



An
Bord
Pleanála

Inspector's Report ABP-312616-22

Question

1. Whether the current use of the premises at 10 Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a "market" on Fridays, Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under section 3 of the Planning Act.

2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations 2000(as amended) in so far as it is a change within Class1 of Part 4 of Schedule 2.

Location

10 Wickham Street and 25 Upper Gerald Griffin Street, Limerick

Declaration

Planning Authority

Limerick City and County Council

Planning Authority Reg. Ref.	EC69/21
Applicant for Declaration	Eva Clarke
Planning Authority Decision	Is not exempted development

Referral

Referred by	Eva Clarke
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Owner/ Occupier	Eva Clarke
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Observer(s)	None
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Date of Site Inspection	26 th January 2024
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Inspector	Lorraine Dockery
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1.0 Site Location and Description

1.1 The site comprises 10 Wickham Street and 25 Upper Gerald Griffin Street, Limerick. On inspection, the site was accessible, however the market was not taking place. Street signage attached to the Wickham Street entrance advertises for 6 food offerings. A number of food trailers and outdoor tables were evident. The site is partly open and partly covered, with a number of more permanent type shops opening onto the covered area, two with street frontage onto Upper Gerald Griffin Street.

2.0 The Question

1. Whether the current use of the premises at 10 Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a “market” on Fridays, Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under section 3 of the Planning Act.

2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations 2000 (as amended) in so far as it is a change within Class 1 of Part 4 of Schedule 2.

3.0 Planning Authority Declaration

3.1 Declaration

Refuse Exemption Certificate- A declaration under Section 5 of the Planning and Development Act 2000 (as amended) to state that the works as described above IS development and is NOT EXEMPT Development.

3.2 Planning Authority Reports

3.2.1 Planning Reports- Development Inspector

- Consider the said change of use to be development and not exempted development under section 3(2)(b) and section 4(1)(h) of the Planning and Development Act 2000 due to there being a material change of use by the intensification of single unit to a market with multiple units including for units for food.

3.2.2 Other Technical Reports

None

4.0 Planning History

None

5.0 Policy Context

5.1 Development Plan

The Limerick Development Plan 2022-2028 applies

Zoning- 'City Centre' which seeks 'To protect, consolidate and facilitate the development of the City Centre commercial, retail, educational, leisure, residential, social and community uses and facilities'.

3.4.3.2 Living Limerick City Centre Initiative- seeks to make positive, innovative and transformational change to revitalise the centre of Limerick City

3....A critical element of this is to animate the streets with installations, events, markets, etc. while demonstrating the new Limerick brand.

5.7.12 Casual Trading

5.8.21 Limerick's Food Sector

5.2 Natural Heritage Designations

The nearest designated site- Lower River Shannon SAC (Site Code: 002135) is located approximately 0.7km from the subject site.

6.0 The Referral

6.1 Referrer's Case

- Considers planning authority has incorrectly interpreted legislation with regard to the meaning of 'development' in accordance with section 3(2)(b) of the Planning Act
- Planning authority accepts that established use of premises is retail/shop for visiting members of the public- Article 5(1) of Planning Regulations gives definition of 'shop'. Notwithstanding this acknowledgement, planning authority concludes that as the premises is now being used by a number of different stall holders, which are setting up daily for the market it must be considered under Section 3(2)(b) of the Act. Considers that this is not appropriate given the established and accepted use of site as retail. No material difference between the established retail use and the existing retail use of the land thus a material change of use cannot have occurred
- Cites ABP-305080-19 in support of argument relating to continuous use of premises
- Submits that as there is an established use of the site as a shop, the use of premises as a market is a continuation of same use, namely use of premises for sale of goods. Refutes planning authority claim that it cannot be considered a shop. Current function and layout of market does not differ from the form and function of a department store which is an established retail use. Some department stores e.g. Debenhams, Brown Thomas are also marketplaces with similar operational characteristics, namely smaller retailers with their own individual stalls. Previous use as tool shire shop both in open yard and internally involved movement and placement of goods for display not dissimilar to movement and placement of tables for display of goods in market
- Conclusion of planning authority that the works required to facilitate the use of the premises as a 'market' do not come within the scope of exemptions of

section 4(1)(h) lacks justification. Does not establish how works that affect only the interior of the structure would 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. Does not consider this to be an intensification of use (reduction in hours of use from 55hr30mins per week tool hire to 19hrs30mins market)

- No definition of market within legislation- cites Mahon V Dublin Corporation and Galway County Council v Lackagh Rock Ltd regarding test for materiality. Contends that essential character of established use of premises is unchanged and that this is a less intensive form of retailing due to reduction in vehicular traffic, operates outside of peak hours and more compatible with sustainable modes of transport than tool hire. Change of use cannot be considered 'material' on grounds of intensification.

5.2 Planning Authority Response

None

5.3 Further Responses

None

6 Statutory Provisions

6.1 Planning and Development Act, 2000

Section 2(1)

In this Act, except where the context otherwise requires –

"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"

“structure” as any building, structure, excavation or other thing constructed or made on, in or under any land, or part of a structure so defined, and-

- (a) where the context so admits, includes the land on, in or under which the structure is situate

In Section 3 “development” is defined as

- (1) 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.

- (2) For the purposes of subsection (1) and without prejudice to the generality of that subsection—
 - (a) where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or
 - (b) where land becomes used for any of the following purposes—
 - (i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods,
 - (ii) the storage of caravans or tents, or
 - (iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders’ waste, rubbish or debris,

the use of the land shall be taken as having materially changed.

In Section 4 (1) the following shall be exempted development for the purposes of this Act

- (k) development consisting of the use of land for the purposes of a casual trading area (within the meaning of the Casual Trading Act, 1995);

6.2 Planning and Development Regulations, 2001

Article 6 of Part 2 of the Regulations provides that subject to Article 9, certain classes of development specified in Schedule 2 shall be exempted development for the purposes of the Act, subject to the conditions and limitations specified in Column 2

Article 10, Part 4 of Schedule 2- Exempted Development- Classes of Use

Class 1- Use as a shop

Class 37 of the P & D Regulations (Schedule 2, Part 1) states that the following is exempted development

‘Development consisting of the use of land for any fair, funfair, bazaar or circus or any local event of a religious, cultural, educational, political, social, recreational or sporting character and the placing or maintenance of tents, vans or other temporary or moveable structures or objects on the land in connection with such use’

Provided that it complies with the following conditions/limitations:

- 1) The land shall not be used for any such purposes either continuously for a period exceeding 15 days or occasionally for periods exceeding in aggregate 30 days in any year; and
- 2) On the discontinuance of such use the land shall be re-instated save to such extent as may be authorised or required by a permission under the Act.

6.3 Previous Board References/Referrals

RL2813 – Junction of Ravens Rock Road and Carmanhall Road, Sandyford Industrial Estate, Dublin 18. Whether a country market to operate occasionally for periods not to exceed in aggregate 30 days in any year is or is not exempted development. The Board concluded that the holding of a country market comes

within the meaning of a “fair” for the purposes of Class 37. Accordingly, it was decided that a country market to operate occasionally for periods not exceeding 30 days in any year is development and is exempted development.

RL3171- Northern and southern banks of the Grand Canal, adjacent to Percy Place, Dublin 4 and Warrington Place, Dublin 2. Whether or not the operation of a public market for a period not exceeding 30 days per year is or is not development or is or is not exempted development. The Board concluded that the operation of a public market for a period not exceeding 30 days per year is development and is exempted development.

7 Assessment

7.1 The question under consideration in this referral is as follows:

1. Whether the current use of the premises at 10 Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a “market” on Fridays, Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under section 3 of the Planning Act.

2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations 2000 (as amended) in so far as it is a change within Class1 of Part 4 of Schedule 2.

7.2 Is or is not development

7.3 Under Section 3(2)(b)(i) of the 2000 Act, where land has become used for the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods, the use of the land shall be taken as having materially changed. It is considered, therefore, that the use of the land for the operation of a market involving the keeping of stalls and food trucks constitutes a material change of use

amounting to development.

7.4 Is or is not exempted development/ Restrictions on exempted development

7.5 It is accepted by all sides that there is an established use of the premises as a shop (most recently a tool hire shop), albeit that there is no planning history relating to this. There is an open yard to the rear of the building and it is this area that is being utilised as the market (noted also that the area is partly covered over). It is stated in the file that the number of stalls approximately 30. I noted at the time of my site visit, that there was advertising for 6 no. food operators on signage at the main entrance. The market was not operational at the time of my site visit, but a number of food trucks were evident on site, together with associated seating areas. I note that there are three more permanent retail units opening onto what could be described as the market area. These were open/opening at the time of my site visit and it appears that they do not operate by the market hours. The referrer submits that as there is an established use as shop, the use of premises as a market is a continuation of same use, namely the use of the premises for sale of goods. The referrer further refutes the planning authority claim that it cannot be considered a shop and notes that there is no definition in legislation for 'market'. They further contend that the current function and layout of market does not differ from the form and function of a department store which is an established retail use.

7.6 The planning authority notes the definition of 'shop' under Article 5(1) as 'a structure used for any or all of the following purposes, where the sale, display or service is principally to the visiting public: (a) for the retail sale of goods and (d) for the sale of sandwiches or other food for consumption off the premises, where the sale of such food is subsidiary to the main retail use'. The planning authority accepts that there was a shop on the premises but are not satisfied that the change of use to a market with 30 stalls can be still considered a shop. They consider there to be a material change of use from shop to market and reference section 3(2)(b) of the Act in stating that as the premises is not being used by a number of different stall holders which are setting up daily for the market, it must be considered development under Section 3(2)(b) of Act.

7.7 I acknowledge the definition of 'shop' under the legislation (under Article 5(1) of the Planning and Development Regulations, 2001, as amended) and note also that there appears to be no legal definition in the legislation for 'market'. I note that in previous referrals, the Board considered the operation of a public market as constituting a 'fair' (RL3171 and RL2813). They did not consider the public markets to represent a shop. The term 'fair' is referenced in Class 37 of the P & D Regulations (Schedule 2, Part 1). In these above referenced referrals, the Board relied on two definitions of the word 'fair'- The Compact Oxford English dictionary, where it is given as: "an event at which people, businesses, etc. display and sell goods" and (b) The Cambridge Dictionary Online, where it is given as "a large public event where goods are bought and sold, usually from tables which have been specially arranged for the event, and where there is often entertainment". Notwithstanding the previous use of the site as retail, I consider that the referral before me could be most accurately described as a 'fair', based on these definitions, rather than a 'shop'.

7.8 I note that the Cambridge dictionary defines 'market' as 'a place or event at which people meet in order to buy and sell things' while a 'shop' is defined as 'a place where you can buy goods or services'. The Oxford dictionary defines 'market' as 'an occasion when people buy and sell goods; the open area or building where they meet to do this' while 'shop' is defined as 'a building or part of a building where you can buy goods or services'. It is clear to me that while both 'shop' and 'market' are involved in the buying/selling of goods, there is more of a focus on the occasion/meeting with a market than a shop. I am of the opinion that market in this sense is more akin to a 'fair' than a 'shop'.

7.9 As stated above, I note that in previous referrals, the Board considered the operation of a public market as constituting a 'fair' (RL3171 and RL2813) and therefore it is my opinion that the market, the subject of this current referral, would come within the scope of Class 37 provided that it complies with the conditions and limitations. The first condition is that the land shall not be used for any such purposes, either continuously for a period exceeding 15 days or occasionally in aggregate 30 days in any year. It is stated in the documentation that the market operates weekly Friday, Saturday and Sundays for 19hrs30mins per week. At the time of my site visit on a Friday afternoon, the market was not operational (however it is stated on social

media that it will resume of Feb 3rd 2024). It is therefore considered that the use does not comply with this condition, given that it exceeds 30 days in any one year. The second condition states that on the discontinuance of such use, the land shall be reinstated save to such an extent as may be authorised or required by a permission under the Act. It is unclear, based on the information before me, if at the end of each market, the stalls and all equipment are removed from the area and is returned to the manner in which it had been prior to the setting up of the markets. Certainly, there were closed food trucks and associated seating on site at the time of my site visit.

7.10 I note that certain development is exempted by virtue of Section 4(1)(k) of the Principal Act, which reads:

Development consisting of the use of land for the purposes of a casual trading area (within the meaning of the Casual Trading Act, 1995)

7.12 I note that the Board considered this issue in respect of the country market in Sandyford, Co. Dublin (RL2813). It was considered, in that instance, that the market use did not come within the scope of Section 4(1)(k) as the market was being operated on private lands. Section 2 of the Casual Trading Act 1995 defines “casual trading” as selling goods at a place (including a public road) to which the public have access as of right or at any other place that is a casual trading area. As such, it is considered that this development does not come within the scope of Section 4(1)(k) of the 2000 Act, as amended as the market is located on private lands.

7.13 Based on the above, I do not consider this referral to be exempted development under Article 10 of the Planning and Development Regulations 2000 (as amended) in so far as it is not a change within Class 1 of Part 4 of Schedule 2.

7.14 Therefore, on the basis of all of the above, it is considered that the operation of the public market for more than 30 days in any one year constitutes development and is not exempted development as it does not come within the scope of Class 37 of

Schedule 2, Part 1 of the Planning and Development Regulations 2001 (as amended).

8 Recommendation

8.1 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 current use of the premises at 10 Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a “market” on Fridays, Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under section 3 of the Planning Act.

2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations 2000(as amended) in so far as it is a change within Class1 of Part 4 of Schedule 2:

AND WHEREAS Eva Clarke requested a declaration on this question from Limerick City and County Council and the Council issued a declaration on the 04th day of January, 2022 stating that the matter was development and was not exempted development:

AND WHEREAS Eva Clarke referred this declaration for review to An Bord Pleanála on the 28th day of January, 2022:

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, as amended, and,
- (c) Class 37, Part 1, Schedule 2 of the Planning and Development Regulations, 2001, as amended;
- (d) The meaning of the word “fair” including in
 - (i) The Compact Oxford English dictionary, where it is given as: “an event at which people, businesses, etc. display and sell goods” and
 - (ii) The Cambridge Dictionary Online, where it is given as “a large public event where goods are bought and sold, usually from tables which have been specially arranged for the event, and where there is often entertainment”.
- (e) The submissions received by the Board and the report of the Inspector:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) Class 37 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, provides, subject to certain conditions and limitations, for the exemption from the need to obtain planning permission for certain developments, including those constituting a “fair”
- (b) The operation of the public markets constitutes a “fair”
- (c) The said public markets do not comply with the conditions and limitations of the said Class 37 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001-2011, as amended

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act, hereby decides that the use of the premises on Fridays, Saturdays and Sundays is development and is not exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Lorraine Dockery
Senior Planning Inspector

29th January 2024