2. Planning Authority Reports**

### **3.2.1. Planning Reports**

The recommendation within the report of the Planning Officer (March 2020), reflects the declaration issued by the planning authority and can be summarised as follows:

- a pharmacy falls within the legislative definition for a shop, and given that this definition now excludes an off-licence, this implies that a change of use from an off-licence to a shop requires planning permission;
- the planning history refers to an off-licence operating on the site during consideration of planning register reference (reg. ref.) 1392/04 in 2004, which, also included a proposal for a new off-licence on the redeveloped site;
- the definition of a 'shop' altered to exclude an off-licence use as part of the 2005 revisions of the Planning and Development Regulations 2001-2020 (hereinafter referred to as 'the Regulations');
- the planning authority issued a declaration under reg. ref. EXPP0545/18, relating to a shop that had been granted planning permission in 2004 prior to the revised definition for a shop in the 2005 revisions to the Regulations. This declared that as this development was constructed and the retail unit was occupied with a part off-licence in 2008, within the lifetime of the permission, the change of use to incorporate an off-licence into the shop would be exempted development;
- the subject change of use from off-licence to a pharmacy was clearly not initiated within the lifetime of the permission granted under reg. ref. 1392/04, therefore, the post-2005 definition for a shop, excluding an off-licence, must be relied upon;
- different planning considerations apply when considering a change of use from an off-licence to a pharmacy, as exemplified by the differing sections of

the Dublin City Development Plan 2016-2022 addressing these specific uses and the standard variations in the restriction of opening hours for such uses. Consequently, a material change of use would apply.

### 3.2.2. Other Technical Reports

- None received.

## 4.0 Planning History

### 4.1. Referral Site

4.1.1. The planning history associated with the referral site, includes the following planning applications:

- reg. ref. 2900/06 – permission was granted by the planning authority in August 2006 for amendments to reg. ref. 1392/04 to allow for an additional fourth-floor to the building, in order to amend an apartment into a duplex unit and minor elevation alterations;
- reg. ref. 1392/04 – permission was granted by the planning authority in September 2004 for the demolition of a single-storey off-licence served by a basement store and the construction of a four-storey building, to include an off-licence at ground floor with associated basement storage and three two-bedroom apartments on the upper floors;
- reg. ref. 1000/91 – permission granted by the planning authority in October 1991 for a new shopfront.

4.1.2. The following enforcement case relates to the referral site:

- Enforcement Ref. E0637/19 – change of use to pharmacy and illuminated signage.

### 4.2. Relevant Referrals

4.2.1. The following referral is considered relevant to this appeal:

- ABP Ref. PL13.RL.2244 – in September 2005 the Board declared that the change of use of the permitted retail unit to a wine merchant/off licence at Ennis Road, Limerick, was development and was not exempted development.

## **5.0 Policy & Context**

### **5.1. Development Plan**

- 5.1.1. The referral site has a zoning objective 'Z1 - Sustainable Residential Neighbourhoods' within the Dublin City Development Plan 2016-2022, with a stated objective 'to protect, provide and improve residential amenities'. The site does not have any conservation status.

## **6.0 Statutory Provisions**

### **6.1. Planning and Development Act 2000, as amended**

- 6.1.1. Section 2(1) of the Act states the following:
- 'development' has the meaning assigned to it by Section 3;
  - '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;
  - 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ....'
- 6.1.2. Section 3(1) of the Act states that:
- 'development' means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land'.
- 6.1.3. Section 4(1) of the Act sets out various forms of development that are exempted development. Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development.

## **6.2. Planning and Development Regulations 2001-2020**

6.2.1. For the purposes of interpretation, as amended by Article 3 of the Planning and Development Regulations 2005, Article 5(1) within Part 2 of the Regulations referring to 'exempted development' provides the following definition, which is of particular relevance in the consideration of this case:

- '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.

6.2.2. Subject to restrictions under Article 9 of the Regulations, Article 6(1) states that development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1. Class 14 of

column 1 of Part 1 of Schedule 2 identifies several forms of exempted changes of use, with the associated conditions and limitations set out in column 2. The restrictions under Article 9 include development that would contravene a condition of a permission, as well as other matters not specific to this referral.

6.2.3. Article 10(1) of the Regulations states that development, which consists of a change of use within 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, inter alia, -

- (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.

6.2.4. Part 4 of Schedule 2 to the Regulations specifies that:

- Class 1 refers to use as a shop.

## **7.0 The Referral**

### **7.1. Referrer's Case**

7.1.1. The referrer's submission was received by An Bord Pleanála on the 16<sup>th</sup> day of April 2020 and was accompanied by a copy of the planning authority declaration. The submission can be summarised as follows:

- an off-licence had been situated on this site for decades and prior to the commencement of the 2005 Regulations, which amended the definition of a shop to exclude an off-licence;
- the permission to demolish the off-licence and construct a four-storey building with a ground-floor off-licence (reg. ref. 1392/04) was issued in 2004 prior to the 2005 legislation being commenced, therefore the established use of the premises was as a 'shop';



- use for the off-licence did not wither with the 2004 planning permission;
- the High Court judgement *Molloy & Others v the Minister for Justice, Equality and Law Reform & Others* [2004] 2 I.R. 493 should be referred to with respect to the principles of losing or abandoning a permission. The planning authority granted permission for a use and there is no limit on the life of the permission for this use;
- the planning authority has issued a flawed judgement when considered in the context of the conclusions of the revised declaration issued under reg. ref. EXPP0545/18, which had been issued on foot of a High Court Order;
- when compared with an off-licence use, a pharmacy use in this area would be far more acceptable and less likely to affect the proper planning and sustainable development of the area, therefore, any change of use would not be material;
- if the new use does not amount to a material change of use, then it does not amount to development.

## **7.2. Planning Authority's Response**

7.2.1. The planning authority did not respond to the referrer's submission.

## **7.3. Observations**

7.3.1. None received.

## **8.0 Assessment**

### **8.1. Introduction**

8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the matters raised in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development within the meaning of the relevant legislation.

## **8.2. Is or is not development?**

- 8.2.1. The referral questions pertain to changes of use and do not relate to the carrying out of any specific 'works', as defined in the Act.

### Actual Change of Use

- 8.2.2. The initial matter to consider is the nature of the permitted use of the premises, based on the information and submissions on the file, including the previous planning files relating to the site. The referrer asserts that an off-licence existed on the site for many years with an extract from Thom's Directory 1989 appended to their application to support this. This claim is not contested by the planning authority with the planning history for the site revealing that a single-storey off-licence premises had occupied the site in 2004. Planning permission (reg. ref. 1392/04) was granted in September 2004 for the demolition of this off-licence premises to facilitate the construction of a four-storey building, to include an off-licence at ground floor with associated basement storage and three two-bedroom apartments on the upper floors. An application was submitted to amend this 2004 permission (reg. ref. 1392/04) and according to the amendment planning application details, construction was ongoing on the site in May and June of 2006 (reg. ref. 2900/06). The amendments to the development were subsequently permitted in August 2006 and the drawings identified the off-licence at ground floor and associated basement storage. These facts are clear-cut and are not in dispute between the parties. I am satisfied that it can be concluded that the authorised use of the subject premises is as an off-licence.
- 8.2.3. An off-licence existed on the referral site in 2004 and permission to demolish this off-licence and redevelop the site to accommodate a four-storey building with a ground-floor off-licence (reg. ref. 1392/04) was issued on the 21<sup>st</sup> day of September 2004. The referrer asserts that the subject off-licence would have fitted into the planning definition of a 'shop' when this permission was granted as the previous legislative definition for a shop did not preclude an off-licence. After the 14<sup>th</sup> day of July 2005, when the Planning and Development Regulations 2005 came into effect, the definition of a shop was revised to specifically exclude a retail use comprising the sale of intoxicating liquor for consumption off the premises, other than wine and where the sale of such wine is subsidiary to the main retail use. The effect of this

resulted in a shop changing its use to an off-licence or part off-licence requiring planning permission and an off-licence no longer came within the definition of a 'shop' within the meaning of the planning legislation.

8.2.4. The previous off-licence premises that occupied the site was demolished and removed from the site circa 2006 following the grant of permission under reg. ref. 1392/04, which would have been after the coming into effect of the revisions to the Regulations in 2005. Historical photographic images for the site that I have extracted from online streetview images of the area, reveal that the development permitted under reg. refs. 1392/04 and 2900/06 had been completed at some stage prior to June 2009, when an off-licence operated from the ground-floor premises. In June 2014 and in August 2018 the streetview imagery indicates that the subject premises was vacant. The most recent available streetview image dating from August 2019 reveals that the premises was occupied by a pharmacy, as was the case at the time of my site visit. Based on the evidence detailed above, the operation of a pharmacy from the subject premises would appear to have occurred at some stage between August 2018 and August 2019. I am satisfied that the existing use as a pharmacy falls within the current legislative definition for a shop.

8.2.5. The referrer asserts that the established and permitted use as an off-licence came within the previous legislative definition for a shop and that the premises only changed from one type of shop (off-licence) to another (pharmacy). As a consequence, it is asserted that the use of the premises remained within the legislative definitions of a 'shop' and that an actual change of use did not therefore take place. Both parties have referred to a High Court Order (Tesco Ireland Limited v Dublin City Council 2018/873 JR), given with respect to a Section 5 referral declaration (reg. ref. EXPP 0317/18) issued by the planning authority regarding the operation of an off-licence area from a retail store that was granted planning permission prior to the commencement of the Planning and Development Regulations 2005 and which had subsequently commenced trading in 2008. Following the High Court Order the planning authority issued a revised declaration (reg. ref. EXPP 0545/18) stating the following:

- The existing retail unit, including part off licence, commenced trading in 2008 on foot of planning permission granted on 25 February 2004 (Reg. Ref. 4650/03, decision order P2835A). At the time of granting permission, the

definition of a retail unit included an off licence or part off licence and the permission therefore provided for this use, notwithstanding the subsequent amendment to the Planning and Development Regulations under SI No. 364 of 2005. The part off licence use is, therefore, exempted development.

- 8.2.6. The referrer asserts that this declaration shows that where planning permission is granted by a planning authority for a use, there is no limit on the life of the permission or the continuance of a use.
- 8.2.7. The Board are not bound by declarations issued by the planning authority. In comparison with the declaration issued under (reg. ref. EXPP 0545/18), this specifically related to a permission allowing for a 'shop', whereas the permitted use for the subject premises was more specific in solely providing for an off-licence. The new off-licence on the redeveloped site was under construction in 2006 and occupied by 2009, which was after the coming into effect of the revisions to the Regulations in 2005. I am therefore satisfied that the authorised use of the premises was as an off-licence and not as a 'shop'. In conclusion, an actual change in use of the premises from an off-licence to a pharmacy would appear to have occurred at some stage between August 2018 and August 2019, based on the evidence detailed above.

#### Material Change of Use

- 8.2.8. The second issue to consider is whether the actual change from the permitted and previous use of the subject premises as an off-licence to its current use as a pharmacy is or is not development. The definition of 'development' in the Act includes the 'making of any material change of use of any structures or land'. Case law has dictated that various tests can be applied to determine whether or not a change of use is material in planning terms, including whether the character of the uses are patently different, whether issues raised by the change of use would raise matters that would normally be considered by a planning authority if it were dealing with an application for planning permission and whether different effects would arise.
- 8.2.9. As a local shop, pharmacies would be permissible in principle in this area based on the zoning provisions of the Dublin City Development Plan 2016-2022. The Development Plan includes a policy (RD5) controlling the distribution of off-licences and under the Z1 zoning for the site, an off-licence would not normally be a

permissible use in the subject Z1-zoned area, although it is recognised that non-conforming uses can be facilitated in specific circumstances, including where they existed for more than seven years. The referrer asserts that a pharmacy would be more acceptable than an off-licence in this area. Notwithstanding this, it is clear that there are differing locational factors dictating the acceptability or otherwise of off-licence and pharmacy uses in this area. Off-licences primarily sell comparison goods, whereas pharmacies primarily sell convenience goods and these factors are material considerations when assessing proposals for compliance with retail policy. An off-licence would need to operate in line with licencing laws, including hours of operation (10:30 to 22:00 hours on weekdays and from 12:30 to 22:00 hours on Sundays), which could differ from those for a pharmacy, many of which tend to operate late-night opening hours and early mornings. Consequently, the uses would have different compatibility with neighbouring land uses, which would need to be assessed, particularly with respect to the impacts on the residential amenities of the area, including the residents along St. Ignatius Road and the upper-floor residences on site and along Dorset Street Lower. I am satisfied that the change of use from an off-licence to a pharmacy is material, as the change would raise matters that would normally be considered in a planning application. Therefore, this material change of use is 'development' within the meaning of Section 3 of the Act.

### **8.3. Is or is not exempt development?**

- 8.3.1. I have examined the provisions set out within Articles 5, 6, 9 and 10 the Regulations, including Parts 1 and 4 of Schedule 2 to the Regulations. There is no class of development in Part 1 of Schedule 2 exempting a change of use from an off-licence to a pharmacy. Article 10(1) of the Regulations states that development, which consists of a change of use within one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act. Part 4 of Schedule 2 includes Class 1 'use as a shop'. As concluded above, a pharmacy can be considered a 'shop', however, an off-licence is now excluded from the planning definition of a 'shop'. I am satisfied that Article 10(1) of the Regulations would not provide for an exemption of the development referenced in the question, as it would not consist of a change of use within any one of the classes of use specified in Part 4 of Schedule 2 to the Regulations and I am satisfied that it is not exempted

development, because there is no provision in the Act or the Regulations, by which it would be exempted.

- 8.3.2. In view of the foregoing, I am of the opinion that the subject change of use constitutes development that is not exempted development.

## **9.0 Appropriate Assessment**

- 9.1.1. Having regard to the existing development on site, the minor nature of the development referenced in the question above, the location of the site in a serviced area and the separation distance to the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the development would be likely to have a significant effect 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 change of use from an off-licence to a pharmacy at 62 Dorset Street Lower, Dublin 1, is or is not development or is or is not exempted development:

**AND WHEREAS** Michael Maher care of Kenny Kane Associates, requested a declaration on this question from Dublin City Council, and the Council issued a declaration on the 20<sup>th</sup> day of March, 2020, stating that the matter is development and is not exempted development:

**AND WHEREAS** Michael Maher care of Simon Clear & Associates Planning and Development Consultants referred this declaration for review to An Bord Pleanála on the 16<sup>th</sup> day of April, 2020:

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

- (a) Sections 2, 3 and 4 of the Planning and Development Act 2000, as amended,
- (b) Articles 5, 6, 9 and 10 of the Planning and Development Regulations 2001-2020,
- (c) the planning history of the site,
- (d) the provisions of the Dublin City Development Plan 2016-2022,
- (e) the pattern of development in the area,
- (f) the submissions on file from the referrer:

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) the previous and permitted use of the premises as an off-licence and the change to the current use of the premises as a pharmacy, constitutes a change of use, which is considered to be a material change of use and is, therefore, development within the meaning of Section 3 of the Planning and Development Act 2000, as amended, and;
- (b) there are no provisions in the Planning and Development Act 2000, as amended or in the Planning and Development Regulations 2001-2020, made thereunder, whereby the said change of use is exempted development:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the Planning and Development Act 2000, as amended, hereby decides that the change of use from an off-licence to a pharmacy at 62 Dorset Street Lower, Dublin 1, is development and is not exempted development.

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Colm McLoughlin  
Planning Inspector

8<sup>th</sup> December 2020