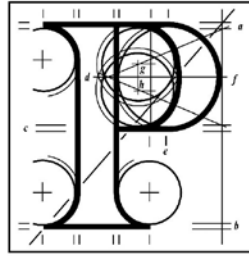


An Bord Pleanála



Inspector's Report

An Bord Pleanála Ref.: RL07.RL3400

Referral under Section 5 of the 2000 Act (as amended)

Question: Whether the construction of a pedestrian entrance is or is not development or is or is not exempt development.

Referrer: Lidl Ireland

Location: Tullyvoheen (Galway Road), Clifden, North Connemara, Co. Galway.

Planning Authority: Galway County Council

Planning Authority Ref.: ED15/21

Date of Site Inspection: 24th of November 2015

Inspector: Angela Brereton

1.0 INTRODUCTION

A referral case has been received by An Bord Pleanála pursuant to Section 5 of the Planning and Development Act 2000 (as amended) whereby the referrer has sought a determination as to whether or not the construction of a pedestrian entrance at Tullyvoheen (Galway Road) Clifden is or is not development or is or is not exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).

2.0 SITE LOCATION AND DESCRIPTION

The application site, contains a Lidl Foodstore, abuts the N59, National Secondary road (i.e. Galway Road) and a local road (L-5127 i.e. The Low Road) on the eastern approach to Clifden town within the town speed limits at Tullyvoheen, Clifden, North Connemara. The entrance to the site is from the local road and this is both the vehicular and pedestrian entrance. This is a barrier controlled entrance (presumably for night time use). The proposed pedestrian entrance is from the north western corner of the site at the junction of the L-5127 and the busy N59 and would form pedestrian linkages to the commercial development on the opposite side of the road to the west.

It is of note that the existing and permitted parking layout has not been included in the Site Layout Plans submitted. Parking spaces have been marked out on site. The proposed pedestrian entrance would appear to be into a landscaped area and proximate to existing parking spaces. The Lidl site is bounded by a stone wall and footpath and is at a lower level than the road. The Aldi site further to the east has a vehicular/pedestrian entrance directly to the N59.

3.0 PLANNING HISTORY AND BACKGROUND

A detailed planning history of the site relative to the construction of the Lidl store and of the 'works', that have occurred has been included in the documentation submitted. This is summarised as follows:

Previous History

- Reg.Ref.08/1369 – Permission granted subject to conditions by Galway County Council for the construction of a discount foodstore incorporating an off-licence (c.1,364sqm gross floor area and 1,065 sqm net sales area), comprising of a single storey mono pitched roof structure, enclosed dock leveller, removable compactor, LPG tank, boundary treatments, new site access, hard and soft landscaping, the provision of car parking, public lighting, the connection to all public services and associated site development works, signage to include the following; 2 No. freestanding double sided internally illuminated flagpole signs, 1 No. poster display and 2 No. building mounted internally illuminated signs. (gross floor space 1364sqm).
- Reg.Ref.10/1743 – Permission granted subject to conditions by GCC to construct a single storey extension to the existing Licensed Retail Discount Food Store. The extension measures approx. 133.31sqm gross

floor area. The proposed extension is single storey with a flat roof and located to the front of the existing store and will be finished with materials consistent with the existing store. The proposed development also comprises an enclosed plant area adjoining the proposed extension, internal modifications/connections to the existing store and all associated works. This application also seeks to relocate existing car parking spaces, connection to existing services on site with all ancillary site development works.

- Reg.Ref.13/457 – Permission granted subject to conditions by GCC for development of a delivery bay enclosure and the removal of Condition No. 17 of reg. ref. 08/1369 at the Lidl Licensed Discount Foodstore, Galway Road (Tullyvoheen), Clifden. The development proposed comprises the erection of a 4 metre height acoustic screen the full length of the truck delivery loading bay to the southern extreme of the store and associated noise reducing measures to allow for proposed extended delivery times and as allowing deliveries at any time of day or night.

4.0 DECLARATION BY THE PLANNING AUTHORITY

The planning authority decided on the 24th of August on foot of a request by Lidl Ireland Ltd for a declaration under Section 5 that the construction of a pedestrian entrance at Tullyvoheen (Galway Road), Clifden is development and is not exempted development by virtue of the provisions contained in Article 9(1)(a)(i) of the Planning and Development Regulations, 2001 (as amended), as it would materially contravene Condition 1 of planning reference no.08/1369.

5.0 THE QUESTION

The Planning Partnership, on behalf of Lidl Ireland Ltd seeks the Board's determination as to whether;

- A pedestrian entrance to the existing site from the Galway Road is exempted development under:
 - a) Section 4(1)(h) of the Planning and Development Acts, 2000-2015; and/or;
 - b) Class 13 of Schedule 2 of the Planning and Development Regulations, 2001-2014.

They request the Board to determine whether the proposed works are exempted individually under either or both of the above exempted development provisions.

6.0 REFERRER'S SUBMISSION TO AN BORD PLEANALA

The Planning Partnership has submitted a Referral to ABP on behalf of Lidl Ireland Ltd. The purpose of this request is for a declaration to confirm whether or not planning permission is required to carry out the proposed works. They refer to the planning history of the site as noted above and their submission includes the following:

- They dispute the conclusions reached on this matter by Galway County Council which they submit does not provide a detailed assessment of the P.A's rationale for determining that the works in question require planning permission.

- The P.A have given a single reason for rejecting the works as being exempted development, which they consider is flawed and based on a misinterpretation of the planning acts and regulations.
- They provide details of the question asked and of the relevant legislation as noted in their Question above.
- They consider that Section 4(1)(h) of the Acts is relevant to and can be availed of in the subject scenario. They also refer to Ref.29S.RL2120 in this respect.
- They consider that the existing wall is a structure as it is landscaped and paved area over which the pedestrian entrance will be developed, accordingly the proposal relates to an 'alteration' of a structure/structures.
- The provision of a pedestrian entrance would not unduly alter the appearance of the site nor would it look inconsistent with the character of the area, nor materially affect the operation of the site including the availability of car parking.
- They also consider that the proposed pedestrian entrance could be considered exempt under Class 13 and note that the proposed pedestrian entrance could be described as being 'the construction of a type of private footpath or paving. They note that the proposed entrance is approx 2.2m at it widest (the top and bottom platforms) and approx.1.6m at its narrowest. They consider that the proposed pedestrian entrance could fall within the terms of the above exemption.
- They have regard to the wording of the Council's Declaration and consider that the P.A has not appropriately determined the subject application.
- If the P.A deemed S4(1)(h) inapplicable, reasons other than Article 9, the declaration should confirm the same.
- It would appear that the P.A decision either (a) ignored the precedent set by ABP and considered that the works were not exempt under either S4(1)(h) or Class 13; (b) ignored the request of the applicant to consider S4(1)(h) and determined the application under Class 13 only.
- They note that the P.A could be in breach of Section 5 (7) of the Acts, which requires them...*before making a declaration under this section, shall consider the record forwarded to it in accordance with subsection (6)(c).* The P.A were made aware of a relevant previous ABP decisions and appear not to have taken same into account.
- In scenario (b) above, they request the Board to consider Section 4(1)(h) also. They also refer to the relevance of condition no.1 of the parent permission and note the P.A. refers to materially contravening this condition of Reg.08/1369.
- They provide a discussion of the issue of Article 9(1)(a)(i) having regard to compliance with the conditions of a planning permission.
- They consider that Condition no.1 which is a relatively standard condition simply clarifies what has received planning permission and does not contain any ongoing/operational limits on development of the site.
- The P.A has misinterpreted the effect/significance of Condition no.1 of the parent permission so that it would restrict any exempted development being carried out.

- They also refer to ABP Ref.06D.RL2601 relative *inter alia* to an ESB substation where the Board determined that a landscaping condition would not be contravened, notwithstanding the Inspector, the P.A in their initial Declaration, considering that a material contravention of the condition would arise.
- Based on the wording of the Declaration decision, the Board are requested to confirm that Condition no.1/Article 9(1)(a)(i) is not applicable to Section (4)(1)(h) and accordingly that the proposal would be exempt and secondly that the proposed works do not contravene Condition no.1 and accordingly be exempt under Class 13.
- They submit that the proposed works fall within the scope of Section 4(1)(h) and Class 13 and would not constitute a material change of use of the site and would accordingly constitute exempted development.

7.00 PLANNING POLICY

Galway County Development Plan 2015-2021

Chapter 4 refers to Economic, Tourism and Retail Development. Section 4.17 refers to Improvement of Town Centres and S.4.23 provides the Retailing Policies and Objectives. S5.2 refers to Land use Integration and Sustainable Transportation Strategy policies. Policy T14 (c) refers: *Prioritise walking, cycling and public transport alternatives within, and providing access to, new development proposals, as appropriate.* Objective T13 refers to *Mobility Management Plans* for larger scale including retail/commercial developments-DM Standard 25 refers. TI 14 provides for Road Safety Schemes.

S10.15 and Policy SI 1 refers to Social Inclusion and Universal Access and this includes access to buildings and facilities.

Chapter 13 provides for Development Management Standards and Guidelines and this supports the principle of universal access DM Standard 1(d) refers.

DM Standard 9 provides Guidelines for Employment uses, including Commercial. This includes: *Care should be taken in the laying out of parking areas to avoid conflict between the movements of customer's vehicles, goods vehicles and pedestrians.*

DM Standard 26 refers to Pavement Finish of a Surface Abutting a Public Road i.e: *To prevent damage to the structure of a public road, Galway County Council require a developer to provide adequate road base with bitumen finish where the private access joins the public road surface. These works may require a road opening licence.*

Clifden Local Area Plan 2009-2020 (extended 2014)

This LAP had been made in accordance with the objectives of the GCDP 2009-2015 as varied and has been extended in 2014. Section 2.8 refers to Retail and Town Centre Uses having regard to the town's character as a planned town.

Section 3.2.2 refers to Land use Management Policies and Objective D8 seeks to promote the development of the town centre.

Section 3.6 refers to Transportation Infrastructure and 3.6.2 provides: *It is the policy of Galway County Council to ensure that the road and street network is safe and convenient.* S.3.6.19 seeks to: *Ensure footpath and public lighting connectivity to existing town system for all developments to ensure access is provided for all including disabled access.*

Policies relative to Retail and Town Centre uses include 3.10.26 which seeks to: *Promote pedestrian/cycling access to, and use of the Town Centre.*

As shown on the Land-use Zoning Map the site is zoned for 'C1' town centre/commercial purposes. Section 5.4 has regard to the mix of uses encouraged in the 'C1 land-use zone. Regard is also had to pedestrian/special needs and access in such development. Section 5.8.1 refers to the Car Parking Standards and 5.8.3 to Design and Layout of Parking areas.

8.0 RELEVANT LEGISLATION

Planning and Development Act 2000 (as amended)

In order to assess whether or not the proposal is or is not development or is or is not exempted development, regard must be had to the following legislation:

Planning and Development Act, 2000 (as amended):

Part 1, S.2 (1) Defines, among other things, "works" – as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

Also noted is that: 'Public Road' has the same meaning as in the Roads Act, 1993 i.e: *'public road' means a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority.*

S.3.(1) 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.

S.4(1)(h) Provides for 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.

Planning and Development Regulations 2001 (as amended)

Article 6 refers to Exempted Development i.e. (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 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(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,

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width,

(iii) endanger public safety by reason of traffic hazard or obstruction of road users.

(xi) obstruct any public right of way.

Class 13 of Part 1 Schedule Schedule 2 Exempted Development Regulations

Column 1 Description of Development <i>Sundry Works</i>	Column 2 Conditions and Limitations
Class 13 The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.	The width of any such private footpath or paving shall not exceed 3 metres.

9.0 ASSESSMENT

9.1 Is it or is it not development

Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) it is considered that the creation of a pedestrian entrance at the Lidl Store at Tullyvoheen (Galway Road), Clifden, constitutes development i.e the carrying out of works on lands in the ownership of Lidl.

9.2 Is the Development Exempted Development

The Referrer has asked the Board to have regard to Section 4(1)(h) of the Planning and Development Act 2000 (as amended). This Section refers to 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.*

Regard is had to the interpretations provided in Section 2(1) and it is noted that *'structure' means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and (a) where the context so admits, includes land on, in or under which the structure is situate.*

Sub-section (b) is relevant to a protected structure and this includes both *the interior of the structure and land lying within the curtilage of the structure.*

The issue here is whether the opening of an entrance within the curtilage of the Lidl store (not a P.S) can be considered under Section 4(1)(h) as exempted development so as not to materially affect the appearance of the structure. Or is it considered that these works bring about a material change in the existing structure i.e. from wall and landscaped/parking area to include the provision of a pedestrian entrance for public use.

The Referrer considers that the proposed development is also exempt under Class 13 of Schedule 2 and requests the Board specifically to consider the proposed works under S4(1)(h) at the same time. Regard has been had to the latter Section above which refers to exempted development to a structure. The latter includes within the curtilage of the site. Class 13 refers specifically to *Sundry Works* i.e: *The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or*

way, and the construction of any private footpath or paving. The width of any such private footpath or paving shall not exceed 3m.

In this case the width of the proposed entrance clearly does not exceed 3metres. However the entrance is from the commercial Lidl site which is open for public retail use and abuts onto a public road so it is not considered that this use class exemption would particularly apply to Class 13 or be relative to Section 4(1)(h).

9.3 Regard to Planning History

It is noted that Article 6(1) of the Planning Development Regulations 2001 (as amended) provides for exemptions to classes of development subject to compliance with the restrictions on exemption provided in Article 9.

The Declaration of the Council has provided that the proposed works are development and not exempted development by virtue of the provisions of Article 9(1)(a)(i) as it would materially contravene Condition no.1 of Reg.Ref.08/1369.

This condition provides the following: *The development shall be carried out in accordance with the plans and particulars lodged with the application as received by the Planning Authority on the 6th of May 2008, except as may otherwise be required in order to comply with the following conditions.*

Reason: In the interests of clarity.

It is noted that a Parking Layout is shown on the Site Layout Plan then permitted and this appears to show that the pedestrian entrance now proposed would be into an area designated for parking spaces.

Condition no.18 of this permission also provides:

(a) The car parking area shall be properly surfaced and car-parking spaces on site shall be clearly de-lined.

(b) Bicycle parking facilities shall be put in place on the site.

Reason: In the interest of traffic safety and proper planning and sustainable development.

The Referrer considers that Condition no.1 is a relatively standard condition and its function is essentially to clarify the extent of works and development which have received permission. They also note that planning permission has been granted twice for modifications of the parent permission Reg.Refs. 10/1743 (single storey extension to the Lidl store) and 13/457 (delivery bay enclosure and removal of Condition no.17 – (restriction on times for loading and unloading) of the parent permission refer. It is noted that the plans submitted with these applications do not show alterations to the northern corner of the parking layout. Having visited the site it would appear that the proposed pedestrian entrance could have an impact on existing parking spaces in this northern corner of the site and on the permitted parking layout. Having regard to these issues it is considered that the proposed development would contravene Condition nos. 1 and 18 of the parent permission Reg.Ref.08/1369 and therefore not comply with Article 9(1) (a)(i).

9.4 Road Safety issues

Having visited the site I am concerned about the location of the proposed pedestrian entrance and consider that there would be road safety issues. The proposed pedestrian entrance is from the north western corner of the site at the junction of the L-5127 and the busy N59. This would form a pedestrian link to the site from the N59 and the other commercial development to the west. It is noted that this is a relatively busy junction and there is a 'Stop' sign from the local road to the N59. There are no traffic lights or defined pedestrian crossing at this location. Therefore there could be an issue of pedestrian safety having regard to the existing arrangement of this junction.

Regard is had to Article 9(1)(ii) and it is provided that the proposed pedestrian entrance is approx. 2.2m at its widest (the top and bottom platforms) and approx.1.6m at its narrowest. While the entrance is narrower, the public road which it is proposed to access is greater than 4m in width. It is noted that this proposal includes steps due to the Lidl store and parking area being at a lower level but does not include a ramp or facilities for disabled access. Regard is had to Technical Guidance Document M of the Building Regulations 2010 which while dealt with under separate remit refers to Access and Use.

Having regard to *Restrictions on Exemption*, Article 9(1)(iii) is more relevant in that it is considered that there are implications for pedestrian safety due the proposed provision of a pedestrian access so close to the junction with a major road. Without due assessment it could not be ruled out that the proposed location would not: *endanger public safety by reason of traffic hazard*.

9.5 Precedent Cases

The Referrer considers a number of Board decisions on other Referrals relative to their implications for the current proposal. While varying issues present and each case raises different circumstances regard is had to such cases in this Assessment below. Copies of these decisions are included in the Appendix to this Report.

They provide that Section 4(1)(h) of the Act provides a broad exemption, one which is not restricted by Articles 6,9 or 10 of the Regulations. They refer to the Board conclusions in Ref. PL29S. RL2120 (Whether the provision of a velux window to the rear is or is not exempted development) in this respect i.e: *The restrictions on exemption contained in Article 9 of the Planning and Development Regulations apply to exemptions allowed under Article 6 of the said Regulations only and do not restrict any exempted development under section 4(1) of the Planning and Development Act, 2000*. They consider that this exemption provides immunity from restrictions or limitations as may be applied under the Regulations. They consider Section 4(1)(h) is relevant to and can be availed of in the subject scenario. They regard the existing wall as a structure as is the paved and landscaped area over which the pedestrian entrance is to be developed. It is of note that that referral referred to a velux rooflight. I am not convinced that the opening up of a pedestrian entrance at this visually prominent corner close to a busy junction, where traffic safety issues are relevant and where there maybe implications for the existing car

parking layout would not materially affect the appearance of the structure, or of neighbouring structures. I would not consider that Section 4(1)(h) is particularly relevant to the subject scenario, which concerns a commercial development for public usage.

Reference is also made to another decision by the Board in Ref.RL06D.RL2601, relating to works associated with a Lidl Supermarket *inter alia* the construction of a sub-station under Class 29 (carrying out of electricity developments) of the Regulations, where the Board determined that a landscaping condition would not be contravened, notwithstanding the Inspector, and the Local Planning Authority in their initial Declaration, considering that a material contravention of the condition would occur. In this case regard was had to the scope of Section 4 (1)(h). It is noted that the Board Direction provided: *Except for the construction of a fire escape, which requires planning permission, the rest of the structures are exempt development.* The Board concluded that: *the construction of a fire escape along the north-eastern site boundary, which is surrounded by a c.2m high mesh fencing, does not come within the scope of section 4(1)(h) of the P&D Acts, 2000, as it materially affects the external appearance of the supermarket.* However, I do not consider this case to be particularly relevant as it relates primarily to the carrying out by any electricity undertaking of development consisting of the construction or erection of a unit substation.

Other Referrals of note having particular regard to Pedestrian entrance include RL16.2993 which relates to a decision by the Board that the creation of a pedestrian entrance at the Church of Ireland Grounds at Polranny, Achill Sound, County Mayo is development and is exempted development. Their decision provided: *These works fall within the description of development (which is exempted development in accordance with Article 6, as set out in Class 40 (burial ground) of Column 1 of Schedule 2 of the P & D Regulations 2001.* It is noted in this case that it was included in the Board decision that: *the works do not bound or abut a public road.*

In the Board decision relative to RL09.RL2734 they provided that the formation of a doorway for private pedestrian access is exempted development but that the, inclusion of the construction of a concrete step, to a public footpath to the side of a private property is not exempted development. Again this is a different circumstance as the referral referred to a private house.

10.0 CONCLUSION AND RECOMMENDATION

Having regard to the foregoing, it is my view that the works proposed to construct a pedestrian entrance to the Lidl carpark constitute development and is not exempted development having regard to Section 4(1)(h) of the Planning and Development Act 2000 (as amended) and Section 9(1)(a)(i) and (iii) and Class 13 of Part 1, Schedule 2 of the Planning and Development Regulations 2001.

Accordingly I recommend the Order in the following terms:

11.0 DRAFT ORDER

WHEREAS a question has arisen as to whether the construction of a pedestrian entrance at Tullyvoheen (Galway Road), Clifden, North Connemara, Co. Galway, is or is not development or is or is not exempted development.

AND WHEREAS the said question was referred to An Bord Pleanála by The Planning Partnership, McHale Retail Park, Castlebar, Co. Mayo on behalf of Lidl Ireland GmbH under the provisions of Section 5(3)(a) of the Planning and Development Act, 2000 on the 3rd April 2012.

AND WHEREAS An Bord Pleanála, in considering this referral, had particularly regard 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 9(1) of the Planning and Development Regulations, 2001,
- (c) Class 13, Part 1, Schedule 2 to the Planning and Development Regulations 2001 (as amended),
- (d) The planning history of the site,
- (e) The location of the site adjacent to public road
- (f) The use of the site as a supermarket.

AND WHEREAS An Bord Pleanála concluded that –

- (a) The works constitute development, being works which come within the scope of section 3(1) of the Planning and Development Act 2000(as amended).
- (b) The works would not come within the scope of section 4(1)(h) of the Planning and Development Act 2000 (as amended).
- (c) The works bound and abut a public road.
- (d) The works come within the restrictions on exempted development contained at Article 9(1)(i) and (iii) of the Planning and Development Regulations 2001(as amended).
- (e) The works do not fall within the description of exempted development set out in Class 13, Column 1 of Schedule 2, Part 1 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 said works are development and not exempted development.

Angela Brereton,
Inspector,
17^h of December 2015