



An
Bord
Pleanála

Inspector's Report ABP-318832-24

Question

Whether a material change of use arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.

Location

Unit no. 3 Fonthill Retail Park, Fonthill Road, Dublin 22.

Declaration

Planning Authority	South Dublin County Council
Planning Authority Reg. Ref.	ED16/0045
Applicant for Declaration	PKB Partnership
Planning Authority Decision	Is not exempted development

Referral

Referred by	PKB Partnership
Owner/ Occupier	PKB Partnership/Poundland Limited
Observer(s)	Poundland Limited

Date of Site Inspection

23 January 2025

Inspector

Claire McVeigh

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1.0 Site Location and Description

- 1.1. The subject site is located within the Fonthill Retail Park to the west of Liffey Valley Shopping Centre and south of the N4 within 1.5km of the M50 Dublin. Unit no. 3 Fonthill Retail Park is within a block of 3 no. units, both Unit 1 and Unit 3 have been sub-divided. The central unit (Unit 2) is in use by one occupier. To the front (east) and rear (west) of the retail warehouse is surface car parking and landscaped areas.
- 1.2. Unit no. 3 has been sub -divided to form no. 3 and no. 3 A. The section 5 referral relates to unit no. 3 currently in use by Dealz (Poundland Limited). Unit 3A is in use by Cash and Carry Kitchens and is accessed at the rear (western elevation).

2.0 The Question

The question as originally posed in the section 5 declaration request submitted on the 12 October 2016 to South Dublin County Council is:

“Whether a material change of use at retail unit no. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development”.

- 2.1. Following legal challenge of the section 5 referral to the Board the case, now remitted, is being considered having regard to the letter to the parties by the Board notifying that it proposes to take into account the following:
 - (i) The request for a declaration pursuant to section 5 of the Planning and Development Act, 2000 as amended as to whether a material change of use at retail unit no. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.
 - (ii) The proposed reformulation of the question so as to ask whether the use of a permitted retail warehouse unit to use as a discount store for the sale of small-scale convenience goods at unit number 3 Fonthill Retail Park,

Retail Road [sic], Dublin is or is not development or is or is not exempted development.

- (iii) The jurisdiction of the Board to make a declaration under section 5 of the 2000 Act having regard to the decision of the Court of Appeal in *Narcanon Trust v. An Bord Pleanala* [2021] IECA 307.

2.2. For clarity, noting the Board's correspondence with the parties, the reformulated question is:

“Whether the use of a permitted retail warehouse unit to use as a discount store for the sale of small-scale convenience goods at Unit Number 3, Fonthill Retail Park, Dublin is or is not development or is or is not exempted development”.

I acknowledge the concerns raised by both the owner PKB Partnership and current occupier of unit no. 3, Poundland, in respect to the wording of the question. I shall address these concerns in my assessment in section 9.0 of this report.

3.0 Planning Authority Declaration

3.1. Declaration

In respect to whether a material change of use at retail unit no. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development the planning authority made that declaration that it is considered not to be exempted development under the Planning and Development act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended) and therefore **does require** planning permission.

3.2. Planning Authority Reports

3.2.1. Planning Reports

- Further information requested on the 14 September 2016 in respect to the type of goods being sold on site.

- Considers that a retail warehouse was permitted on site and unit 3 was then subdivided into two units for the sale of bulky goods. It is considered therefore that the sale of non-bulky goods would constitute non-compliance with planning permission previously granted on site and would constitute a material change of use.

4.0 Planning History

Section 5 Declarations

Planning Authority register reference ED16/0025: The question sought by a third party 'Save Our Town Centres Limited' refers to whether a change of use from the former retail warehouse to use as a discount store for the sale of non-bulky convenience goods is or is not exempted development. The planning authority decided that the use constituted development and was not exempted development on 3 June 2016.

Planning applications relating to Unit no. 3

Planning authority register reference S96A/0741: Permission granted, May 1997, for site development, fencing and landscape works for a new Business and Industrial Park at Ballyowen, Fonthill Road, Dublin 22. An Environmental Impact Statement accompanies this application (*referred to as the infrastructure application*).

The decision to grant permission was subject to 24 no. conditions. Condition no. 2 is noted as it pertains to use, limiting office use:

Condition no. 2: This permission relates only to site development, fencing and landscaping works for the site and does not, in particular, commit or otherwise imply or infer the agreement of the Planning Authority to granting permission for the industrial building shown on the submitted drawings and located in the southern section of the site (to the north of Ballyowen Park) or roads marked 'possible future industrial road'. In the context of this permission 'industrial and business park' shall not include use of the site for offices other than offices ancillary to an industrial use. REASON: In the interests of clarity and the proper planning and development of the area.

Planning authority register reference S97A/0791 permission granted March 1998 (Applicant Gravenland Ltd.) for retail warehousing within the overall retail park (*referred to as parent permission and/or the 1998 permission*).

Planning authority register reference S99A/0265 ABP:PL06512272 Planning permission granted on appeal February 2000 (Applicant Heatmerchants Ltd) at unit no. 3 for the erection of a 550 sq.m mezzanine floor incorporating showroom, sales offices, toilets and new windows to west elevation.

Planning authority register reference S99A/0555 permission granted at Unit 3, Fonthill Retail Park (Applicant Heatmerchants Ltd.) November 1999 for the erection of a 244 sq.m mezzanine floor storage area at recently constructed retail warehouse development (S97A/0791).

Planning authority register reference SD15A/0152 permission granted at Unit 3, Fonthill Retail Park (Applicant PKB Partnership) for new internal subdivision of walls to create two units (Unit No. 3 984.6sq.m and Unit No. 3A 1051.9 sqm), new loading door arrangement at south elevation, new toilets, two no. new fire exit doors to north elevation, new glazed double doors/screen to east elevation and signage to west elevation (September 2015).

Condition no. 2 stated *'The range of goods to be sold in the extended retail warehouse unit shall be limited solely to 'bulky goods' (as defined in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the department of the Environment, Community and Local Government in April 2012), and shall not include the sale of toys, footwear, sportswear or other clothing. Reason: In order to prevent an adverse impact on the viability and vitality of the town area and so as not to undermine the retail hierarchy of the area'*.

Planning authority register reference SD17A/0094 PL 06S. 248674 retention permission refused for change of use of 670 square metres from retail warehousing to "shop", internal alteration consisting of the erection of internal walls and all associated works at Dealz, Unit 3 Fonthill Retail Park, Fonthill Road, Dublin.

Reason for refusal:

Having regard to the zoning provisions of the Development Plan for the area within which the site is located, 'Objective RW – to provide for and consolidate Retail

Warehousing’, the Retail Planning Guidelines for Planning Authorities’, issued by the Department of the Environment, Heritage and Local Government in January, 2012, the Retail Strategy for the Greater Dublin Area 2008-2016 and the retail hierarchy set out in the South Dublin County Development Plan 2016-2022, it is considered that the change of use to be retained would be contrary to policies and objectives aimed at restricting the role of retail warehousing to the retailing of bulky goods and would seriously injure the vitality and viability of existing designated town centres, and major retail centres in the vicinity. The change of use to be retained would, therefore, materially contravene the development plan and would be contrary to the proper planning and sustainable development of the area.

5.0 Other Referrals

- PL.2988: Unit Number 5, Sligo Retail Park, Carrowroe, Sligo the Board decided that the use of Unit Number 5 for the type and class of goods being sold by Homestore & More is development and is not exempted development.

I highlight for the Board that the retail element of unit no. 5, permitted under Planning Register Reference PL 04/383 with condition no. 18 amended by An Bord Pleanála appeal reference number PL 21.207870, is restricted to retail warehousing development only and the range of goods to be sold in the retail units are restricted to bulky household goods and goods generally sold in bulk (as defined in Annexe 1 of the Retail Planning Guidelines for Planning Authorities, 2000).

- RL.3445: The Board decided that the change of use from a former retail warehouse to use as a supermarket for the sale of non-bulky convenience goods including the retail sale of convenience goods directly to members of the public at ‘Your Fresh Today Extra’, N4 Axis Centre, Longford is development and is not exempted development.

In this decision the Board had regard to condition no. 1 of PL68.126135 which restricted the use of the premises to retail warehouse use only as defined in the Retail Planning Guidelines for Planning Authorities issued by the Department of Environment and Local Government in December 2000.

- RL2603: Butlerstown Retail Park, County Waterford the Board decided that (1) the amalgamation of two or more retail warehouse units to form a larger unit, (2) the sale of non-bulky goods within a newly constructed retail warehouse park, (3) the addition of a floor within a retail warehouse unit, and (4) the subdivision of a retail warehouse unit is development and is not exempted development.
- RL2308: Block K, The River Centre, Pelletstown, Dublin 15 the Board determined that the proposed subdivision of an existing anchor retail unit, to create two new retail units plus an internal shared lobby service area, does not constitute a material change in the use of any structure or other land.
- RL2241: 77-78 O'Connell Street, Clonmel, Tipperary the Board determined that the proposed subdivision into two shop units would give rise to increased commercial activity and would have material consequences in terms of the proper planning and sustainable development of the area.

6.0 Policy Context

6.1. South Dublin County Development Plan 2022-2028

- The subject site is zoned Objective RW 'To provide for and consolidated retail warehousing'.

Table 12.11: Zoning Objective RW: 'To provide for and consolidate retail warehousing'.

Use Classes Related to Zoning Objective	
Permitted in Principle	Advertisements and Advertising Structures, Car Park, Industry-Light, Motor Sales Outlet, Office less than 100 sq.m m, Open Space, Petrol Station, Public Services, Recycling Facility, Refuse Transfer Station, Retail Warehouse, Service Garage, Transport Depot, Warehousing, Wholesale Outlet.
Open for Consideration	Childcare Facilities, Enterprise Centre, Fuel Depot, Funeral Home, Garden Centre, Heavy Vehicle Park, Industry-General, Nightclub, Primary Health Care Centre, Restaurant / Café, Shop-Local , Veterinary Surgery.

Not Permitted	<p>Abattoir, Aerodrome / Airfield, Agriculture, Allotments, Bed & Breakfast, Betting Office, Boarding Kennels, Camp Site, Caravan Park-Residential, Cemetery, Community Centre, Concrete / Asphalt Plant in or adjacent to a Quarry, Conference Centre, Crematorium, Cultural Use, Data Centre, Doctor / Dentist, Education, Embassy, Guest House, Health Centre, Home Based Economic Activities, Hospital, Hotel / Hostel, Housing for Older People, Industry-Extractive, Industry-Special, Live-Work Units, Nursing Home, Office Based Industry, Offices 100 sq.m m-1,000 sq.m m, Offices over 1,000 sq.m m, Off-Licence, Outdoor Entertainment Park, Place of Worship, Public House, Recreational-Facility, Refuse Landfill / Tip, Residential, Residential Institution, Retirement Home, Rural Industry-Food, Science and Technology Based Enterprises, Scrap Yard, Shop-Major Sales Outlet, Shop Neighbourhood, Social Club, Sports Club / Facility, Stadium, Traveller Accommodation, Wind Farm, Work-Live Units.</p> <p><i>(my emphasis)</i></p>
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- The subject site is within the **Outer Horizontal Surface Dublin Airport**, the **Conical Surface Casement Aerodrome** and the Bird Strike Hazard Zone (12.11.6 of the development plan refers)
- Long term High-Capacity Public Transport Route mapped to the east of the subject site and a mapped cycleway (Cycle South Dublin) Liffey Valley SC to N4 and Coldcut Road.
- (Table 7.5) Six Year Road Programme, includes the Fonthill Road/N4 junction upgrade.

6.2. General Development Order/Retail Planning Guidelines

- 6.2.1. The Retail Planning Guidelines for Planning Authorities (2005) provides a useful policy background outlining the timeline of retail guidelines published since 1982 and for ease of reference I have included this in summarised form in Table 6.1 below:

Table 6.1:

Month/Year	Reference	<i>Commentary summary taken from 2005 Guidelines.</i>
August 1982	S.I. No. 264/1982 - The Local Government (Planning and Development) General Policy Directive. Repealed – replaced by S.I.No. 193/1998	This Directive provided general advice regarding large scale additions to existing retail shopping capacity in a locality. It has now become apparent that this Directive did not provide sufficiently focused and specific criteria for assessing proposals or for preparing development plans.
June 1998	S.I. No. 193/1998 - The Local Government (Planning and Development) General Policy Directive (Shopping) 1998. Revoked with saver ¹ January 2001.	This Directive repeated much of the generalised advice contained in the early Directive. The principal change, however, was to place an embargo on the grant of planning permission for any supermarket (or an extension to one) in excess of 3,000 square metres.
December 2000 came into effect from 1 January 2001.	Retail Planning Guidelines (issued by the Department of the Environment and Local Government).	
January 2005, take effect from 1 February 2005.	Retail Planning Guidelines for Planning Authorities	The 2005 guidelines update and replace the policy on retail development set out in the Local Government (Planning and Development) General Policy Directive (Shopping), 1998. These revised guidelines

¹ In the case of any application to a planning authority which is received by the planning authority before the date of coming into force of this Order, or any appeal to An Board Pleanála against a decision on such an application, the provisions of the Local Government (Planning and Development) General Policy Directive (Shopping), 1998 will continue to apply notwithstanding the revocation of the Directive.

		contain new policies regarding large retail warehouses.
April 2012	Retail Planning Guidelines (issued by the Department of the Environment, Community and Local Government)	Planning authorities are recommended to carefully consider the zoning of land for any additional retail warehousing development in their areas, given the level of provision of this category of development in recent years in and around the main centres of population, the levels of vacancy in such centres and thus pressure to entertain uses inappropriate to the edge-of-centre or out-of-centre locations of many of these developments.

6.3. Natural Heritage Designations

Proposed Natural Heritage Area (pNHA): Liffey Valley is approximately 900 metres north of the subject site.

Proposed Natural Heritage Area (pNHA) Grand Canal is approximately 2.3km south of the subject site.

7.0 The Referral

7.1. Referrer's Case

- On foot of the High Court Order the planning status of unit no. 3 as permitted under Reg. Ref. S97A/0791 (parent permission) has been clarified, with the Court confirming that the permission does not entail a restriction on retail warehouse use equivalent to that now found in the Retail Planning Guidelines.

- Questions the enforceability of conditions attached to Reg. ref. SD15A/0152, specifically condition no. 2 which would have resulted in a change of use via condition. Reference made to Simons on Planning Law (third edition, 2021) at para. 4-234 stating:

“It would be equally wrong to attempt to regulate development which is not the subject of the application for planning permission: for example, it would be wrong to seek to retrench on (unrelated) existing use rights²”.

- Site context and planning history outlined.
- In the case ED16/0025 PKB Partnership were not afforded the opportunity to provide any input into the assessment process.
- While Reg. Refs. ED16/0025 and ED16/0045 refer to the same land not only are the questions posed completely different, but the evidence presented on behalf of PKB partnership demonstrate a change in the planning facts and circumstances from the planning authority’s determination. Consideration of implications of Narconon Trust v An Bord Pleanála provide at section 4.6 of the submission.
- Contends that the newly formatted question is based on the Retail Planning Guidelines and is leading in its use of ‘discount store’ and ‘non-bulky convenience goods’.
- Sets out that the works undertaken were exempt in accordance with the provisions of the Planning and Development Act, 2000 (as amended) and the Planning and Development Regulations 2001 (as amended) and not under SD15A/0152.
- Suggests that basing the assessment of permitted retail use if unit 3 as permitted under the parent permission results in a different outcome for the referral.

² State (O’Hara and McGuinness Ltd) v An Bord Pleanála, unreported High Court, Barron J., 8 May 1986. See also Kelly v An Bord Pleanála unreported High Court, Flood J., 19 November 1993.

- Outline of works undertaken sections 4.2.1 – 4.2.4 which it is argued are not under SD15A/0152 rather under the exemption provisions contained in the Act and Regulations.
- Assessment of Condition no. 2 of reg. ref. SD15A/0152 against the provisions of the Development Management Guidelines, 2007 and Practice Note PN03 published by the Office of the Planning Regulator (OPR). Contends that condition no. 2 is ultra vires. Notwithstanding, contends that SD15A/0152 has not been implemented and condition no. 2 is therefore not relevant to the consideration of the subject referral.
- Review provided of the previous assessment by the Board of referral (RL 3520), now remitted.

7.2. Planning Authority Response

- None received.

7.3. Occupier's response – Poundland Limited

- Confirmed by the Court in the decision of Justice Ferriter that Planning Permission reference 97A/0791 dated 19 March 1998 ("1998 Permission") does not entail a restriction on retail warehouse use and use was not confined to use of the retail sale of bulky goods.
- Sub-division works were carried out at the premises, prior to occupation by Poundland, and upon examination of the planning register reference SD15A/0152 it is not evident that the sub-division works were carried out pursuant to this permission.
- Suggests that works may have been carried out pursuant to the exempted development provisions under the Planning and Development Regulations, 2001 (as amended).
- It is their position that the reformulation of the Section 5 referral is incorrect, and its predetermined characterisation of the retail unit gives rise to considerations that are not matters raised in the Section 5 referral. ABP are obliged in considering all of the factual circumstances to carry out a full *de*

novo review of the planning status, in light of the High Court Judgement and all of the relevant factual circumstances.

- Argues that the factual circumstances have changed with reference to the first section 5 referral, taking into account the misunderstanding that the nature of the retail use has changed and that the Retail Planning Guidelines for Planning Authorities dated 2012 could be relied upon for the purposes of their assessment of the retail use and the meaning of retail warehouse use which is incorrect, and that this section 5 referral can be readily distinguished from the previous section 5 referral.
- Report submitted by Tony Bamforth Planning Consultant to support the argument made by Poundland Limited that the works of sub-division were not carried out pursuant to planning register reference SD15A/0152.

8.0 Statutory Provisions

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

Section 3 – Development

Section 3 (1). In this Act, except where the context otherwise requires, ‘development’ means—

(a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, or

(b) development within the meaning of Part XXI (inserted by section 171 of the Maritime Area Planning Act 2021).]

Section 4 – Exempted Development

Section 4 (1) (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.

Section 4 (3) A reference in this Act to exempted development shall be construed as a reference to development which is—

- (a) any of the developments specified in subsection (1) or (1A), or
- (b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

Section 4 (4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

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

Part 2

Exempted Development

Article 5. (1) Interpretation for this part,

in this part -

‘shop’ means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public –

- (a) for the retail sale of goods,
- (b) as a post office,
- (c) for the sale of tickets or as a travel agency,
- (d) for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and “wine” is defined as any intoxicating liquor which may be sold under a wine retailer’s off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,
- (e) for hairdressing,
- (f) for the display of goods for sale,
- (g) for the hiring out of domestic or personal goods or articles,
- (h) as a launderette or dry cleaners,

(i) for the reception of goods to be washed, cleaned or repaired, but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies.

Schedule 2 - Part 4

Exempted development – Classes of Use

Class 1 Use as a shop

Article 10. (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 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.

9.0 Assessment

9.1. At the outset of my assessment, I acknowledge both PKB Partnership and Poundland Limited raise concerns with the wording of the reformulated question given the determined³ unrestricted retail (shop) use permitted under the parent permission. I am of the opinion that the reformulated question is an accurate description that provides clarity and specificity to Unit 3 within Fonthill Retail Park,

³ [2022] IEHC 542

which was approved as part of a “retail warehouse development” as per the plans and particulars subject to condition no. 1 of parent permission (S97A/0791 also referred to as the 1998 permission), and does not in any way obscure the planning fact, as confirmed by the court, that the 1998 permission does not entail a restriction on retail warehouse equivalent to that now found in the various iterations of the retail planning guidelines.

9.2. In considering whether the jurisdiction of the Board is constrained by the planning authority’s previous determination under ED16/0025 I have considered the question before the Board in light of the previously determined question Planning Register Reference ED16/0025 in respect of the same subject site (Unit no. 3 Fonthill Retail Park). The question posed in ED16/0025, for the record, as follows: “*Change of use from the former retail warehouse to use as a discount store for the sale of non-bulky convenience goods*”. I am of the opinion having regard to the following facts:

- a) that the planning authority did not place any reliance on the 1998 permission in ED16/0025 and rather arrived at its decision based on condition 2 of the 2015 permission (i.e. SD15A/0152),
- b) that Mr. Justice Cian Ferriter [2022] IEHC 542 finds condition 2 of SD15A/0152 enforceable and effective and applies to both unit 3 and unit 3A.
- c) that the referrer, PKB Partnership, advances the argument in their submission to the Board that the works to sub-divide unit no. 3 into two separate planning units, namely unit 3 and unit no. 3A, were undertaken in accordance with the exempt development provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended) and that planning permission register reference SD15A/0152 was never executed.

that there is a change in the planning facts and circumstances since the planning authority’s determination and conclude that the jurisdiction of the Board to make a declaration under section 5 of the 2000 Act⁴ is not, therefore, constrained by the planning authority’s determination under ED16/0025.

⁴ Having regard to the Court of Appeal in *Narconon Trust v. An Bord Pleanala* [2021] IECA 307.

- 9.3. For clarity, the purpose of this referral is not to determine the acceptability or otherwise of the use of Unit no. 3 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.
- 9.4. **Is or is not development**
- 9.4.1. The question put forward by PKB Partnership in their section 5 declaration request to South Dublin County Council, made on 12 October 2016, relates to whether a material change of use arises by reason of the type of goods being sold in unit 3 Fonthill Retail Park and consequently whether it is development or is not development or is or is not exempted development. As reformulated by the Board, see section 2.0, the question asks whether the use of a permitted retail warehouse unit to use as a discount store for the sale of small-scale convenience goods at Unit Number 3, Fonthill Retail Park, Dublin is or is not development and is or is not exempted development.
- 9.4.2. The first question to consider is whether or not the proposal constitutes 'development' under the definition in the Planning Act. Section 3 (1) of the Act defines 'development' as the 'carrying out of any works on, in, over or under lands or the making of any material change in the use of any structures or other land'.
- 9.4.3. In order to consider whether or not a material change of use arises by reason of the sale of small-scale convenience goods at unit no. 3 I refer back to the parent permission for this unit under planning register reference S97/0791 to confirm the permitted use to establish whether to not there is a change of use. As noted in section 4.0 permission was granted for the retail warehouse development in March 1998.
- 9.4.4. The first part of the question requires some consideration as to scope of the permitted use and any limitations thereof. I highlight for the Board that the parent permission contained the standard condition (at condition no. 1) that "*the development shall be carried out and completed in its entirety fully in accordance with the plans, particulars and specifications lodged with the application, save as may be required by the other conditions attached hereto*". The application for the parent permission submitted on the 4 December 1997 is described as: 'Retail

warehouse development (c.4210 sq. m)'. On review of the referenced 1982 General Policy Directive (GPD), the policy considerations to which planning authorities and An Bord Pleanála must have regard in performing their functions in relation to establishment of certain retail shopping development, applicable at the time of the decision of the planning authority to grant permission under S97A/0791 hereby called the 'parent permission' I note that there is no differentiation made in respect to specialist types of retail shopping development within the 1982 GPD.

- 9.4.5. The judgment by the courts [2022] IEHC 542 provides assistance to the Board in that it was decided the parent permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the retail planning guidelines that confine the use for the retail sale of bulky goods. As such, I would agree with the statements by both the referrer and observers to the subject appeal that in this specific instance, given the timing of the approval of the parent permission pre-dating policy considerations with respect to defined retail typologies, that there is no restriction of the type of goods sold.
- 9.4.6. Nevertheless, I note that modification works both internally and externally have been undertaken at Unit 3 to form namely Unit 3 and Unit 3A. Unit 3 comprises the majority of the ground floor of the unit, as subdivided. I highlight to the Board that the question relates solely to Unit 3 and its use, and I shall focus my assessment on the use of Unit 3 but note for the record that unit 3A is currently occupied by Cash and Carry Kitchens.
- 9.4.7. The question before the Board is solely about the range of goods sold within the unit, however, given the sub-division undertaken at the unit I am of the opinion that the interpretation of the current permitted use requires consideration of whether the 2015 permission (SD15A/0152) was implemented acknowledging that condition no. 2 of that permission restricts the range of goods to be sold in both unit 3 and unit 3A to solely 'bulky goods'.
- 9.4.8. It is argued by the referrer in their submission to the Board that the works to sub-divide unit no. 3 into two separate planning units, namely unit 3 and unit no. 3A, were undertaken in accordance with the exempt development provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended) and planning permission register reference

SD15A/0152 was never executed. In support of this argument it is put forward by the current occupiers 'Poundland Limited' (Dealz) that whilst sub-division of unit 3 to form unit 3 and unit 3A was carried out it is not evident that the sub-division works were carried out pursuant to planning register reference SD15A/0152, rather it is suggested that the works appear to have been carried out pursuant to the exempted development provisions under the Planning and Development Regulations 2001, as amended.

- 9.4.9. From my site visit, review of both the parent permission and that of SD15A/0152 and having regard to the referrers submission I would agree that the works undertaken at Unit 3 to sub-divide the unit do not accord with those plans and particulars submitted with SD15A/0152. I note for the Board that no drawings have been provided to clarify the exact works undertaken, but I note section 4.2 of the PKB Partnerships response submission received 21 May 2024 and submitted photographs to demonstrate that works approved under SD15A/0152 were not undertaken. On site inspection from my visual assessment, it appears that works carried out internally more closely align with that illustrated in the plans and particulars submitted in respect to the retention application register reference SD17A/0094 (Reg. Ref PL06.248674), which was refused by the Board (please see section 4.0 of my report). However, I note that the western elevation and southern elevation, as existing, do not correspond with the submitted drawings of SD17A/0094.
- 9.4.10. In the interests of clarity, if the Board is willing to accept the bona-fides of the argument that the works to sub-divide the unit into unit 3 and unit 3A were undertaken as exempted development works rather than as the execution of planning permission register reference SD15A/0152 then condition no. 2 is not applicable and there is no restriction on the range of goods that can be sold in Unit 3 Fonthill Retail Park.
- 9.4.11. To conclude on this point, I am of the opinion that unit no. 3 is in use as a shop, as per interpretation contained in Article 5 (a) "for the retail sale of goods" of the Planning and Development Regulations 2001 (as amended) and is not subject to any limitation to the type of goods sold accepting that planning application register reference SD15A/0152 was not executed. In this instance I am of the view that there is no change of use of Unit no. 3 within the Class (Class 1, Part 4 of Schedule 2 of

the Planning and Development Regulations, 2001 as amended) and, as such, the use of Unit no. 3 for sale of small-scale convenience goods is not development.

9.4.12. The question of whether the works undertaken at Unit 3 and Unit 3A Fonthill Retail Park are or are not exempt development is not currently before the Board and, as noted above, given that no change of use within the Class arises by reason of the type of goods sold the provisions of Article 10, with respect to restrictions on changes of use, are not applicable in that no change of use within the class (Class 1 Use as a shop) occurs.

9.4.13. For clarity, nothing in my assessment addresses or relates to shopfront signage and/or advertisements associated with either the Unit 3 or Unit 3A.

9.5. Is or is not exempted development

I highlight to the Board that the scope of the referral question does not extend to the works undertaken to subdivide Unit 3 into Unit 3 and 3A. As already addressed above, restrictions on change of use set out under Article 10 of the Planning and Development Regulations, 2001 (as amended) do not apply in this case as the use of a permitted retail warehouse unit to use as a discount store for the sale of small-scale convenience goods at Unit. No. 3 is not development. As such, I am of the view that the determination of whether the works are or are not exempt development is a separate question and an unrelated question to that currently before me.

Previous decisions on the question on the materiality of sub-division, see section 5.0 of my report, do evidence a difference of opinion and the materiality of same is very much determined on the particularities of the site in question.

In this respect, I highlight for the Board that the matter for enforcement falls under the jurisdiction of the planning authority if it is deemed that such works do not constitute exempt development.

9.6. Restrictions on exempted development

9.6.1. See assessment contained in section 9.4 outlining that the sale of small-scale convenience goods at Unit no. 3 Fonthill Retail Park is not development. As such,

the question of whether an environment impact assessment or an appropriate assessment is required does not apply.

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 retail warehouse unit to use as a discount store for the sale of small-scale convenience goods at Unit Number 3, Fonthill Retail Park, Fonthill Road, Dublin is or is not development or is or is not exempted development:

AND WHEREAS PKB Partnership requested a declaration on this question from South Dublin County Council and the Council issued a declaration on the 2 day of November, 2016 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 28 day of November 2016:

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

- (a) Section 3(1) of the Planning and Development Act, 2000, as amended,
- (b) Article 5 (1) of the Planning and Development Regulations, 2001, as amended,
- (c) Part 4 of Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (d) the planning history of the site, and

(e) the judgement by the courts [2022] IEHC 542 in that it was decided the parent permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the retail planning guidelines that confine the use for the retail sale of bulky goods:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The parent permission, planning register reference S97A/0791 for retail warehousing does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the retail planning guidelines that confine the use for the retail sale of bulky goods.
- (b) Unit no. 3 Fonthill Retail Park is in use as a shop, for the retail sale of goods, as per interpretation contained in article 5 of the Planning and Development Regulations 2001, (as amended).
- (c) Given that no change of use within the Class (Class 1 Use as a shop, Part 4 of Schedule 2) has occurred, the provisions of Article 10 are not applicable.
- (d) Accepting that planning permission register reference SD15A/0152 was not executed, Unit 3 is in that case, not subject to any limitation to the type of goods sold.
- (e) There is no material change of use of Unit no. 3 and, as such, the use of the Unit no. 3 for sale of small-scale convenience goods is not 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 that the use of a permitted retail warehouse unit to use as a discount store for the sale of

small-scale convenience goods at Unit Number 3, Fonthill Retail Park,
Fonthill Road, Dublin is not 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.

Claire McVeigh
Planning Inspector

4 February 2025