



An  
Bord  
Pleanála

## Inspector's Report ABP-312276-21

### Question

Is the building, and its current use, that was granted permission as a Garage/Store Class-4 for P.478/84 which was built 30% larger than the plans submitted, and is now used as a wholesale/distribution business, development? and if so, is it exempt development?

### Location

Fruit and Vegetable Wholesale,  
Kilmurry, Slieverue, Co. Kilkenny.

### Declaration

Planning Authority

Kilkenny County Council

Planning Authority Reg. Ref.

DEC648

Applicant for Declaration

Martin and Deirdre Freyne

Planning Authority Decision

Is not exempted development

### Referral

Referred by

Martin and Deirdre Freyne

Owner/ Occupier

Brendan Walsh

**Date of Site Inspection**

1<sup>st</sup> December 2022

**Inspector**

Emer Doyle

## **1.0 Site Location and Description**

- 1.1. The appeal site is located on the main street of the village of Slieverue village, Co. Kilkenny. The site accommodates an existing business 'Brendan Walsh Fruit and Veg'. The site is located between two residential properties. The appeal site is accessed from the main road running through the village within a 50km/hr speed limit zone. A primary school is located within 150m of the site on the opposite side of the road. The roadside boundary of the site consists of a stone wall and an evergreen hedge.

## **2.0 The Question**

- 2.1. Whether the building and its current use, that was granted permission as a Garage/ Store Class 4 under P478/84 which was built 30% larger than the plans submitted and is now used as a wholesale/ distribution business is or is not development and is or is not exempted development within the meaning of the Act.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

- 3.2. The declaration issued by Kilkenny County Council concluded that:
- (a) The building that was granted planning permission as a garage/ store Class 4 under planning reference P478/84 and was used as a wholesale/ distribution business is development and is exempted development.
  - (b) The area of building built approximately 30% larger than the plans submitted under planning reference P478/84 is development and is not exempted development.

### **3.3. Planning Authority Reports**

- 3.3.1. Planning Reports

- The Planning Report describes the elevational changes and considers that the elevational changes are exempted under Section 4(1)(h) of the Planning and Development Act. It is considered that the extension to the commercial premises is not exempted development.

#### 3.3.2. Other Technical Reports

- None.

### 4.0 Planning History

#### **PA Reg. Ref. 21203/ ABP Ref. ABP 310441.21**

Permission granted by the PA and the Board for the retention of two car parking spaces.

#### **PA Reg. Ref. 11/638/ ABP Ref. PL10.240884**

Permission originally sought for new entrance and boundary wall to commercial premises. This was amended to permission for new entrance and boundary wall to commercial premises which will include retention of cold room store and office extension and for permission to build canteen and toilet extension to existing store and revised notices were submitted in this regard.

Permission granted by PA and refused on appeal for two reasons relating to traffic and impacts on residential amenity.

#### **PA Reg. Ref. P478/84**

Permission granted for lorry garage including vegetable storage facility.

## **5.0 Policy Context**

### **5.1. Development Plan**

#### **Kilkenny County Development Plan 2021-2027**

The core strategy identifies that Slieverue is a rural town/ village as set out in Table 4.3. Slieverue is located within the Waterford MASP area. The site itself is within the designated settlement boundary for Slieverue as identified in Figure 4.23.

It is council policy in such rural towns and villages to encourage development of economic activity, services and infrastructure provision.

### **5.2. Natural Heritage Designations**

5.2.1. None relevant.

## **6.0 The Referral**

### **6.1. Referrer's Case**

- The main case made by the referrer is that the original building does not have permission. The original permission for the building was for a garage (P478/84) for domestic use and the change of use to commercial wholesale is unauthorised.
- The Planning Authority are now attempting to apply exemptions to a building that contravenes a planning condition and is unauthorised development.
- Concerns regarding impact on residential amenities.

### **6.2. Planning Authority Response**

- The response notes that Kilkenny County Council have no further comments/ observations in relation to this case.

### **6.3. Owner/ occupier's response**

- None.

### **6.4. Further Responses**

- None.

## **7.0 Statutory Provisions**

### **7.1. Planning and Development Act 2000 as amended**

#### **7.1.1. 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 ....'

#### **7.1.2. 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.

#### **7.1.3. Section 4 provides for Exempted Development**

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.

## **7.2. Planning and Development Regulations 2001 as amended**

7.2.1. For the purposes of interpretation, Article 5(1) within Part 2 of the Regulations referring to 'exempted development' provides the following definition that is of relevance in the consideration of this case:

- 'light industrial building' means an industrial building in which the processes carried on or the plant or machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

## **8.0 Assessment**

8.1. It should be stated at the outset of this assessment, that the purpose of the referral is not to determine the acceptability or otherwise of the commercial use and extension to same 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. Likewise, planning enforcement is a matter for the Planning Authority and does not fall within the jurisdiction of the Board.

The question asked is as follows:

'Is the building, and its current use, that was granted permission as a Garage/ Store Class 4 for P478/84 which was built 30% larger than the plans submitted, and is now used as a wholesale/ distribution business, development and if so is it exempt development.

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

8.2.1. Having regard to Section 2(1) and Section 3(1) of the Planning and Development Act 2000 as amended, it is considered that the development as described above, is development within the meaning of the act. These works fall within the definition of development.

### **8.3. Is or is not exempted development**

8.3.1. The main issue arises as to whether the development is or is not exempted development.

8.3.2. The Planning Authority report notes that permission was granted for a commercial use in 1984. The development permission was charged as a non-residential commercial Class 4 building use at the time of the permission consistent with its current business use. An additional side extension office area along the eastern elevation of the building was constructed which does not have permission and is not consistent with the plans and particulars granted under the parent permission. The report states that it is unknown when this was built but the KCC Senior Executive Technical considers that this was built outside the statutory timeframe over seven years ago and is therefore outside the timeframe for legal enforcement proceedings.

Other elevation design changes noted by the report include

- Larger vertical emphases to permitted two no. windows to side elevation
- Omission of two hardwood doors/glazed covered vents to front elevation
- Roof orientation relative to plans opposite to that approved
- Signage
- Additional door to side elevation

The planning report considers that these changes are exempted development and come under Section 4 (1)(h) of the Planning and Development Act.

A declaration was issued by Kilkenny County Council on the 19<sup>th</sup> of November 2021 as follows:

- (a) The building that was granted planning permission as a garage/ store Class 4 under planning reference P478/84 and was used as a wholesale/ distribution business is development and is exempted development.
- (b) The area of building built approximately 30% larger than the plans submitted under planning reference P478/84 is development and is not exempted development.

8.3.3. The referrer makes the case that the Planning Authority has not had regard to Condition 4 of the parent permission as follows:

‘The development shall be carried out and completed strictly in accordance with the conditions of this permission and specifications lodged with the application.’

It is stated that the Planning Authority have split the building and its use into two separate entities giving two separate findings. For the planning to do so it must be able to physically define where the 70/30% is on plans. The developer, when in the construction phase didn't work on the plans submitted and built an entirely different building, the building was done in its entirety at a onetime construction, an office was later added to the building. This office was refused retention for planning application 11/638.'

The referral goes on to describe aspects of the building which are not in compliance with the original permission together with impacts on residential amenity.

- 8.3.4. I consider that the alterations do not come under the scope of Section 4(1)h of the Planning and Development Act, 2000 (as amended). I consider that the works in question do 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 on both sides which are residential properties. I also note that the nature of the use has changed significantly from that originally granted - the wording of the notices in the original application was for a lorry garage including vegetable store. Whilst it is clear that a commercial use was granted, the description of use as simply a vegetable store is not in accordance with the current operations on the site. Information from the business owner on a previous appeal to the Board indicates that the business operates from 6.30am to 9.30pm and supplies fresh vegetables and prepared produce to restaurants, the catering industry and local retail stores. The works in question to this commercial premises do come under the scope of any of the categories of exempted development listed under Schedule 2 of the Planning and Development Regulations, 2001 (as amended).

#### **8.4. Restrictions on exempted development**

- 8.4.1. As I have determined that the proposal is development and is not exempted development, it is considered that the restrictions on exempted development are not relevant in this context.

## 9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** a question has arisen as to whether the building and its current use, that was granted permission as a Garage/ Store Class 4 under P478/84 which was built 30% larger than the plans submitted and is now used as a wholesale/ distribution business is or is not development and is or is not exempted development.

**AND WHEREAS** Martin and Deirdre Freyne of 16 The Village, Slieverue, Co. Kilkenny requested a declaration on this question from Kilkenny County Council and the Council issued a declaration on the 19<sup>th</sup> day of November, 2021 stating that

- (a) The building that was granted planning permission as a garage/ store Class 4 under planning reference P478/84 and used as a wholesale/ distribution business is development and is exempted development
- (b) The area of building built approximately 30% larger than the plans submitted under planning reference P478/84 is development and is not exempted development

**AND WHEREAS** Martin and Deirdre Freyne of 16 The Village, Slieverue, Co. Kilkenny referred this declaration for review to An Bord Pleanála on the 15<sup>th</sup> day of December, 2021:

**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, Planning and Development Regulations
- (b) the planning history of the site,
- (c) the nature of the current use,
- (d) the report of the planning inspector.

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

- (a) The building and its current use, that was granted permission as a Garage/ store Class 4 under P478/84 which was built 30% larger than the plans submitted constitutes development under section 3(1) of the Planning and Development Act, 2000, as amended,
- (b) the alterations to the design from the parent permission materially affects the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and therefore the works do not come within the scope of the exempted development provisions of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, and
- (c) there are no exemptions provided for in the Planning and Development Act 2000, as amended, and in the Planning and Development Regulations, 2001, as amended, by which such works would be 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 the building and its current use, which was built 30% larger than the plans submitted under P478/84 at Kilmurry, Slieverue, Co. Kilkenny is development and is not exempted development.

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made

thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

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Emer Doyle  
Planning Inspector

7<sup>th</sup> June 2024