



An
Bord
Pleanála

Inspector's Report ABP-312602-22

Question

Is the use of a permitted warehouse/light industrial unit, permitted under the planning reference 01/465 and amended by planning permission ref. 05/1335 and 14/216, as a wholesale warehouse is or is not development and if so, is or is not exempted development.

Location

Unit 27, Hebron Business Park, Kilkenny.

Declaration

Planning Authority

Kilkenny County Council

Planning Authority Reg. Ref.

DEC662

Applicant for Declaration

ACCHL LTD.

Planning Authority Decision

Is not exempted development

Referral

Referred by

ACCHL LTD.

Owner/ Occupier

ACCHL LTD.

Observer(s)

None

Date of Site Inspection

18th of October 2022

Inspector

Angela Brereton

1.0 Site Location and Description

- 1.1. The premises is located in the Hebron Business Park, off Hebron Road in Kilkenny City. It is on a cul-de-sac road and the subject unit no.27 is located on a corner site and has on-site parking and entrance to the road frontage. This Business Park contains a variety of different uses, including some light industrial and various wholesale warehousing and some cash and carry outlets. There is a large Post Office building at the southern end of the cul-de-sac.
- 1.2. Unit no.27 is currently in use as 'Aim Wholesale Cash and Carry'. There are a few signs on the building to this effect. There is an onsite parking area to the front.

2.0 The Question

- 2.1. Whether the use of a permitted warehouse/light industrial unit, permitted under planning permission reference 01/465 and amended by planning permission refs. 05/1335 and 14/216, as a Wholesale Warehouse does or does not constitute development, or in the alternative if it does constitute development, it is exempted development at Unit 27, Hebron Business Park, Kilkenny.

3.0 The Referrer's Case to the Planning Authority

- 3.1. This Application under Section 5 of the Planning and Development Act 2000, as amended was made to the Planning Authority on the 14th of September, 2021 and in summary included the following:
 - ACCHL Ltd has commenced trading as a wholesale warehouse operation at unit no.27 Hebron Business Park, Kilkenny, in reliance upon planning permission ref. 01/465. There were inaccuracies in the Council's response to their previous section 5 application (Ref. Dec 638) and they have not been able to get clarification in relation to those inaccuracies. For this reason, they require that the planning authority give the matter fresh consideration.
 - They note the planning history which includes reference to the original permission Reg.Ref.01/465 for the development of a warehouse/light industrial unit with associated office accommodation to include all associated site works.

- The 2001 planning permission was updated by the retention permission Reg.Ref. 05/1335. This provided for certain amendments to the original plan but the permitted use remained the same. Further permission (14/216) was granted for a change of use from warehouse/light industrial use to use as a sport and fitness centre. They provide that in relation to the unit the subject of this section 5 application (ground floor left), that use was never taken up.
- Since construction the only use carried out at the unit was unauthorised use as a furniture store. It appears this use ceased in or around 2012 and the unit has been vacant since.
- The unit the subject of this application has never been used for its intended and permitted use i.e. a Warehouse/Light Industrial unit.
- ACCIL Ltd has commenced trading as a wholesale warehouse at the location. The use entails the wholesaling of mixed variety of goods to trade customers. They employ 25 members of the local community at this location.
- It is confirmed that no works are proposed. For clarity, there is no intention to carry out any works, not have any works been carried out to date.
- Previous An Bord Pleanála determinations have confirmed that a wholesale warehouse falls within the definition of a warehouse.
- They submit that as the proposed (current use) as a wholesale warehouse is within the permitted use (as a warehouse/light industrial unit), there has been no material change for the purposes of section 3(1) of the Planning and Development Act 2000. As a result, there has been no development for the purposes of that section.
- As there was no permitted use of the unit since its construction there is no prior use against which intensity of use can be measured.
- In the alternative and strictly without prejudice to the submission above, they submit that any development is exempted by virtue of the application of Regulation 10 of the Planning and Development Regulations 2001 (as amended) as it consists of a change of use within class one of Part 4 of Schedule 2 of those Regulations.

- They request that the planning authority confirm by declaration that the proposed use of the unit as wholesale warehouse is not development for the purpose of section 3(1) of the Planning and Development Act or in the alternative, if the proposed use does constitute development, that the use is exempted development for the purpose of the 2000 Act.

4.0 Planning Authority Declaration

4.1. Declaration

On the 22nd of December 2021, Kilkenny County Council declared that:

The use of a permitted warehouse/light industrial unit, permitted under planning permission ref. 01/465 and amended planning permission ref.05/1335 and 14/216, to a wholesale at Unit 27, Hebron Business Park, Kilkenny is development, is a material change of use of this premises and is not exempted development.

4.2. Planning Authority Reports

4.2.1. Planning Reports

The Planner noted that the premises is located in the Hebron Business Park and that the site is located in an area zoned for the purpose of 'industrial/warehousing' in the Kilkenny City and Environs DP 2021-2027. That the zoning objective is 'to provide for industrial employment and related uses'. That wholesale premises are permitted under this zoning. Also permitted are single retail warehousing units.

They noted that there is no recorded heritage in the area.

They had regard to the planning history i.e P.14/216, P05/1335, P02/768 and P.01/465 and also to previous Section 5 history and to planning enforcement ENF20091. (Note -these are referred to in more detail in the Planning History Section below).

In summary, their Assessment includes the following:

Legislative Context

- They have regard to the relevant section 3(1) of the Planning and Development Act 2000 (as amended) – development. They note that the use of the premises permitted as a warehouse/light industrial unit as a wholesale warehouse development, being the subject of this application for a certificate of exemption as outlined, is classed as *development* under the said Act.
- Under Part 4 of the Planning and Development Regulations 2000 (as amended) the uses as defined include:
 - Class 4 – Light Industrial Building
 - Class 5 – A wholesale warehouse or repository.
- They refer to Condition no.2 of permission Reg.Ref.01/465 which provides a restriction on the use of the unit *solely for light industrial use and/or warehouse use for each unit within the development.*
- The subsequent permission under Reg.Ref. 05/1335 was for retention and completion of these units which included alterations to both the ground and first floors of these units.
- The change of use from existing warehouse/light industrial use to sport and fitness centre, (Reg.Ref. 14/216 relates) was implemented at first floor level but not at ground floor level.
- The unauthorised furniture store at ground floor level has been vacated and this unit has remained vacant ever since.
- They refer to the definition of a wholesale warehouse as provided in Part 2 Article 5 of the Planning and Development Regulations 2000 (as amended).
- The permitted use of this building is as a warehouse, which is a commercial building use for the storage of goods.
- As a commercial warehouse, the storage of goods is the prime use, but when as is the case of this unit, a member of the public can shop in the wholesale warehouse, buying both bulk and single items, this would be seen as a material change of use, where the storage and dispatching of goods is no longer the prime use, rather the sale of goods becomes the prime use.

- Thus, when the unit alters from a warehouse purely for storage of goods to a wholesale warehouse, there is a shift from commercial storage to a commercial sales element and the planning authority sees this as an intensification of the use of this premises and it would be classed as a material change of use, and thus requires the benefit of a change of use permission.
- They make their recommendation as per the Declaration noted above i.e: 'is development' and 'is not exempt development'.

4.3. Other Technical Reports

None noted on file.

5.0 Planning History

The Referral makes reference to the following history cases on the Site at 25-35 inclusive Hebron Business Park, Kilkenny:

- Reg.Ref.01/465 – Permission granted to McCorry's Construction Ltd, to develop a warehouse/ light industrial unit with associated office accommodation with all associated site works subject to conditions and in accordance with the plans submitted in that application. Condition no.2 is of note relative to the permitted use in Reg.Ref.01/465: *This grant of permission includes solely for light industrial use and/or warehouse use for each unit within the development.*

Reason: To clarify the detailed development proposals authorised by this permission.

- Reg.Ref.02/768 – Permission refused for a material change of use by Corry Construction Ltd to modify existing permission 01/465 to provide 1045sq.m of single storey furniture retail warehouse and associated site development works at Hebron Business Park. The reasons for refusal in summary considered that the proposed development would materially contravene the zoning policies and objectives of the Kilkenny DP 1994 and the Kilkenny Draft DP and would materially contravene a condition attached to a current

permission for development on the proposed development site and would be contrary to the proper planning and sustainable development of the area.

- Reg.Ref.05/1335 – Permission granted subject to conditions to Pat & Mary Corry for Retention and Completion of development to a warehouse/light industrial building, previously granted by planning permission 01/465. The application applied for was for the following:

- (1) Alterations to ground floor plan, to provide an amended internal layout, providing areas for ancillary offices, canteen, sanitary facilities, loading/unloading and central staircase;
- (2) Alterations to the first floor mezzanine plan to provide for an increase in floor area of approx. 855sq.m;
- (3) Alterations to front, rear and side elevations, providing windows, escape doors, external fire escape staircases, and a projecting canopy over the front door;
- (4) The increase of the overall building height and
- (5) All associated site development works including car parking, boundary treatment and landscaping.

Site at 25-35 inclusive Hebron Business Park.

Condition no.3 is of note relative to Reg.Ref 05/1335: *This grant of permission is solely for light-industrial and/or warehousing use only and strictly precludes the use of the building for retail/retail warehousing purposes.*

Reason: *To clarify the detailed development proposals authorised by this permission.*

- Reg.Ref.14/216 – Permission granted subject to conditions for a change of use from the existing warehouse/light industrial use to sport and fitness centre use for existing property at nos. 27-35 Hebron Business Park in accordance with the plans submitted.

Condition no.5 is of note: *This planning permission refers strictly to the use of the subject site as a sport and fitness centre only. No other leisure use other than that applied for shall operate from the site without first consulting and receiving separate*

written confirmation and if necessary or appropriate separate planning permission for Kilkenny County Council or An Bord Pleanala.

Reason: In the interest of clarity and orderly development.

Planning Enforcement

- ENF20091 – Enforcement Notice issued to the occupiers with regards unauthorised signage on this premises. The Planner’s Report states that this remains a live case.

Section 5 – History

Dec 638 by ACCIL posed the following question:

Is the change of use of permitted warehouse/light industrial unit permitted under planning permission reference 01/465 and amended by planning permission ref.05/1335 and 14/216, to a wholesale cash and carry, development and, if so, is it exempt development?

The Planning Authority that the change of use of a permitted warehouse/light industrial unit, permitted under planning permission ref.01/465 and amended by planning permission ref. 01/1335 and 14/216, to a wholesale cash and carry, is works, is development and is not exempt development.

6.0 Policy Context

6.1. Kilkenny City and Development Plan 2021-2027

This is now the pertinent plan.

Chapter 12 – Movement and Mobility.

This includes (Section 12.5.2) – Workplace Travel Plans. It notes the separate developments of Retail Warehousing and Warehousing and Distribution.

It is noted that Table 12.3: Car Parking Standards – distinguishes between the requirements of various types of uses i.e.:

Industry - 1 space for every 60m² gross industrial floor area and operational space to be determined by the P.A.

Warehousing – Each application to be determined by the P.A.

Retail Warehousing – 1 car space for every 35m² of net retail floor space.

Chapter 13 provides the Requirements for Development and this includes regard to the land use zoning objectives (Section 13.30 refers).

As shown on the Lane Use Zoning Map the site is located within the 'Industrial/Warehousing Zoning'.

This includes that permitted uses include industrial and warehousing

6.2. Retail Planning Guidelines 2012

These guidelines are aimed at ensuring that the planning system continues to play its role in supporting competitiveness and choice in the retail sector commensurate with promoting the vitality and viability of city and town centres thereby contributing to a high standard of urban design and encouraging a greater use of sustainable transport.

The Guidelines have five key policy objectives:

- Ensuring that retail development is plan-led;
- Promoting city/town centre vitality through a sequential approach to development;
- Securing competitiveness in the retail sector by actively enabling good quality development proposals to come forward in suitable locations;
- Facilitating a shift towards increased access to retailing by public transport, cycling and walking in accordance with the Smarter Travel strategy; and
- Delivering quality urban design outcomes.

Section 3 refers to Retailing and Spatial Planning and includes:

- o The need for any additional retail warehousing should be carefully assessed in view of the significant levels of recent provision and potential impacts on vitality and viability of city and town centres.

Section 3.8 notes the context for the provision of retail warehousing in Development Plans. This includes regard to the level of vacancy in town centres and the pressure

to entertain uses inappropriate to the edge-of-centre or out-of-centre locations of many of these developments.

Section 4.9 provides the criteria to be considered in a Retail Impact Assessment. This also has regard to the sequential approach.

Section 4.11 provides an Assessment of Specific Categories of Retail Development. Section 4.11.2 refers to Retail Parks and Retail Warehouses. This includes regard to the type of goods sold i.e. 'mainly bulky household goods'.

Annex 1 provides a Glossary of Terms to cover forms of retail development and types of retail location. This includes Types of Retail Floorspace, Types of Retail Goods (convenience and comparison) and includes definitions.

A Retail Warehouse is described as:

A large single level store specialising in the sale of bulky goods such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers.

A Retail Park:

A single development of at least three retail warehouses with associated parking.

Annex 2 – Assessing the Vitality and Viability of Town Centres. This includes regard to Health Check indicators.

Annex 5 – The Assessment of Retail Impact – criteria for consideration are provided.

6.3. Natural Heritage Designations

There are no natural heritage designations either within or immediately abutting the referral site. The site is some distance to the northeast of the River Nore SPA, and to the north of the River Barrow and River Nore SAC.

7.0 The Referral to the Board

7.1. Referrer's Case

On the 27th of January, 2022, An Bord Pleanála received a request for a review of the Declaration of Kilkenny County Council, from Owen Roche, Solicitor for ACCHL Limited, Unit 27, Hebron Business Park, Kilkenny. This includes the following:

- The Declaration of Kilkenny County Council, states, without explanation, that the use of the premises as a wholesale warehouse is development, is a material change of use of the premises and is not exempt development.
- They refer to the Sections 2(1) 'Development' and 3(1) 'Works' of the Planning and Development Act, 2000 (as amended). No works are proposed in relation to the premises, and as stated in their Application to Kilkenny County Council, there is no intention to carry out any works, nor have any works been carried out to date.
- Any changes that have been made to the interior of the premises fall under the category of exempted development, pursuant to Section 4(1) of the Planning and Development Act 2000.
- The permitted use attaching to this unit is warehouse/light industrial. As stated in their application to the Council dated 14th of September 2001, 'Wholesale warehouse' is defined at Article 5(1) of Part 2 of the Planning and Development Regulations, and previous An Bord Pleanála determinations have confirmed that a 'Wholesale warehouse' falls within the definition of a 'Warehouse'.
- They submit that the use as a wholesale warehouse is within the permitted use (as a warehouse/light industrial unit) and that there has been no material change for the purposes of Section 3(1) of the Planning and Development Act 2000.
- Planning Permission Ref. 14/216, which was for a change of use from the existing warehouse/light industrial use to sport and fitness centre for existing property, was granted, but never taken up and is considered abandoned.

- The existing planning permission Ref.01/465 was amended by permission 05/1335.
- They further submit that there are no reasons or explanation issued by the Council in their Declaration dated 22nd of December 2021. In this respect they refer the Board to the Supreme Court decision in Balz and Heubach v An Bord Pleanála and Cork County Council, Cleanrath Windfarms Limited {2019} IESC 90 Balz.
- They submit that Kilkenny County Council are in breach of their duty to them as Applicant, in their failure to issue reasons for the conclusion arrived at and referred to in their Declaration dated 22nd December 2021.
- They also submit that the Council erred in this Declaration and request the Board to carry out a Review of the Declaration, and to confirm that the use of a permitted warehouse/light industrial unit, permitted under Ref. 01/465 and amended by permission refs. 05/1335 and 14/216 as a Wholesale Warehouse does not constitute development, or in the alternative if it does constitute development, it is exempted development by virtue of the application of Regulation 10 of the Planning and Development Regulations 2001 (as amended), as it consists of a change of use within Class 1 of Part 4 of Schedule 2 of this Regulations.

7.2. Planning Authority Response

There is no response to the Referral from the Planning Authority on file.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000 (as amended)

Section 2

Section 2(1) of the Act states as follows:- In this Act, except where the context otherwise requires – ‘development’ has the meaning assigned to it by Section 3 ... “works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal

Section 3

Section 3(1) of the Act sets out the meaning of development as follows: 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) 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;

8.2. **Planning and Development Regulations, 2001 (as amended)**

Part 2 Exempted Development - Article 5.

“repository” means a structure (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than business incidental to such storage;

“wholesale warehouse” means a structure where business, principally of a wholesale nature is transacted, and goods are stored or displayed incidentally to the transaction of that business.

Article 6(1)

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2.

Article 9 Restrictions on exemption.

(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 Changes of use.

(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.

(2) (a) A use which is ordinarily incidental to any use specified in Part 4 of Schedule is not excluded from that use as an incident thereto merely by reasons of its being specified in the said Part of the said Schedule as a separate use.

Part 4 – Exempted Development – Classes of Use

Class 4 – Use as a light industrial building;

Class 5 - Use as a wholesale warehouse or as a repository

8.3. Legal Cases

The Referrer makes reference to a legal case:

They refer the Board to the Supreme Court decision in Balz and Heubach v An Bord Pleanála and Cork County Council, Cleanrath Windfarms Limited {2019} IESC 90 Balz, wherein O Donnell J concluded his judgment with the following statement:

It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given as to why they are not accepted, if indeed that is the case. This is fundamental not just to the

law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned and the public more generally, are to be expected to accept decisions with which in some cases they may profoundly disagree and with whose consequences they may have to live.

Regard is had to the Assessment below and a copy of this decision is included in the Appendix to this Report

9.0 Assessment

- 9.1.1. It should be stated at the outset, that the purpose of this referral is not to determine the acceptability or otherwise of the subject matter 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. The onus of proof is on the party seeking to prove the exemption, and the development in question must fall clearly and unambiguously within the terms of the exemption claimed.
- 9.1.2. Likewise, planning enforcement is a matter for the planning authority, and does not fall within the jurisdiction of the Board.

9.2. Is or is not development

- 9.2.1. The definition of development at s.3(1) of the Act provides that a material change of use of a structure or land would comprise development within the meaning of the Acts. The subject of this referral relates to a change of use from the permitted use as *light industrial/warehouse use* to as per the Question submitted – a wholesale warehouse. In this case I would consider that there is a material change of use from the permitted light industrial/warehouse use as permitted (Condition no. 2 of Reg.Ref.01/465 refers) and as amended by Reg.Ref.05/1335 (Condition no.3 refers). The latter restricts the building solely to light industrial and/or warehousing use only and strictly precludes the use of the building for retail/retail warehousing.
- 9.2.2. It is noted that neither of these conditions refers to use as a ‘wholesale warehouse’. Part 2 Article 5 (1) of the Planning and Development Regulations 2001, provides an

'Interpretation for this Part'. This includes regard to 'light industrial building' and 'wholesale warehouse'. The latter means: *a structure where business, principally of a wholesale nature is transacted, and goods are stored or displayed incidentally to the transaction of that business. A specific interpretation of what constitutes a 'warehouse' is not given, but it is generally used primarily for storage rather than for retail purposes. Permission has not been granted for a 'wholesale' or 'retail warehouse'.*

9.2.3. On site I noted that it appeared that the unit in question was being used more so as a retail warehouse. Unit no.27 is currently in use as 'Aim Wholesale Cash and Carry'. There are a few signs on the building to this effect. The one by the entrance doors provides details of opening hours. There is an onsite parking area to the front. While onsite, I visited the premises and found that it was selling a variety of goods from garden furniture, to smaller goods including hardware, bric a brac and toys. The majority of the goods were non-bulky items. There were cash desks and floor staff and it appeared to be open to the general public.

9.2.4. Regard is also had to the Retail Planning Guidelines 2012, which are Section 28 Guidelines (Planning and Development Act 2000 (as amended)). Section 4.11.2 refers to *Retail Parks and Retail Warehouses* and includes: *Due to the fact that the range of goods being sold from retail warehouse parks often includes non-bulky durables, there is potential for a detrimental impact on city/town centres as indicated by the increasing numbers of vacant units in urban centres where retail parks exist on the periphery. It also needs to be recognised that many bulky goods stores such as furniture retailers can and are accommodated in city and town centres.*

9.2.5. Having regard to these considerations, including relative to the planning history of the site, as noted above, it is my opinion that the change of use from permitted light industrial/warehouse use to wholesale warehouse or retail warehouse would constitute a material change in the use of this structure such that it would comprise development.

9.3. **Is or is not exempted development**

9.3.1. Under the Irish planning system, development can lawfully be carried out in either of the following circumstances:

- In accordance with the terms of the planning permission granted for it; or
- In the case of an exempted development, without planning permission but in accordance with the terms of the exemption.

9.3.2. The issue of relevance to this Referral is whether the wholesale warehouse use is deemed to be in accordance with the permissions granted, details have been noted in the Planning History Section above i.e.:

Condition no.2 is of note relative to the permitted use in Reg.Ref.01/465: *This grant of permission includes solely for light industrial use and/or warehouse use for each unit within the development.*

Reason: *To clarify the detailed development proposals authorised by this permission.*

Condition no.3 is of note relative to Reg.Ref 05/1335: *This grant of permission is solely for light-industrial and/or warehousing use only and strictly precludes the use of the building for retail/warehousing purposes.*

Reason: *To clarify the detailed development proposals authorised by this permission.*

9.3.3. The wording of these conditions and the restriction provided relative to the stated use is considered to be quite specific. Under Art. 9(1)(a)(i) of the Planning and Development Regulations 2001 (as amended) the use as extant would contravene these conditions, it is therefore submitted that the exemptions provided for under Art.6 and set out in the Second Schedule of the Regulations are not exempted in this case.

9.4. **Restrictions on exempted development**

9.4.1. Therefore, the limitation on exemptions set out at Art.9(1)(a)(i), namely that the development would not 'contravene a condition attached to a permission under the Act, or be inconsistent with any use specified in a permission under the Act' would apply. Article 10 (1)(b) relevant to contravention of conditions of a planning permission and Article 10(1)(c) inconsistency with any use specified are also of note i.e the development would contravene Condition no.2 of Reg.Ref.01/465 and Condition no.3 of Reg.Ref. 05/1335.

- 9.4.2. It is of note that in relation to Article 6 - Schedule 2 Part 1 – *Change of Use* – Class 14 does not provide an exemption relation to such a change of use.
- 9.4.3. In any event, it is not considered that it has been demonstrated in the details submitted, that the use for ‘wholesale warehouse’ or indeed ‘retail warehouse’ would fit into the interpretation of ‘light Industrial/or warehouse’ as provided in Article 5, Part 2 Exempted Development of the Planning and Development Regulations 2001 (as amended). Rather as seen on site, the existing use of the building would appear to fit more into ‘retail warehouse’ or indeed ‘retail unit’.
- 9.4.4. It is of note that Annex 1 of the Retail Planning Guidelines 2012, provides a ‘Glossary of Terms’ relative to ‘Types of Retail Floorspace’ which as noted in the Policy Section above a retail warehouse refers to: *A large single-level store specialising in the sale of bulky household goods such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for carborne customers. As the range of goods for sale are not in the main such ‘bulky items’, it could be argued that such usage would be more suited to a town centre location, having regard to the sequential approach, as provided by the said Guidelines. However, this consideration is more related to a planning application, rather than a subject for this Referral.*
- 9.4.5. Therefore, the exemption provided in Part 4 relative to *Classes of Use* i.e. Class 4 Use as a ‘light industrial building’ or Class 5 ‘wholesale warehouse or as a repository’ would not be applicable.

9.5. **Regard to Precedent Cases**

- 9.5.1. The Referral cases noted below while the uses are not particularly similar to those aforementioned in the current Referral, nevertheless, are of interest as they raise the issue of material change of use, relative to conditions limiting the use and relating to extant permissions for such sites. Copies of these decisions are included in the Appendix to this Report.
- 9.5.2. In Referral ABP-303868-19 a Question arose as to whether the operation of a toy shop in a retail warehouse in a bulky goods retail park at World of Wonder, Unit 3, Limerick Road, Shesherahkeale, Nenagh, Co Tipperary is or is not development or is or is not exempted development. In this case in summary the Board noted that it

materially contravened condition no.26 of the planning permission and decided that the operation of a toy shop in a retail warehouse in a bulky goods retail park at World of Wonder, Unit 3, Limerick Road, Shesherahkeale, Nenagh, Co Tipperary, is development and is not exempted development.

9.5.3. In Referral Ref. ABP-304548-19 a Question arose as to whether the change of use that has already occurred at premises owned by Kevin Wall and operated by Swift Engineering Ltd at Rathgory, Dunleer, Co. Louth, having regard to condition number 1 of planning permission register reference number 05/1008 is or is not development or is or is not exempted development. In this case in summary the Board noted that any exemption would be restricted having regard to the terms of a condition to the original planning permission. They decided that the change of use of a building previously granted planning permission under register reference number 05/1008 as a timber workshop for manufacturing of kitchen units, to its current use for steel fabrication, at Rathgory, Dunleer, Co Louth, is development and is not exempted development.

9.5.4. In Referral Ref.09. RL.2936 a Question arose as to whether the use of a portion of the overall premises for ancillary purposes, comprising multi-purpose display, reception, storage and sale activities at Unit WIE, Tougher's Business Park, Ladytown, Naas, County Kinsale is or is not development or is or is not exempted development. In this case in summary the Board conclusion included that the said change of use of part of the light industrial unit would contravene condition no. 2 of Reg. Ref. 05/1880 which limits the use of the units to solely for light industry/warehousing/associated vehicle parking and associated office uses and for no other uses. The Board considered that the change from light industrial unit uses to include the display and sale of goods constitutes a material change of use and is development and is not exempted development.

9.6. **Screening for Appropriate Assessment**

Having regard to nature and scale of the development and the nature of the receiving environment and the distance and lack of connections to the nearest European sites, 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 use of a permitted warehouse/light industrial unit, permitted under planning permission reference 01/465 and amended by planning permission refs 05/1335 and 14/216 as a Wholesale Warehouse is or is not development or is or is not exempted development at Unit 27, Hebron Business Park, Kilkenny:

AND WHEREAS ACCHL Limited requested a declaration on this question from Kilkenny County Council and the Council issued a declaration on the 22nd day of December, 2021 stating that the matter was development and was not exempted development:

AND WHEREAS ACCHL Limited referred this declaration for review to An Bord Pleanála on the 27th day of January, 2022:

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) Articles 6(1) and Articles 9(1) and 10(1)(b) and (c) of the Planning and Development Regulations, 2001, as amended,
- (c) the planning history of the site, which includes restrictions on the authorised use i.e.: condition number 2 of register reference 01/465 and condition no.3 of register reference 05/1335,

- (d) the nature of the current use of the site,
- (e) the submissions on file and the report of the Inspector:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) Unit number 27 has a permitted use as light industrial and/or warehousing use under planning permission reference numbers 01/465 and 05/1335.
- (b) Condition number 2 of planning permission reference number 01/465 and Condition number 3 of planning permission reference number 05/1335, restrict the subject unit to light industrial and/or warehouse use. The latter strictly precludes the use of the building for retail/retail warehousing purposes.
- (c) The sale of toys and other non-bulky items which as noted in the report of the Inspector does not come within the scope of a 'Retail Warehouse' for the sale of 'bulky goods' as defined in Annex 1 of the Retail Planning Guidelines 2000.
- (d) Accordingly the current use of Unit 27 as a retail unit is a change of use from the authorised use of this unit as light industrial and/or warehousing, and this change of use constitutes development, being a material change of use, having regard to the retail character and its material change of use, having regard to its retail character and its material external impacts (such as its possible impacts on town centre retailing, traffic and parking) on the proper planning and sustainable development of the area,
- (e) This material change of use:
 - (i) would be inconsistent with the use specified and included in the permission under planning register reference numbers 01/465 and 05/1335 for light industrial and/or warehousing, and would therefore not be exempted development having

regard to article 10(1)(c) of the Planning and Development Regulations, 2001, as amended, and

- (ii) materially contravenes condition number 2 of planning register reference number 01/465 and condition number 3 of planning register reference number 05/1335 and would therefore not be exempted development having regard to article 10(1)(b) of the Planning and Development Regulations, 2001, as amended.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the operation of a wholesale warehouse in a unit where there is permission for light industrial and/or warehousing at Unit 27, Hebron Business Park, Kilkenny is development and is not exempted development.

Angela Brereton
Planning Inspector

23rd of November 2022