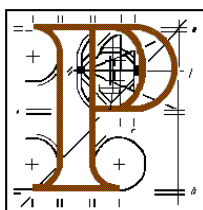


## An Bord Pleanála



## Inspector's Report

**Declaration/Referral Sought:** Whether the Change of Use of Part of the Existing Retail Premises for Sale of Hot Food is or is not Development or is or is not Exempted Development at McCann's Newsagent, Calverstown, Kilcullen, Co Kildare

**Reference No.:** PL09.RL3402

**Planning Authority:** Kildare County Council

**Referrer:** John McCann

**Site Inspection:** 14 January 2016

**Inspector:** Juliet Ryan

## **1.0 INTRODUCTION**

The subject referral relates to a newsagents in the small settlement of Calverstown, County Kildare. The question concerns a hot food counter and its use on the premises, which the Planning Authority decided was development and was not exempted development. The First Party has thus submitted the question to the Board for review under S.5(3)(a). The origins of the referral appear to emanate from a Warning Letter and Enforcement Notice issued to the First Party by the Planning Authority.

## **2.0 THE SITE**

- 2.1 The subject site is located at Calverstown Crossroads, County Kildare, which is a small settlement some 6.5 kilometres southwest of Kilcullen, in an otherwise generally rural area. It comprises a part two-storey / part 1.5 storey property in a neighbourhood centre terrace. There is a dedicated surface car park to the rear of the premises.
- 2.2 The premises is occupied by McCann's Newsagent, a convenience shop with a ground floor area of a stated 174.1 sq m, which contains a hot food counter. The latter is located to the rear of the premises, to the side behind the checkout area.
- 2.3 Upon site inspection it became evident that the 'hot food counter', as described, was actually two hot food counters adjoined and perpendicular to each other. There were detailed menus erected behind each counter – one advertising various hot food items such as hot dogs and burgers, the other advertising a full pizza menu. Atop one of the counters was a stand of leaflets with full details / menus for "Florence's Take Away".
- 2.4 Aside from the grocery part of the shop, there is also a small stand-up counter area just inside the window. On the main door to the shop was a small poster advertising "Florence's Take Away".

## **3.0 REFERRAL HISTORY**

### **3.1 Extant Permissions**

Per Kildare County Council Reg Ref 04/1152 permission was granted for a part two storey part 1.5 storey structure comprising ground floor shop and first floor office units. One of the first floor offices was permitted a change of use to retail per Reg Ref 07/206. A condition of the latter permission prohibited the sale of hot food for consumption off the premises (which was not a condition of the parent, 2004 permission)

#### **4.0 Planning Authority Declaration**

On 20<sup>th</sup> August 2015 Kildare County Council declared that use was development and was not exempted development. The Planning Authority's conclusions may be summarised as follows:

- Nature and extent of use not subsidiary to main retail use
- Use results in material planning consequences and constitutes a material change of use

#### **5.0 REFERRER'S SUBMISSION TO AN BORD PLEANÁLA**

A lengthy submission has been made to the Board on behalf of the Referrer, which may be summarised as follows:

- Planning law provides for the sale of ready to eat food for consumption off the premises from shops
- References precedent Board decision RL2179
- Counter space occupies low-profile part of shop and is only accessible through the shop
- Counter can only operate when shop is open and its trading hours 4pm – 11 pm are less than that of shop
- Key test is whether use is subsidiary to shop
- Counter area does not constitute a restaurant style internal eating area
- Type of food sold and type of counter installed are not material planning considerations in the instant case
- Introduction of a hot food take-away facility in shop is exempted development
- A change of use must be material before it becomes development
- Considers the change of use (i.e. providing for ancillary sale of hot food) within the grocery shop to be minor and constitutes a subsidiary use within the planning unit that is the shop
- The definition of "shop" in PDR, 2001 expressly provides for the sale of food for consumption off the premises

- Refers to RL2179 whereby the Board determined that the sale of hot food was subsidiary and did not result in a material change of use of the shop
- Refers to RL2333 whereby the Board determined that the installation of a pizza oven in a shop did not result in a material change of use
- Reiterates that small counter area is not a restaurant seating area and cites various Board determinations whereby the provision of a coffee dock within a retail outlet was not considered to be a material change of use.
- Planning Authority's perception of the food preparation area is not a key issue given that internal alterations to a shop are exempted under S.4(1)(h)
- The fact that there might be a Third Party internal operator of the food counter is not a determining factor (refers to various well-known examples)
- The delivery service is only a small part of the overall operation – refers to expressed opinions of Planning Inspector regarding an Apache Pizza delivery service in shop (RL2333).
- Given the small scale of the use, it does not result in material planning consequences (litter, noise, traffic etc)
- Contends that the sale of hot food is not development, but concedes that were the Board to disagree, that it should be considered exempted development per article 10
- The original 2004 permission did not refer to the sale of burgers or chips, and therefore constitutes a Part 4 Class 1 land use
- Refers to RL2590 and the approach taken by its Inspector regarding subsidiarity, which relied on floor area, layout, prominence and sales pattern
- Subject counter occupies discrete area at farthest point from entrance
- Counter does not have any independent access / counter / serving hatch
- Fewer staff operate hot food counter than tend to remaining shop
- Lack of clarity regarding Planning Authority's concerns regarding "extent" of activity

## **6.0 LEGISLATIVE CONTEXT**

### **6.1 The Planning and Development Act, 2000 (as amended)**

#### **6.1.1 Section 3(1)** of the Act states the following in respect of ‘development’:

*“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.”*

#### **6.1.2 Section 4(1)** of the Act states that the following shall be exempted developments for the purposes of this Act:

*“(h) development consisting of the use 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 (2)(a)** of the Act enables certain classes of development to be deemed exempted development by way of regulation.

## **6.2 PLANNING AND DEVELOPMENT REGULATIONS 2001 – 2013**

### **6.2.1 Article 10(1)**

With specific regard to change of use, Article 10(1) provides that any change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development provided that they 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.

### 6.2.2 Schedule 2 Part 4

This part of the regulations sets out classes of use for exempted development, whereby “shop” is in a class of its own:

#### CLASS 1

Use as a shop.

### 6.2.3 Article 5

Article 5 defines “shop” as follows:

‘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

## 7.0 ASSESSMENT

- 7.1 The subject of this referral is a hot food counter (or, more accurately, two connected hot food counters) within an existing convenience shop. As has been noted in the Planning Authority's Planner's Report, the area set out on the submitted plans as comprising the area for the sale of hot food is not representative of the actual current situation. As witnessed upon site inspection, the hot food area of the shop is defined by two adjoining perpendicular counters addressing floorspace that is free from any retail goods and generally comprises the entire area to the north of the checkout area.
- 7.2 The Board is referred to the drawing no.PA-001 submitted with the referral. This illustrates one of the counters (i.e. that one running adjacent to the eastern wall) but does not show the second connected counter, running parallel to the northern wall. The drawing states that the hot food area measures some 18.2 sq m. Arising from my site inspection, I would estimate that the actual floor area dedicated to the sale of hot food is closer to 32 sq m, which is a considerable portion of the shop's area that is accessible to the public. With respect to the latter, the 174.1 sq m total shop area alluded to on the drawing appears to include ancillary storage and staff facilities; the actual retail area (i.e. sales space including checkouts) is closer to 113 sq m (including the hot food area).
- 7.3 In general terms, then, I consider it a fair representation to state that the hot food area takes up almost one third of the retail floorspace. Whether this constitutes development or not requires consideration of what is provided for under the definition of 'shop' in PDR, 2001 (as amended), and by reference to the materiality of any planning implications arising from the hot food offer.
- 7.4 At the outset, I would note that the parent permission (Reg Ref 04/1152) was not subject to any condition prohibiting the sale of hot food for consumption off the premises, nor were any later permissions pertaining to the site. As such, I do not consider that article 9(1)(a)(i) (i.e. restrictions on exemption arising from contravention of conditions attached to an extant permission) applies.
- 7.5 Article 5 of PDR, 2001 (as amended) provides a definition of 'shop' wherein subsection (d) states:

*“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 ...”*

Arising from the above, the key issue here is the subsidiarity of the hot food offer. The Planning Authority considers that the hot food area actually functions as a fast food takeaway, and notes that it is advertised independently in the window and online as “Florence's Takeaway”. I

would tend to agree with this, particularly given the availability of menus to take away on the hot food counter, and given the sign on the door for “Florence’s Takeaway”. In forming this opinion I would also draw the Board’s attention to the extensive menus (including a full pizza and fast food / burgers and chips menu). Notwithstanding that this hot food area is located within a convenience store, it is of a size and scale of a typical self-contained take-away. I do not consider it to be a subsidiary use, and consider that it would be a trip generator in and of itself and that it would generate custom independent of the shop. As such, I do not consider the hot food offer comes within that which is provided for by Article 5(d).

7.6 The Planning Authority also point to the fact that that a delivery service is advertised, and that this means that custom is not solely reliant on visitors to the shop; but is likely to depend significantly on phone orders, which would have materially different planning implications than those of hot food for sale to shop customers only; particularly in relation to traffic. I would agree with this. In short, I consider that the hot food counter does not come within the definition of ‘shop’ per Article 5(d) and constitutes a separate take-away use that is not subsidiary to the shop and thus constitutes a material change of use, which is development. Further, it generates different material planning consequences relating to traffic, noise, and disturbance.

7.7 I would not share the Planning Authority’s concerns regarding the counter space inside the shop window - this is relatively modest in scale and would not, in my opinion be analogous in any way to a restaurant or provide any significant sit down area. I would agree with the Referrer in this regard that it is a small counter adjacent to a coffee station and is of a type commonly found in such convenience units. I would not, in fact, connect this counter with the hot food offer and would consider the latter appears in all respects to function as a take-away.

## **7.8 Precedent ABP Determinations**

### **7.8.1 RI2590 (attached)**

The question related a shop with a meat counter and cold store, which also had a large counter for a takeaway business at the front of the premises.

The Board determined that the sale of hot food for consumption off the premises was development and was not exempted development, as follows:

- The sale of hot food for consumption off the premises in this particular case was not subsidiary to the principal shop use



- The sale of hot food for consumption off the premises resulted in a material change of use from the use of this shop for the retail sale of groceries

#### **7.8.2 RL2179 (attached)**

The referral related to an all-purpose grocery shop (including petrol pumps in the forecourt). The shop contained a small heated cabinet and an oven associated with the sale of hot food for consumption off the premises.

The Board decided that the use was not development, concluding that the sale of hot food for consumption off the premises was in this particular case subsidiary to the principal shop use; and that the use was of such a limited extent that it did not result in a material change of use of the shop.

#### **7.8.3 RL2432**

This case related principally to the use of a retail unit for the sale of hot food for consumption off the premises and also to related external signage. The main issues were the scale and intensity of the subject use vis-à-vis the retail use; whether the subject use could be considered the primary or subsidiary use, and the material planning consequences, if any, arising from the use.

The Board declared that the development was not exempted development, concluding that the sale of hot food for consumption off the premises was not subsidiary to the principal shop use, and that it resulted in a material change of use.

#### **7.8.4 RL2333**

The referral related to an existing Spar retail unit in Beaufield Shopping Centre, Maynooth. The project consisted of the use of a small part of the shop (c.8 sq m - of a total GFA of 212 sq m) for the preparation and sale of pizzas for consumption off the premises. There was also an element of home delivery involved also (c.70 no. deliveries per week).

The Board decided that the development was not development, concluding that the sale of hot food for consumption off the premises to the limited extent that was occurring did not result in a material change of use from the use as a shop.

#### **7.8.5 Commentary**

It can be seen from the comparable cases outlined above that a determining factor in previous Board decisions has been the scale and

intensity of the use, and whether the sale of hot food was considered subsidiary to the principal retail use or not. Another key consideration in previous cases was whether the use generated material planning consequences. I would consider these to be the critical factors in the instant referral also, and in this regard would comment that the hot food counter in question is of a nature and scale to function as a separate primary use within the shop. Its operation, particularly its advertised delivery offer, also raises new material planning considerations.

## **8.0 CONCLUSION**

8.1 In considering this referral I have had regard to the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended); to the planning history of the subject site and my observations during site inspection. Arising from this, I conclude that the sale of hot food at the subject premises is not subsidiary or incidental to the shop use, but is more accurately described as a separate, takeaway use, which is a material change of use for which there is no exemption. Accordingly, I consider the change of use for the sale of hot food is development and is not exempted development.

## **9.0 RECOMMENDATION**

I recommend that the question referred to the Board by John McCann be decided as follows:-

**WHEREAS** a question has arisen as to whether the change of use of part of the existing retail premises for the sale of hot food is or is not development or is or is not exempted development

**AND WHEREAS** the said question was referred to An Bord Pleanála by John McCann on the 9<sup>th</sup> day of September 2015:

**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) The definition of 'shop' under article 5(1) of the Planning and Development Regulations, 2001, as amended by the Planning and Development Regulations 2005

(c) Articles 9 and 10 of the Planning and Development Regulations, 2001-2011

- (d) The planning history and internal layout of the premises,
- (e) The material planning consequences arising in relation to traffic, noise and general disturbance:

**AND WHEREAS** An Bord Pleanála has concluded that –

- (a) The sale of hot food for consumption off the premises in this particular case is not subsidiary to the principal shop use and
- (b) The sale of hot food for consumption off the premises results in a material change of use within this shop from the retail sale of groceries

**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 change of use of part of the existing retail premises for the sale of hot food is development and is not exempted development.

**Juliet Ryan**  
**Senior Planning Inspector**

**19 February 2016**