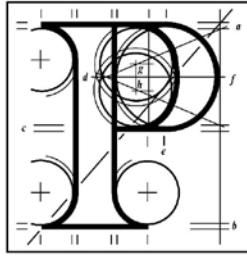


# An Bord Pleanála



## Inspector's Report

**Question:** (a) Whether the sub-division of Unit 16, Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, into two separate units is or is not development and whether it is or is not exempted development, and (b) whether a material change in use of part of Unit 16 has occurred where it is used by McMahon Builders Providers.

**Referrer:** McMahon Builders Providers

**Planning authority:** South Dublin County Council

**Referral ref. no.** ED15/0028

**Site visit:** 22<sup>nd</sup> January 2016

**Inspector:** Hugh D. Morrison

## Site

The site is located towards the north eastern corner of Cherry Orchard Industrial Estate in a position to the north of a Lidl supermarket, which adjoins the Ballyfermot Road (R833) to the south. This site accommodates Unit 16, an industrial/warehouse building that is composed of two expansive bays, with an attached two storey office building to the front. The combined building is served by a forecourt to the front and an enclosed yard to the side, which is used for open storage. Service vehicle doors are sited in the front elevation on either side of the office building and in the southern side elevation to the said yard.

## The question

(a) Whether the sub-division of Unit 16, Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, into two separate units is or is not development and whether it is or is not exempted development, and (b) whether a material change in use of part of Unit 16 has occurred where it is used by McMahon Builders Providers.

## Planning/enforcement history

S10A/0243: Permission granted for the following:

- Warehouse extension (830 sq m in floorspace and 11.6m in height) to southern side of existing warehouse,
- Two storey extension to northern side of existing two storey office block along the front of the existing warehouse and second floor extension over existing office block and its proposed extension – overall increase in floorspace of 256 sq m and 10.35m in height, and
- 2m high railings with two 9.3m wide automated access gates along the front (eastern) boundary.

This permission has not been implemented.

S7605: Alleged unauthorised development consisting of (i) the material change of use of the unit from industrial/warehouse type use to use as a builders providers, and (ii) the sub-division of Unit 16 into two separate units, without the benefit of planning permission.

## Planning authority's declaration

*Insufficient details have been submitted in relation to the works carried out to sub-divide the unit and therefore a determination cannot be made on the matter. The change of use of the building, as detailed in the documentation submitted, would constitute a material change of use which is development and is not exempted development.*

## The referrer's case

- The established use of the site is a warehouse.
- Under Section 4(1)(h) of the Planning and Development Act, 2000 – 2014 and in the light of the Board's decision on a similar case (RL.2308), the sub-division is exempted development.
- With respect to the submission of sufficient information, photographs and plans of the sub-division have been submitted.
- Reference is made to a letter from the planning authority, in which the following description of the use on site is stated:

*the material change of part of Unit 16 from warehouse to retail warehouse/builders providers retailing to trade and public, with associated external yard.*

This description is critiqued on the basis that it suggests a complete change of use from warehouse to retail warehouse/builders providers and yet the use in question is not a retail warehouse and the term builders providers is undefined in legislation.

- With respect to "retail warehouse", this term is defined in the Retail Planning Guidelines as:

*a large single-level store specialising in the sale of bulky goods such as carpets, furniture and electrical goods, and bulky DIY items, catering for car-borne customers.*

Manifestly, the development in question is not a retail warehouse.

- Under RL3105, the Board stated that, in determining referrals, it "has to have regard to the legislative definitions, and not the Development Plan definitions, as the latter are irrelevant to its determination in this matter." Attention is thus drawn to the definitions of "wholesale warehouse" and "repository" in the Planning and Development Regulations, 2001 – 2015, and in the light of these definitions the view is expressed that a "warehouse" can be defined as follows:

*A building where business is transacted, and goods are stored or displayed incidentally to the transaction of that business.*

- Having regard to the aforementioned definition, the conclusion that no material change of use has occurred between the pre-existing warehouse use and the "builders providers" use undertaken by the referrer is prompted by the following considerations:

- The majority of the space in Unit 16 is used for storage.
- Open storage also occurs in the adjoining yard.
- An ancillary area (430 sq m or c. 20%) within the building is now used as a sales area for display of product to trade purchasers and private individuals.
- The opening hours of the sales area are as follows:

Mondays – Thursdays 07.30 – 17.00

Fridays 07.30 – 16.00

Saturdays 08.30 – 13.00

These hours are indicative of a business that primarily serves the building trade rather than the public.

- The retail sales use is an ancillary use that is incidental to the primary warehouse use, i.e. it is interdependent upon and connected to the said main use. Nevertheless, the retail sales area is separated from the overall warehouse by counter areas and low ceilings, which differentiate it from the warehouse itself. As this area is unlike a retail warehouse, it is likely to be used by building tradesmen for the most part.
- Again, the planning authority’s description of the use as a builders providers is contested on the basis that the factual use of the site *per se* has to be considered rather than perceptions of the business.
- The “associated external use” of the yard for open storage is incidental to the use of the building on the site as a warehouse. (A submitted photograph shows such storage in this yard under the previous user of the site).
- Precedent for the use of a warehouse as a builders providers is established by the following cases:
  - A site on the Tramore Road in Cork was developed under permitted application reg. no. 00/24436 for DAF Trucks and subsequently used by a builders providers with a public, trade, and sales area to the front and a warehouse and distribution facility to the rear.
  - Under RL2899, the Board accepted that the change of use of an Avonmore retail unit for the sale of a mix of bulky and non-bulky food, durable and non-durable goods, and DIY and gardening products to visiting members of the public and trades at Powerstown, Clonmel was exempted development.

- Under RL2804, the Board accepted that the use of a dairy yard for the commercial storage of cars was exempted development.
- With respect to changes of use, attention is drawn to the Lackagh Rock case in which it was held that if, in assessing a proposed use, the matters considered are materially different from the original use, then a material change of use would occur. In the present case, the zoning of the site in the South Dublin County Development Plan 2010 – 2017 allows for a wide range of permissible uses and so with the change of use in question material differences cannot be said to arise and so no material change of use has occurred.

### **Response**

The planning authority has not responded to the above beyond that which is set out in the case planner's report.

### **Legislation**

#### **Planning and Development Act 2000 – 2015**

Section 2(1) of the Planning and Development Act, 2000 – 2014, states the following:

*In this Act, except where the context otherwise requires –  
“planning authority” means a local authority,*

Section 5(1) of the aforementioned Act, states the following:

*If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*

Section 5(3)(a) of the aforementioned Act, states the following:

*Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.*

Section 127(1) of the aforementioned Act states the following:

*An appeal or referral shall –*

*(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,*

Section 3(1) of the aforementioned Act states the following:

*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.*

Section 2(1) of the aforementioned Act states the following:

*“land” includes any structure and any land covered with water (whether inland or coastal);*

*“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...*

*“alteration” includes –*

*(a) plastering or painting or the removal of plaster or stucco, or*

*(b) the replacement of a door, window or roof,*

*That materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;*

Section 4(1) of the aforementioned Act states the following:

*The following shall be exempted developments for the purposes of this Act*

*–*

*(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 of neighbouring structures;*

### **Planning and Development Regulations 2001 – 2015**

Under Class 5 of Part 4 to Article 5 of the Planning and Development Regulations 2001 – 2015, the following is stated:

*Use as a wholesale warehouse or as a repository.*

Under Article 5(1) of the aforementioned Regulations, the following is stated:

*“repository” means a structure (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than business incidental to such storage;*

*“wholesale warehouse” means a structure where business, principally of a wholesale nature is transacted, and goods are stored or displayed incidentally to the transaction of that business.*

Also, under Article 5(1) of the aforementioned Regulations, the following is stated:

*“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 laundrette 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;*

Under Article 10(1) of the aforementioned Regulations, the following is stated:

*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.*

Part 4 of Schedule 2 to Article 10 of the aforementioned Regulations states the following:

*Class 1*

*Use as a shop.*

*Class 5*

*Use as a wholesale warehouse or as a repository.*

## **Assessment**

1. The referral question is as follows:

(a) Whether the sub-division of Unit 16, Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, into two separate units is or is not development and whether it is or is not exempted development, and (b) whether a material change in use of part of Unit 16 has occurred where it is used by McMahan Builders Providers.

2. The definition of development set out in Section 3(1) of the Planning and Development Act, 2000 – 2015, comprises two arms, i.e. that of “the carrying out of works” and “the making of any material change of use”. The referral question refers to items that fall to be assessed under each of these arms.

3. With respect to the carrying out of works, the sub-division of Unit 16 has entailed the construction of an internal wall along the east/west centreline of this Unit, i.e. through the industrial/warehouse building and the attached office building. This wall lies wholly within the combined building.

4. The planning authority’s decision on the current referral draws attention to the insufficient information submitted with respect to the internal wall. The referrer



has now submitted, under Appendix D to their case, plans that show the “previous undivided layout” and the “internal layout – current”. The former plan shows the situation that pertained within Unit 16 prior to the installation of the internal wall, while the latter plan shows the situation that pertains now. Thus, a comparison of these plans allows the extent of this wall to be traced. During my site visit, I was able to observe the same insitu.

5. Under Section 2(1) of the aforementioned Act, “works” are defined as including any act or operation of construction, amongst other things. The said internal wall is the outcome of such an act or operation of construction and so I conclude that it is development.
6. Under Section 4(1)(h) of the aforementioned Act, works for the alteration of a structure, which affect only the interior, are exempted development. From my observation of the said internal wall on-site, I consider that it represents such works and so it is exempted development, which is not de-exempted under Article 9(1)(a) of the Planning and Development Regulations, 2001 – 2015. (I also observed other works on-site, which affect the external appearance of the referral building. However, these works are not directly related to the sub-division in question and so I have not addressed the same).
7. The sub-division *per se* has not led to a change of use in Unit 16. The referrer advises that this Unit was previously in use as a warehouse and that this use is its authorised use for planning purposes. At the time of my site visit, the northern portion of the Unit was vacant and on the market, while the southern portion is the subject of this referral.
8. With respect to the making of any material change of use, as indicated above, the pre-existing use of Unit 16 was that of a warehouse and the current use of the southern portion of this Unit, denoted as Unit 16A, is that of a builders providers.
9. Under current planning legislation the former use is effectively defined. Thus, Class 5 of Part 4 to Article 5 of the Planning and Development Regulations, 2001 – 2015, comprises “Use as a wholesale warehouse or as a repository” and, under Article 5(1) of these Regulations, each of these uses is defined as follows:

*“repository” means a structure (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than business incidental to such storage;*

*“wholesale warehouse” means a structure where business, principally of a wholesale nature is transacted, and goods are stored or displayed incidentally to the transaction of that business.*

If the former use of Unit 16A was that of a warehouse that coincided with either of the two aforementioned definitions, then this use would come within the ambit of the aforementioned Class 5.

10. Under current planning legislation the latter use is not defined. However, custom and practise suggest that builders providers entail the storage, sale, and delivery of building materials and equipment to those involved in the building trade. Ordinarily this use is a retail one, as distinct from a wholesale one, as the goods purchased are not subsequently resold in their own right.
11. Class 1 of Part 4 to Article 5 of the Planning and Development Regulations, 2001 – 2015, comprises “Use as a shop” and under Article 5(1) of these Regulations, a shop is defined 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,*

Thus, if builders are regarded as one group within the wider public, then the referrer’s builders providers comes within this definition of a shop. (Alternatively, if they are regarded as distinct from the wider public, then retailing is still going on, but the said definition is not applicable and so a builders providers should be regarded as a *sui generis* use). Interestingly, during my site visit, I observed signage, presumably installed by the referrer, which self-identified the sales and display area as a shop.

12. Under Article 10(1) of the aforementioned Regulations, “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”. However, in the present case the change of use that has occurred is not within a single class but between two separate classes, i.e. from Class 5 to Class 1. Accordingly, this change of use is not exempted development and so it is *prima facie* a material change of use.
13. The planning authority described the referrer’s builders providers as a retail warehouse. The referrer takes exception to this description. In doing so they cite the definition of a retail warehouse that appears in the Retail Planning Guidelines:

*a large single-level store specialising in the sale of bulky goods such as carpets, furniture and electrical goods, and bulky DIY items, catering for car-borne customers.*

They contest the applicability of this term to Unit 16A on the basis that it suggests that the entire Unit has been converted, whereas only c. 20% of the floorspace is used as a sales and display area and this area is self-contained and the subject of a low ceiling. They also refer to the days and hours of opening, which are designed to facilitate the building trade in the first instance.

14. I acknowledge that the layout and design of Unit 16A does not conform to the typical retail warehouse and that the days and hours of opening are indeed designed to facilitate the building trade. Nevertheless, it is the existence of retailing *per se* that is of importance rather than whether the type of retailing being enacted is capable of being described as retail warehousing.
15. The referrer draws attention to the scale of the sales and display area in relation to that of Unit 16A overall. They state that this area is ancillary to the primary use of this Unit as a warehouse. However, if the aforementioned definitions of “wholesale warehouse” and “repository” cited above are revisited, then it becomes clear that, as retailing rather than wholesaling is being transacted, the space that is referred to as a warehouse and, by the same token, the adjoining yard that is used for the open storage of building materials are essentially storage areas for bulky materials that are only insitu to be retailed from the site. Thus, Unit 16A, is in use as a shop with a relatively small sales and display area and, by virtue of the bulky nature of building materials, a large supporting storage area.
16. During my site visit I observed that smaller items on display in the sales area were ones that would be of interest to both builders and the general public. There were also other items, such as gardening tools and winter fuels, which would be likely to be of interest to the general public, as distinct from builders.
17. The referrer cites the Lackagh Rock case in which it was held that if, in assessing a proposed use, the matters considered are materially different from the original use, then a material change of use would occur. If this test is applied to Unit 16A, then a comparison is invited between the matters that would have been taken into account in assessing the original warehouse proposal and those that would be taken into account in assessing the builders providers.
18. One of the aforementioned matters would be traffic generation. Under the former use, operational traffic in the form of service/delivery vehicles and staff vehicles would have been taken into account, but there would have been virtually no need to take into account non-operational traffic in the form of visitor/customer vehicles. Under the latter use, operational traffic would persist, but non-operational traffic would become a much greater consideration in the form of customer vehicles, both those of builders and the general public.

Accordingly, the matter of traffic generation would be materially different, thus signalling a material change of use.

19. In view of the foregoing discussion and in particular the change of use that has occurred between Class 5 and Class 1 and the application of the materiality test set out in the Lacken Rock case, I consider that a material change of use has occurred, which is development and which is not exempted development.

### **Conclusion**

In the light of my assessment, I conclude that the answer to the first referral question is that the sub-division of Unit 16 on Cherry Orchard Industrial Estate is development that is exempted development under Section 4(1)(h) of the Planning and Development Act, 2000 – 2015. I conclude that the answer to the second referral question is that a material change of use of part of this Unit from a warehouse to a builders providers, which is a retail use, is development that is not exempted development

### **Recommendation**

Having regard to the above, I recommend that the Board should decide as follows:

- (a) Whether the sub-division of Unit 16, Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, into two separate units is or is not development and whether it is or is not exempted development, and
- (b) whether a material change in use of part of Unit 16 has occurred where it is used by McMahan Builders Providers.

In considering this referral, the Board has had regard particularly to:

- (a) Sections 2, 3, 4 and 5 of the Planning and Development Act, 2000 – 2015,
- (b) Articles 5, and 10 of the Planning and Development Regulations, 2001 – 2015,
- (c) The following submissions:
  - (i) The referrer's submission,
  - (ii) The case planner's report, and
- (d) The report of the inspector.

AND WHEREAS An Bord Pleanála has concluded the following:

- (i) That the sub-division of Unit 16, Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, into two separate units is development that is exempted development under Section 4(1)(h) of the Planning and Development Act, 2000 – 2015.
- (ii) That a change in use of part of Unit 16 , Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, has occurred where it is used by McMahon Builders Providers and that, as this change of use is from a warehouse to a retail use, a material change of use has occurred that is development and that is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5(4) of the Planning and Development Act, 2000 – 2015, hereby declares that (i) the sub-division of Unit 16, Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, into two separate units is development that is exempted development under Section 4(1)(h) of the Planning and Development Act, 2000 – 2015, and (ii) a change in use of part of Unit 16 , Cherry Orchard Industrial Estate, Ballyfermot, Dublin 10, has occurred where it is used by McMahon Builders Providers and that this is a material change of use that is development and that is not exempted development.

Hugh D. Morrison

Inspector

27<sup>th</sup> January 2016