



An
Bord
Pleanála

Inspector's Report

ABP-313171-22

Development	Change of use of ground floor Medical Practice to Pharmacy retail unit, associated site works.
Location	Newpark Primary Care Centre , Golf Links Road , Newpark, Co Kilkenny
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	211020
Applicant(s)	Lou Investments Healthcare Kilkenny Ltd
Type of Application	Permission
Planning Authority Decision	Refuse x 1
Type of Appeal	First Party
Appellant(s)	Lou Investments Healthcare Kilkenny Ltd
Observer(s)	1) Newpark Life Pharmacy 2) Eurospar Kilkenny
Date of Site Inspection	14 th May 2022
Inspector	Mary Crowley

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1.0 Site Location and Description

- 1.1. The appeal site is located within an established purpose built 3 storey Community Resource Centre, a relatively new development located within Kilkenny City. The property within which the additional healthcare floor space is proposed is located adjacent to an existing neighbourhood centre on land which overlooks open / recreational space. A set of photographs of the site and its environs taken during the course of my site inspection is attached. Together these serve to describe the site and location in further detail.

2.0 Proposed Development

- 2.1. Permission is sought for development, to include the following:
 - 1) The material change of use of part (Area: 155m²) of the ground floor general medical practice use (previously granted under planning permission 18/59); to a new pharmacy retail unit, which will now operate as a separate unit
 - 2) Reconfiguration of the existing internal layout & all associated site development works

3.0 Planning Authority Decision

3.1. Decision

- 3.1.1. Kilkenny County Council issued notification of decision to refuse permission for the following reason:
 - 1) *The proposed change of use from general medical practise rooms to retail for the purposes of a new pharmacy retail unit would contravene materially the zoning objective for the area indicated in the Kilkenny City and County Development Plan 2021 – 2017 for the zoning of land for the use solely or primarily as Amenity / Green Links / Biodiversity / Conservation / Open Space / Recreation. Having regard to the above, is considered that the proposed development will be contrary to the proper planning and development of the area.*

3.2. Planning Authority Reports

3.2.1. Planning Reports

- The **Case Planner** recommended that planning permission be refused for 1 no reason relating to the proposed use materially contravening the current development plan. The notification of decision to refuse permission issued by Kilkenny City & County Council reflects this recommendation to refuse permission.

3.2.2. Other Technical Reports

- Water Services – No objection
- Road Desing – No objection

3.3. Prescribed Bodies

3.3.1. None

3.4. Third Party Observations

- 3.4.1. There are 2 no observations recorded on the planning file from (1) Newpark Life Pharmacy and (2) Eurospar Kilkenny. The issues raised relate to noncompliance with the zoning objective for the site, not in compliance with the Retail Planning Policies for Kilkenny and the requirement for the pharmacy.

4.0 Planning History

- 4.1. There was a previous planning application on this site that may be summarised as follows:

- **Reg Ref 18/59** – Planning permission granted by way of a material contravention for a new 3 storey primary healthcare centre (4,914.8sqm) to provide for HSE health and social care services and General Practise.

- 4.2. It is noted that there is a further, more recent appeal also on this site that may be summarised as follows:

- **ABP-313026-22 (Reg Ref 211021)** – Kilkenny City & County Council refused planning permission for 2 no reasons for development to include the following:

- 1) The Material change of use; of part (Area: 176m²) of the ground floor Community Resource Centre use (previously granted under planning permission 18/59); to healthcare use and
- 2) Reconfiguration of the existing internal layout & all associated site development works.

The reasons for refusal are as follows:

- 1) *The proposed change of use from Community Resource Centre to Healthcare would materially contravene the zoning objective for the area indicated in the Kilkenny City and County Development Plan 2021 – 2017 for the zoning of land for the use solely or primarily as Amenity / Green Links / Biodiversity / Conservation / Open Space / Recreation. Having regard to the above, is considered that the proposed development will be contrary to the proper planning and development of the area.*
- 2) *The proposed change of use from Community Resource Centre to Healthcare use would contravene Condition No 1 of the Planning Ref P18/59 and would therefore be contrary to the proper planning and sustainable development of the area.*

5.0 Policy Context

5.1. Development Plan

- 5.1.1. The operative plan for the area is the **Kilkenny City & Environs Development Plan 2021 – 2027**. The appeal site is within the developed Primary Care Centre is located on land zoned “*amenity / green links / biodiversity / open space / recreation*”. Under the current zoning, the Development Plan Objective is to “*allow for green links and biodiversity conservation and to preserve, provide and improve recreational open space*”. The only permissible use under this zoning is open space. Uses that are open for consideration include sports clubs, recreational buildings, stands, pavilions, agricultural uses, public and service installations.
- 5.1.2. Section 13.31 **Non-Conforming Uses** sets out the following:

Throughout the county there are uses which do not conform to the zoning objectives for the area. Extensions and improvement of premises

accommodating these uses may be permitted where the proposed development would not seriously injure the amenities of the area or prejudice the proper planning and development of the area. In some cases, the Planning Authority may encourage relocation of permitted incompatible uses, for example by exchange of sites.

5.2. Natural Heritage Designations

5.2.1. The site is not located within a designated Natura 2000 site.

5.3. EIA Screening

5.3.1. Having regard to the nature and scale of the proposed development, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environment impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

6.0 The Appeal

6.1. Grounds of Appeal

6.1.1. The first party appeal against the notification of decision to refuse permission has been prepared and submitted by Peter Thompson on behalf of Lou Investments Healthcare Kilkenny Limited and may be summarised as follows:

- That part of the medical centre proposed as a pharmacy was identified in the permitted layout plans as a GP reception (one of two on that wing of the ground floor), an admin office and 3 of 11 proposed GP consulting rooms. The pharmacy is proposed on that part of the ground floor closest to the Golf Links Road to the site.
- **Material Contravention** – It is considered that the proposed development is not in material contravention of the Development Plan. Guidance towards determining what might constitute a material contravention can be found in the judgement of Barron J in *Roughan v Clare County Council* (1996). A full and rigorous

assessment of the proposal against the tests outlined in this judgement would have been appropriate in the present case as follows:

- 1) *The location of the proposed development* – The property within which the additional healthcare floor space is proposed is located adjacent to an existing neighbourhood centre on land which overlooks open / recreational space.
- 2) *The planning history of the site or area* – The developer of the primary care centre delivered on the provision of the open space originally designed to serve the Lakeside Housing Estate as a community parkland, in consultation with Kilkenny County Council. The developer also undertook the completion of the housing estate common areas (roads, footpaths, services, lighting etc) and provided the sports ground for St Johns School. It is understood the works to complete the estate totalled c€2.5m and the parkland c€600,000. There will be no reduction in zoned *Amenity / Green Links / Biodiversity / Open space / Recreation* and there are no further areas to be developed for such use. The proposed development will, therefore, have no impact on the open space / recreational space use.
- 3) *The objectives for the Development Plan* – The Development Plan objective for the “amenity / green links / biodiversity / open space / recreation” zoning is to allow for green links and biodiversity conservation and to preserve, provide and improve recreational open space. The change of use within an existing building will have no impact on this objective or result in any loss of green open space.
- 4) *Opposition by Local Interests* – There were no objections from residents in the vicinity or the occupants of the primary care centre, including the HSE. The only objections were on behalf of the Eurospar supermarket and an existing pharmacist in the Newpark neighbourhood centre. The original justification for granting the location of the primary care centre was its proximity to the neighbourhood centre and the synergy between uses. There are excellent footpath connections along Golf Links road and, those parking at the primary care centre regularly walk to the neighbourhood centre rather than driving and vice versa.
- 5) *If there are real of substantial grounds in the context of planning law for opposing the development* – There are no such reasons. Indeed, there are

many instances where pharmacies have been permitted in edge or out of centre locations. It is considered that the provision of the pharmacy as proposed, within the existing primary care centre, will be convenient for patients and compatible with the existing primary care centre use. It is submitted that the proposed use is not in material contravention of the Development Plan Zoning. The existing primary care centre is a non-conforming use within the wider *Amenity / Green Links / Biodiversity / Open Space / Recreation* zoning and the incorporation of the pharmacy is an improvement to the offer within the centre which is compatible with the existing use and convenient for patients.

- **Impact on Existing Permitted Use** – It is noted in the Planners report that the primary driver of the material contravention in permitting planning application 18/59 was the community gain from having an HSE primary care centre in the immediate area. The Development Plan Core Strategy, Neighbourhood Strategy and zoning provide for the city to expand to the west in Loughmask and the Breaghagh Valley neighbourhoods; not in the east of the city where the primary care centre is located. The case for the change of use of the proposed community floorspace to healthcare is made in a separate planning appeal and should not detract from consideration of the current proposal on its individual merits or the established principle that a pharmacy is a compatible use within a primary care centre and beneficial to patients.

6.2. Planning Authority Response

6.2.1. No further comment

6.3. Observations

6.3.1. There are 2 no observations recorded on the appeal file from (1) Newpark Life Pharmacy and (2) Eurospar Kilkenny. The issues raised may be summarised as follows:

- Development is not in accordance with the zoning objectives for the city as set out in the Development Plan.
- Development is not in accordance with the Retail Planning Policies for Kilkenny as set out in the Development Plan. There are adequate pharmacy services available

to the Primary Care Centre in the adjacent Newpark Shopping Centre with convenient level access using the footpath between them.

- The argument for a retail pharmacy within the Primary Care Centre as a matter of convenience for patients does not stand up to scrutiny as the majority of prescriptions are sent by doctors to a pharmacy of the patients choice using Healthmail.

6.4. Further Responses

6.4.1. None

7.0 Assessment

7.1. I would draw the Boards attention to a concurrent appeal at this site: ADP-313026-22 for a change of use from community resource centre to health centre use. It is recommended that both appeals be considered together.

7.2. Having regard to the information presented by the parties to the appeal and in the course of the planning application and my inspection of the appeal site, I consider the key planning issues relating to the assessment of the appeal can be considered under the following general headings.

- Refusal Reason No 1 – Zoning
- Impact to Existing Pharmacy Use
- Other Issues
- Appropriate Assessment

7.3. Refusal Reason No 1 – Zoning

7.3.1. Kilkenny County Council in their first reason for refusal state as follows:

The proposed change of use from general medical practise rooms to retail for the purposes of a new pharmacy retail unit would contravene materially the zoning objective for the area indicated in the Kilkenny City and County Development Plan 2021 – 2017 for the zoning of land for the use solely or primarily as Amenity / Green Links / Biodiversity / Conservation / Open Space

/ Recreation. Having regard to the above, is considered that the proposed development will be contrary to the proper planning and development of the area.

7.3.2. The appeal site is within the developed Primary Care Centre on lands zoned “amenity / green links / biodiversity / open space / recreation” in the Kilkenny City and County Development Plan 2021 – 2027 where the objective is to “allow for green links and biodiversity conservation and to preserve, provide and improve recreational open space”. The only permissible use under this zoning is open space. Uses that are open for consideration include sports clubs, recreational buildings, stands, pavilions, agricultural uses, public and service installations. The proposed pharmacy use is considered to be a non-conforming use.

7.3.3. Section 13.31 Non-Conforming Uses of the Development Plan sets out the following:

Throughout the county there are uses which do not conform to the zoning objectives for the area. Extensions and improvement of premises accommodating these uses may be permitted where the proposed development would not seriously injure the amenities of the area or prejudice the proper planning and development of the area. In some cases, the Planning Authority may encourage relocation of permitted incompatible uses, for example by exchange of sites.

7.3.4. In 2018 a new 3 storey primary healthcare centre (4,914.8sqm) was granted permission (Reg Ref 18/59) by way of a material contravention on land zoned for “amenity / green links / biodiversity conservation” in the Kilkenny City & Environs Development Plan 2014 – 2020. A medical centre was not a permitted use under the zoning for the site and Members of Kilkenny County Council agreed to a Material Contravention of the Plan. The facility has now been constructed and provides a broad range of community healthcare services and supports beyond the setting of a hospital, which is part of the HSE national strategy to provide such facilities at community level in Ireland.

7.3.5. Notwithstanding the material contravention that was granted under 18/59, the zoning under the Kilkenny City & County Development Plan remains “amenity / green links / biodiversity conservation / open space / recreation”, essentially unchanged from the 2014 – 2020 City and Environs Development Plan that was in place at the time of

granting of the material contravention. As stated previously a pharmacy use was and is an non-conforming use under this zoning designation.

- 7.3.6. Having regard to the planning history pertaining to the site together with the constructed primary care centre that is partly occupied by the HSE and other GP / private social and health care providers I consider that the proposed development for a change of use within a permitted primary care centre to be an acceptable non-conforming use that can add to the range of primary care services and facilities available to the community. I consider that to permit a change of use would not seriously injure the amenities of the area or prejudice the proper planning and development of the area and would be compliant with Section 13.31 Non-Conforming Uses of the Development Plan. The zoning, therefore, does not, in my view, present an impediment to granting planning permission
- 7.3.7. I note that the planning authority's reason for refusal states that the proposed development materially contravenes the zoning objective for the area. Having regard to the permitted development on the site together with Section 13.31 Non-Conforming Uses of the Development Plan, reliance on the zoning objectives for the site is not, in my view, sufficiently specific so as to justify the use of the term "materially contravene" in terms of normal planning practice. The Board should not, therefore, consider itself constrained by Section 37(2) of the Planning and Development Act.
- 7.3.8. Recommended that the stated reason for refusal be set aside and permission granted for change of use.

7.4. Impact to Existing Pharmacy Use

- 7.4.1. Concern is raised in the observations to the appeal that there is an adequate supply of pharmacies in the immediate area and an additional pharmacy at this location is not required.
- 7.4.2. While the proposed pharmacy may impact on the existing pharmacies in the area it remains that it is not a function of the planning system to regulate competition between businesses. It should be acknowledged that the retail pharmacy is an auxiliary use to the GP medical rooms within the overall health complex, and I consider this to be a sustainable form of development. Further I am satisfied that a pharmacy is compatible with a primary care centre use.

7.5. Development Contributions

- 7.5.1. I refer to the Kilkenny Council Development Contribution Scheme 2016 – 2017 and the section entitled Exemptions from the payment of Development Contributions where it states that:

Where a planning permission is issued for a change of use, the Planning Authority may consider a waiver of the development charge or part thereof where the change of use does not lead to the need for new or upgraded infrastructure/services.

- 7.5.2. As set out in the development description above this is an application for the material change of use of part of the ground floor general medical practice use (previously granted under planning permission 18/59); to a new pharmacy retail unit. In this regard I refer to the parent application (Reg Ref 18/59 refers), where planning permission was granted for a new 3 storey primary healthcare centre (4,914.8sqm) to provide for HSE health and social care services and General Practise it is noted that Condition No 2 required the payment of a Section 48 financial contribution in the amount of €123,375.00.
- 7.5.3. Having regard to the exemptions from the requirement to make a payment for a change of use as set out above together with the planning history pertaining to the site I am satisfied that that no Section 48 development charge should be applied in this case. I further consider that to do so may result in a double payment. No Development Contribution charges are therefore applicable in this case.

7.6. Appropriate Assessment

- 7.6.1. Having regard to the nature and scale of the development and its distance to the nearest European site, no Appropriate Assessment issues arise, and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

8.0 Recommendation

8.1. Having due regard to the provisions of the Development Plan, together with all other issues arising, I recommended that permission be **GRANTED** for the following reasons and considerations.

9.0 Reasons and Considerations

9.1. Having regard to the zoning objective for the site in the Kilkenny City & Environs Development Plan 2021 – 2027 and the location of the site within the established Community Resource Centre, it is considered that, subject to compliance with the conditions set out below, the proposed development would be acceptable in terms of the policy requirements of the development plan, would not seriously injure the visual amenities of the area or the residential amenities of property in the vicinity and would not be prejudicial to public health. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

10.0 Conditions

1.	<p>The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.</p> <p>Reason: In the interest of clarity</p>
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Mary Crowley

Senior Planning Inspector

25th May 2022