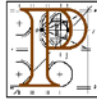

An Bord Pleanála



Inspector's Report

Ref.: RL28. RL3425

Development: Whether the change of use of a premises from retail use to a coffee shop is or is not development and is or is not exempted development.

Referred By: Cork City Council

Other Parties: Mestonway Limited

Planning Authority: Cork City Council

Location: 11 St. Patrick's Street, Cork.

INSPECTOR: Robert Speer

Date of Site Inspection: 11th December, 2015

1.0 SITE LOCATION AND DESCRIPTION

1.1 The site in question is located along the eastern side of St. Patrick's Street, which is a busy thoroughfare passing through Cork City Centre that serves as the

focus for the principle shopping district, and is positioned between a ‘Carroll’s’ retail store to the north and the larger ‘Debenhams’ (‘Roches Stores’) building to the south. It is presently occupied by an end of terrace, two-storey property that adjoins an enclosed service laneway to the immediate south, and is understood to have previously traded as a phone shop / telecommunications service provider outlet store. The ground floor of the premises comprises a linear serving counter which provides for the sale and display of various foodstuffs and beverages with a service area located to the rear of same which provides for staff access to the display cabinets in addition to related food / drink preparation areas including coffee grinders / dispensers and a heating grill / apparatus etc. It also includes for a number seating areas with tables and chairs which allow visiting patrons to consume their purchases on site in addition to customer toilets. The first floor level of the premises is not accessible to customers and provides for a washing-up area, storage facilities and associated staff accommodation.

2.0 THE QUESTION BEFORE THE BOARD

2.1 In its request for a declaration pursuant to Section 5 of the Planning and Development Act, 2000, as amended, the Planning Authority, as referrer, has requested the Board to determine whether the change of use of premises from retail use to a coffee shop at 11 St. Patrick’s Street, Cork, is or is not development and is or is not exempted development.

2.2 Having conducted a site inspection, and following a review of the submitted information, in my opinion, the question before the Board can be reformulated as follows:

‘Whether the use of a premises as a coffee shop at 11 St. Patrick’s Street, Cork, is or is not development and is or is not exempted development’.

3.0 RELEVANT PLANNING HISTORY

3.1 On Site:

PA Ref. No. 88/14214. Was granted on 28th June, 1988 permitting O’Callaghan Property permission for the construction of a retail outlet, including extension onto portion of Merchant Street and fire exit passageway.

PA Ref. No. 95/19448. Was granted on 24th July, 1995 permitting the Early Learning Centre permission for a sign above the shop window.

PA Ref. No. 02/26630. Was granted on 23rd May, 2003 permitting Clear Channel (IRE) Ltd. permission for the erection of a stainless steel and glass bus shelter 9.3m x 1.9m x 2.5m high with illuminated display panels.

3.2 Other Relevant Files:

ABP Ref. No. RL28.RL2221. Was determined on 17th June, 2005 wherein the Board held that a change of use from retail to restaurant use at Unit 50, Wilton Shopping Centre, Wilton, Cork, was development which was not exempted development.

ABP Ref. No. RL17.RL2487. Was determined on 30th September, 2008 wherein the Board held that the use of the structure as a restaurant at 5 Bayview, Ninch East, Bettystown, Co. Meath, was development and was not exempted development, being a restaurant which does not form part of any other use class.

ABP Ref. No. RL28.RL2516. Was determined on 13th October, 2008 wherein the Board held that the use of a former camera shop as a juice bar on the ground floor of No. 55 Patrick Street, Cork, was not development as the use of the premises as a juice bar with a sandwich counter constituted use as a “shop”, as defined at Article 5 of the Planning and Development Regulations, 2001, as amended, and, therefore, did not constitute a material change of use from a camera shop and was not “development”, as defined at Section 3(1) of the Planning and Development Act, 2000.

ABP Ref. No. RL63.RL2821. Was determined on 14th April, 2011 wherein the Board held that the use of part of the ground floor as a café at the Reeks Gateway, Ardnamweely, Killarney, Co. Kerry, was development which was not exempted development.

ABP Ref. No. RL28.RL2887. Was determined on 14th October, 2011 wherein the Board held that the use as a milkshake bar of Unit 23B, Wilton Shopping Centre, Cork, was development which was not exempted development.

ABP Ref. No. RL54.RL2939. Was determined on 28th September, 2012 wherein the Board held that the change of use of a shop to use as a coffee shop/bistro (restaurant) at the corner of Shop Street and North Quay, Drogheda, Co. Louth, was development which was not exempted development.

ABP Ref. No. RL54.RL2940. Was determined on 28th September, 2012 wherein the Board held that the change of use of a bank (protected structure) to use as a

coffee shop at 13 West Street, Drogheda, Co. Louth, was development which was exempted development.

ABP Ref. No. RL54.RL2941. Was determined on 28th September, 2012 wherein the Board held that the use of part of a shop as a coffee shop at West Street, Drogheda, Co. Louth, was not development.

ABP Ref. No. RL07.RL3023. Was determined on 22nd February, 2013 wherein the Board held that a proposed coffee sales area (16.8 square metres) within the existing retail unit at Keane's Garden Centre, Kilcolgan Village, Co. Galway, was not development.

ABP Ref. No. RL29S.RL3072. Was determined on 4th July, 2013 wherein the Board held that the change of use of a premises from banking use to coffee shop at Stephen Court, 18/21 Saint Stephen's Green, Dublin, was development which was not exempted development.

ABP Ref. No. RL61.RL3315. Was determined on 19th March, 2015 wherein the Board held that the partial change of use of a shop to use as a coffee shop at ground floor level at No. 4 Quay Street, Galway (a Protected Structure), was not development.

ABP Ref. No. RL28.RL3424. On 22nd October, 2015 a referral was submitted to the Board by Cork City Council seeking a determination as to whether the change of use of a premises at 11 Emmett Place, Cork, from retail use to a coffee shop, is or is not development or is or is not exempted development. No decision has issued on this referral to date.

ABP Ref. No. RL28.RL3426. On 22nd October, 2015 a referral was submitted to the Board by Cork City Council seeking a determination as to whether the change of use of a premises at 39 Princes Street, Cork, from retail use to a coffee shop, is or is not development or is or is not exempted development. No decision has issued on this referral to date.

4.0 GROUNDS OF REFERENCE

4.1 The grounds of reference have been examined and may be summarised as follows:

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- It is contended that the change of use from retail to a coffee shop at the premises in question constitutes development which is not exempted development.
 - It is the position of the Planning Authority that a change of use has taken place in light of the previous and established use of the subject premises as a retail outlet and the current use of same as a coffee shop. With regard to the 'materiality' of this change of use, the Board is referred to *Monaghan v. Brogan* which has served to clarify that the term 'material' in this context means 'material in planning terms' i.e. whether the issues raised by the change of use would give rise to matters that would normally be considered by a Planning Authority if it were assessing an application for planning permission, for example, visual or residential amenity, traffic safety considerations or policy issues in reference to the requirements of the Development Plan etc. In this regard, the Planning Authority is satisfied that the issues arising from the change of use would also arise in the assessment of a planning application with specific reference to the need for consideration of current planning policy relating to prime retail streets as set out in the Cork City Development Plan, 2015 (The overriding aim of this objective is to protect the primary retail land uses on St. Patrick's Street and other designated streets. St. Patrick's Street is the main shopping street in the city. The concern lies in the precedent which would be set and the incremental loss of retailing uses).
 - In addition to the foregoing, other implications arising as a result of the change of use, which would not have been associated with the previous retail use, concern the use of re-heating equipment / air handling equipment and the possibility of fugitive odours. It is also submitted that there could be issues with regard to traffic and pedestrian safety arising from the number and frequency of customers and the loading / unloading of vehicles along a very busy thoroughfare given the need for the daily delivery of foodstuffs etc. Further consideration would have to be given to the restriction of opening hours in order to prevent any usage as a late-night hot food takeaway. Accordingly, the Planning Authority is of the opinion that the change of use in question is 'material' and thus constitutes development within the meaning of Section 3 of the Planning and Development Act, 2000, as amended.
 - The previous use of the subject premises was as a 'shop' which fell within Class 1 of Part 4 of Schedule 2 of the Planning and Development Regulations, 2001, as amended. Whilst the lessees contend that the current use falls within the definition of a 'shop', it is submitted by the Planning Authority that the use in question is more akin to a café /

restaurant / takeaway and that this is a *sui generis* use which is not included within an identified use class.

- In its determination of previous referrals, with specific reference to ABP Ref. Nos. RL54.RL2939 & RL28.RL2887, the Board held that use as a coffee shop can either be viewed as a 'shop' (where the principle use is the retail sale of goods and where the sale of beverages, coffee etc. for consumption off the premises is subsidiary to such sales) or as a 'restaurant' (where the extent of seating etc. is such that there is a significant element of consumption of food etc. on site). It is also considered that ABP Ref. No. RL29S.RL3072 is of relevance as this concerned the change of use of a bank to a coffee shop with the Board determining that said use was 'sui generis' which subsequently resulted in the lodgement of a planning application that was then granted by Dublin City Council with the unit in question now operating as a 'Starbucks'.

In the case of the foregoing, the determining factor in establishing whether a coffee shop could be defined as either a 'shop' or a *sui generis* café / restaurant appears to have been the scale and relationship of the development relative to the primary retail use as well as the provision of seating for customers for the consumption of food on the premises. In the subject case, the unit is substantial and wholly occupied by Starbucks with the sale of hot beverages and packaged food for consumption both on and off the premises being the primary retailing activity. Although items such as mugs, packaged tea and coffee pots are available for sale, given the scale of the unit, the positioning of the counter and the availability of seating, it is submitted that in this instance it cannot be argued that the café / restaurant use is partial or subsidiary to the retail use. Hot food for consumption off the premises is available for sale and thus the unit is also presently operating as a hot food takeaway in a context where the sale of such food is not subsidiary to a main retail use. Indeed, it is considered that the number of transactions relating solely to the purchase of coffee mugs, cafetieres and / packaged coffee is likely to be wholly subsidiary to the main use of the premises as a café / restaurant / takeaway.

- It is submitted that the use of the subject premises as a 'Starbucks' café:
 - represents a new and separate use from the previous retail use and is more akin to a café / restaurant / takeaway;

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- would be assessed differently to a retail unit in terms of the development objectives and planning policies for Prime Retail Frontages and for such uses; and
 - has a different impact on local amenities when compared to the former use in terms of the potential for waste, littering, the possible hours of operation, and traffic considerations.
- The Planning Authority is of the opinion that the change of use amounts to development which is not exempted development. The use in question is more akin to a café / restaurant / takeaway and is not covered by Classes 1 or 2 of Part 4 of the Second Schedule of the Regulations.

5.0 RESPONSES TO REFERRAL

5.1 Response of the Occupier / Operator (Mestonway Limited c/o John Spain Associates):

- With regard to the reference to ‘Development Plan Objectives’, it should be noted that at no point does the referrer state that the existing ‘Starbucks’ unit does not comply with these objectives. Furthermore, it is respectfully submitted that the objectives of the Development Plan are not directly relevant to the question set out in the referral as no change of use has taken place given that both the previous use and the current use were / are as a shop. Notwithstanding the foregoing, it should be noted that the use of the subject site for retail purposes is permitted in principle in accordance with the relevant land use zoning objective whilst the policy quoted by the referrer makes no reference to coffee shops. Indeed, only three types of retail use (i.e. phone shops, bookmakers / betting shops and convenience shops) are described in that policy provision as not being acceptable at the subject location and the existing ‘Starbucks’ cannot be categorised as any of same. In addition, whilst the aforementioned policy also restricts hot food takeaways, it is clear that the existing use of No. 11 St. Patrick’s Street does not comprise a hot food takeaway.
- With regard to the referrer’s reference to Section 13.16 of the Cork City Development Plan, 2015 which states that ‘*while a mix of retail and other uses is appropriate for many City Centre streets there is a need to maintain the strong retail character and identity of prime retail streets*’, it is submitted that the existing ‘Starbucks’ is a ‘shop’ use and is therefore entirely consistent with the aforementioned provision.

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- The referral does not describe the nature of the use being undertaken at the subject premises or the types of goods being sold from same, save for the statement that *'people were observed seated at tables and at the window seating area eating food and drinking beverages'* and that *'hot food was also available for take-away'*. Such a statement does not provide a complete description of the nature of the use. Accordingly, there is no evidence to suggest that the Planning Authority has given detailed consideration to the actual nature of the existing use of the premises.
 - There has been no material change of use at the property in question and therefore there has been no development. Both the previous and current use of the premises accord with a 'shop' use. Furthermore, in accordance with the definition of a 'shop' as set out in Article 5(1) of the Planning and Development Regulations, 2001, as amended, the current use of the property as a 'Starbucks' consists of the retail sale of goods and the display of goods for sale as per Article 5(1)(a) and (f) respectively.
 - The use of the premises by 'Starbucks' is as a shop which comprises the retail sale and display of goods that include the following:
 - Hot and cold beverages
 - Sandwiches
 - Pastries and cakes
 - Coffee pots
 - Coffee and tea cups
 - Fruit
 - Biscuits and confectionary
 - Syrups

It is submitted that a change in the range of goods sold and displayed at the premises does not in itself comprise a change of use.

- The majority of the goods sold on the site in question are taken off the premises. Whilst this store commenced trading on 11th September, 2015, due to the time constraints associated with the deadline for responding to the referral submission, certified turnover figures for the premises are not available, although these can be provided if requested by the Board. By way of comparison, the Board is referred to the accompanying correspondence prepared by KPMG which states that sales transactions for consumption off the premises at the 'Starbucks' premises located at 11 Emmett Place, Cork, as a percentage of the total sales transactions for the period of 29th June, 2015 to 26th July, 2015, amounted to 83%, and that

the sales transactions for consumption off the premises at the 'Starbucks' premises located at 39 Princes Street, Cork, as a percentage of the total sales transactions for the period of 27th April, 2015 to 26th July, 2015, amounted to 76%.

The subject premises is a smaller unit with less seating than the two previously mentioned examples and having regard to the nature and location of the unit as such a higher percentage of sales relates to sales for consumption off the premises (85-90% of sales are for consumption off the premises). Furthermore, there is only a small element of seating in the premises.

- There are a number of precedents wherein the Board has previously determined that a coffee shop falls within the definition of a shop use as defined by Article 5(1) of the Regulations with specific reference to ABP Ref. No. RL54.RL2941, RL61.RL3315 & RL07.RL3023.
- In its determination of ABP Ref. No. RL28.RL2516 the Board held that the use of a former camera shop as a juice bar with a sandwich counter constituted use as a "shop", as defined at Article 5 of the Planning and Development Regulations, 2001, as amended, and, therefore, did not constitute a material change of use from a camera shop and was not development. Notably, the range of products sold from this juice bar are similar to those available for purchase at the subject 'Starbucks' unit, including hot and cold drinks and sandwiches, primarily for consumption off the premises. In addition, there was also some seating, a display area and stores in that shop unit.
- In its determination of ABP Ref. No. RL54.RL2940 the Board held that the change of use of a bank to use as a coffee shop was exempted development as the existing use of the site was as a coffee shop which fell within the scope of a shop for the purposes of Class 1 of Part 4 of Schedule 2 of the Regulations. In addition, the Board found that the change of use from a bank to a shop use was exempted development pursuant to Class 14 of Schedule 2 of Part 1 of the Regulations and that a coffee shop fell within the definition of 'shop'. Notably, that shop had an even greater amount of seating than the subject premises and also retained very similar characteristics in terms of the nature of the use and the range of items sold and displayed for sale.
- With regard to ABP Ref. No. RL29S.RL3072 wherein the Board determined that the change of use of a premises from banking use to coffee shop was development which was not exempted development, it

should be noted that the Board held that the scale, nature and layout of the proposed coffee shop was more akin to a restaurant which is expressly excluded from the definition of a 'shop' under Article 5 of the regulations. Therefore, it is submitted that this decision can be differentiated from the subject referral in that the reporting inspector stated that:

' . . . the use as a coffee shop can either be seen as a shop (where the principal use is the retail sale of goods and where the sale of beverages, coffee etc. for consumption off the premises is subsidiary to such sale) or as a restaurant (where the extent of seating etc. is such that there is a significant element of consumption of food etc. on the premises).'

On the basis of the foregoing, it is clear that a coffee shop can be defined as a shop depending on the nature of the particular use i.e. whether the principal use is the retail sale of goods or consumption of goods off the premises. It is also of relevance to note that as no details were provided in ABP Ref. No. RL29S.RL3072 of the layout of the proposed use that the nature of the use under consideration was unclear. Therefore, neither the inspector nor the Board could, for example, determine whether there would be a kitchen or food preparation area as part of the proposed use.

The use of the subject premises is clearly not akin to a restaurant use. It has no kitchen, cookers, food preparation area, mechanical extraction systems and no back of house area. Therefore, the existing 'Starbucks' is clearly not a restaurant and comprises a shop as the principal use is the retail sale of goods.

- In relation to ABP Ref. No. RL54.RL2939 wherein the Board determined that the change of use from a shop to a coffee shop/bistro (restaurant) was development which was not exempted development, it is clear that in that instance the use comprised a restaurant rather than a coffee shop / retail use. More notably, the unit in question had already commenced operating as a bistro / coffee shop with the food on offer cooked and prepared within the kitchen to the rear with the consumption of same primarily occurring on the premises. In their assessment of that referral the reporting inspector commented that:

'In deciding whether a coffee shop falls under the definition of a 'shop' or whether it would be more appropriately defined as a restaurant, and

therefore not a shop, should, in my opinion, be considered on a case by case basis. Thus, it should be determined whether the primary purpose is as a shop, i.e. for the sale of beverages, coffee beans, cake, mugs etc. to be taken off the premises, or as a café, where the primary purpose is the consumption of food and beverages on the premises, or indeed whether it is a mix of both uses’.

It is also submitted that the following paragraphs from the Inspector’s Report are of particular note:

‘Having inspected the site and observed the internal layout and operations, I would agree that the premises is being used as a small restaurant or bistro. A coffee shop could be defined as a shop where coffee is sold or drunk. This would include a substantial proportion of coffee purchased and taken off the premises. Any provision of tables and chairs to allow for consumption on the premises should be limited in my opinion to be seen as de minimis and an ancillary aspect of the business for a coffee shop to operate under the definition of a “shop”. Notwithstanding, the Regulations do stipulate that 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, would only be permitted under the definition of “shop”.

Clearly, the subject premises is operating beyond what could be defined as a coffee “shop” and more closely resembles a restaurant. The primary purpose is the consumption of food and beverages on the premises and the percentage of take away trade would be low in this case. I would therefore conclude that the subject premises cannot be defined as a “shop” under Class 1 Part 4 of Schedule 2 of the Regulations. The Board decided under referral case RL2221 that the change of use from retail shop to use as a restaurant is development and is not exempted development. I would similarly conclude that the change of use in this case from retail (clothing) to use as a coffee shop/ bistro is development which is not exempted development’.

Having regard to the foregoing, it is considered that the subject referral is clearly distinguishable from ABP Ref. No. RL54.RL2939 in that the ‘Starbucks’ does not include a kitchen or food preparation area whilst the majority of the transactions conducted on site relate to consumption off the premises. Therefore, the ‘Starbucks’ in question consists of a coffee shop

use which falls within the definition of a 'shop' as per the Regulations and is not a restaurant.

- In its determination of ABP Ref. No. RL63.RL2821 the Board held that the use as a café at ground floor level was not ancillary to the pharmacy use and that the subdivision of the retail unit would materially contravene Condition No. 8 of PA Ref. No. 04/4259 (which prevents the subdivision of the retail units on site) whilst a café did not come within the same use class as a shop. Accordingly, the use in question was deemed to constitute development which was not exempted development. From a review of this referral it is clear that the relevant use was as a restaurant whereas (as previously indicated) the use of No. 11 St. Patrick's Street is not akin to a restaurant in that it has no kitchen, cooker, or food preparation area etc. whilst the majority of sales relate to consumption off the premises.
- With regard to ABP Ref. No. RL28.RL2887 wherein the Board determined that the use as a milkshake bar of Unit 23B, Wilton Shopping Centre, Cork, was development which was not exempted development, it is considered that this decision is distinguishable from the subject referral in that use as a 'milkshake bar' is not akin to a 'Starbucks' coffee shop.
- On the basis that no change of use has taken place, the issue of materiality does not arise. Notwithstanding the foregoing, the Board is requested to note the following responses to the issues raised by the referrer which it considers could demonstrate the materiality of any change of use:
 - *Compliance with development objectives and planning policies:*

It is considered that the objectives of the Development Plan are not directly relevant to the question set out in the referral. Development Plan objectives are only relevant in the consideration of an application for planning permission or in assessing the materiality of a change of use in accordance with the test set out in *Monaghan v. Brogan*. Neither of these circumstances applies in this case as there has been no change of use.
 - *Issues arising from the use of re-heating equipment / air handling equipment and possible odours:*

There is no kitchen or food preparation area in the 'Starbucks' unit and none is required. Accordingly, there is no issue arising in terms of the use of re-heating or air handling equipment and there are no odours

generated that would not be associated with a retail use. Whilst sandwiches can be heated, they are prepared off-site and the heating does not require any extraction equipment. Such equipment for heating sandwiches is commonly found in convenience stores and sandwich shops which fall within the definition of shops.

- *Traffic or pedestrian safety:*

It is considered that the subject use does not give rise to any traffic or pedestrian safety issues whilst there is no car parking associated with the property. The number of customers and deliveries would also be similar to any other retail use.

- *Restriction of opening hours to ensure that a hot food / late-night takeaway does not operate from the site:*

The 'Starbucks' unit opens during the same hours as other retail uses in the surrounding area and there is no late-night use. In addition, the use of the premises does not comprise a 'hot food takeaway'.

- With regard to the referrer's concerns as regards *'the precedent which would be set and the incremental loss of retailing uses from St. Patrick's Street'*, it is submitted that this is not a material consideration in the determination of a Section 5 referral which is required to determine on the facts of the case whether a change of use requiring planning permission has occurred. In any event, it is reiterated that the use of the unit in question as a 'Starbucks' does not result in the loss of a retail use.

- *'Starbucks' is not a 'restaurant' use:*

There is no definition of a 'restaurant' use in planning legislation, although the Oxford English Dictionary defines a restaurant as *'a place where people pay to sit and eat meals that are cooked and served on the premises'*. The only definition of a restaurant that the occupier / operator of the subject site is aware of included in a statutory instrument is in the Intoxicating Liquor Act, 1988 where a restaurant is defined as *'any premises which are structurally adapted and used for the purpose of supplying substantial meals to the public for consumption on the premises and in which any other business carried on is ancillary and subsidiary to the provision of such meals'*. Therefore on the basis of the foregoing, it is apparent that a restaurant use comprises the preparation and serving of food for consumption on the

premises. In this respect it is reiterated that the use of the subject premises is not akin to a restaurant in that it has no kitchen, cooker, or food preparation area etc. whilst the majority of sales relate to consumption off the premises.

- *'Starbucks' is not a 'Takeaway' use:*

Whilst some of the sandwiches available on site may be heated, these are purchased from wholesalers and delivered to the shop individually wrapped and ready for sale. There is no kitchen, cooker, food preparation area, mechanical system, and no back of house area in the 'Starbucks' unit.

Heated sandwiches for consumption off the premises make up less than 2% of the total transactions of the unit and this is clearly ancillary to the primary retail use. It should be noted that Article 5(1)(d) of the Regulations clearly states that the sale of hot food is permitted as part of a 'shop' use where it is ancillary to the primary use.

- The referrer has stated that *'In this instance, the unit is substantial and is wholly occupied by Starbucks, with the sale of hot beverages and packaged food for consumption on and off the premises being the primary retailing activity'*. This would appear to accept that a retail use is taking place. The referrer later states that *'Indeed the number of transactions which would relate solely to the retailing of coffee mugs / pots and / or packets of coffee would be likely to be wholly subsidiary to the main use of the premises as a cafe / takeaway'*. These two statements are considered to be contradictory in that it is initially stated that a retail activity is taking place and then subsequently asserted that the premises is being used as a café / takeaway.
- It is reiterated that there has been no change of use as both the previous and current use is as a shop. Furthermore, as regards concerns relating to any alleged impact on local amenities etc., it is asserted that the 'Starbucks' use is similar to any other retail use in this respect.
- On the basis that there has been no change of use and no development has occurred there is no requirement for screening for the purposes of appropriate assessment.
- It is submitted that the question of appropriate assessment is only relevant in a planning application scenario where a proposed development is being considered and thus is not required in respect of a request for a Section 5 declaration.

6.0 RELEVANT LEGISLATION

The Board received this reference on 22nd October, 2015 and therefore the Planning and Development Act, 2000, as amended, and the Regulations made thereto apply.

6.1 Planning and Development Act, 2000, as amended:

Section 2(1) of the Act defines “works” as follows:

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 3(1) of the Planning and Development Act, 2000, as amended, states the following:

“Development” in this Act 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 use of any structures or other land.

Section 4(1)(h) of the Act states that the following shall be exempted development for the purposes of the Act:

‘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(2) of the Act states that the ‘Minister’ may by Regulation provide for any class of development to be exempted development for the purposes of the Act.

6.2 Planning and Development Regulations, 2001, as amended:

Article 5(1) of the Regulations as amended by S.I. No. 364 of 2005 substitutes the following for the definition of ‘shop’ –

'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 sales 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'.

Article 6 (1) of the Regulations states the following:

'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 10 (1) of the Regulations states the following:

'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'.*

Part 1 of Schedule 2: Exempted Development – General:

Class 14:

Column 1 Description of Development	Column 2 Conditions and Limitations
<p>Development consisting of a change of use –</p> <ul style="list-style-type: none"> a) from use for the sale of hot food for consumption off the premises, or for the sale or leasing or display for sale or leasing of motor vehicles, to use as a shop, d) from use to which class 2 of Part 4 of this Schedule applies, to use as a shop, 	

Part 4 of Schedule 2: Exempted Development - Classes of Use:

Class 1: Use as a shop.

Class 2: Use for the provision of –

- a) financial services,
- b) professional services (other than health or medical services),
- c) any other services (including use as a betting office),

where the services are provided principally to visiting members of the public.

7.0 ISSUES AND ASSESSMENT

7.1 Having conducted a site inspection, and following a review of the available information, in my opinion, it is clear that there are a number of issues which require to be taken into consideration in assessing the subject referral and in determining whether or not the change of use constitutes development which is exempted development.

7.2 Whether the use of a premises as a coffee shop at 11 St. Patrick's Street, Cork, is or is not development and is or is not exempted development:

7.2.1 In assessing whether or not the use of the subject premises as a coffee shop amounts to development or is exempted development it is of relevance at the outset to note that there would appear to be no dispute between the occupier of the site and the referrer that the previous use of the property in question prior to its occupation by 'Starbucks' was as a retail 'shop' unit which accorded with the definition of a 'shop' as set out in Article 5(1) of the Planning and Development Regulations, 2001, as amended. This is of particular significance in that the key issue for determination with regard to the current use of the premises is whether to not its use as a coffee shop (in the format that is presently trading from the property) can be considered to constitute a 'shop' within the meaning of the Regulations. In effect, if it is held that the existing use as a coffee shop amounts to a 'shop' as per Article 5(1) of the Regulations then there has been no material change in the use of the structure and thus no 'development' has occurred pursuant to the definition of same provided by Section 3 of the Planning and Development Act, 2000, as amended.

7.2.2 At this point, I propose to review the existing use and layout of the referral premises in order to ascertain the precise nature of same and in this respect it should be noted that the subject property is presently trading as a 'Starbucks' outlet which extends over two floors of accommodation.

7.2.3 The ground floor of the premises incorporates the sales area and includes a linear serving counter which provides for the sale and display of various foodstuffs and beverages whilst there is a service area located to the rear of same that provides for staff access to the display cabinets in addition to the related food / drink preparation areas including coffee grinders / dispensers and a heating grill / apparatus etc. This floor level also includes for a number of seating areas with tables and chairs which allow visiting patrons to consume their purchases on site in addition to customer toilets.

7.2.4 The first floor level is not accessible to the public / customers and includes a washing-up area, storage facilities and associated staff accommodation

7.2.5 During the course of my site inspection it was estimated that the current layout of the seating / table arrangements could comfortably accommodate approximately 30 No. patrons / customers (and likely in excess of this number).

7.2.6 With regard to the specifics of the actual use of the premises, I note that the Planning Authority has referred to same as a 'coffee shop' whereas the operator has asserted that the use comprises a 'shop' whilst also making reference to a series of previous referrals which relate to 'coffee shops' (*N.B.* The corporate website of 'Starbucks' in Ireland actually refers to its stores as 'Coffee Houses'). In practical terms, it is evident that the nature of the use conducted on site primarily involves the sale of hot / cold beverages and foodstuffs for consumption both on and off the premises in addition to the sale of secondary items including mugs, coffee pots and packaged teas / coffee. Whilst the 'Starbucks' chain of stores is widely known for its sale of hot coffee in particular (for consumption both on and off the premises) it is readily apparent that the subject site also provides for the sale of a notable variety of foodstuffs including sandwiches, cakes, pastries, biscuits and other confectionery. In this respect I would advise the Board that whilst my observations of those products available for purchase in the premises on the day of my site inspection would generally correspond with those set out in Section 3.5 of the submission received by the Board from the site occupier / operator in response to the subject referral, it is perhaps of further relevance to note that the corporate website of 'Starbucks' in Ireland includes a detailed menu which describes all of the food products for sale in its premises. For example, this details that a variety of breakfasts, hot lunches and snacks are available for purchase in its stores. Accordingly, the question arises as to whether the foregoing use can be considered to constitute a 'shop' under the relevant legislative provisions.

7.2.7 In its submission the site occupier / operator has emphasised that all the foodstuffs sold on site (i.e. the sandwiches, rolls, pastries etc.) are prepared off-site in that they are purchased from wholesalers and delivered to the premises individually wrapped and ready for sale. It has also asserted that there are no kitchen or cooking / food preparation areas on site and that any heating of sandwiches etc. uses equipment commonly found in convenience stores and sandwich shops and does not necessitate the use of mechanical extraction / air handling systems. In effect, the case has been put forward by the site operator that the current use of the subject premises constitutes a 'shop' as per Article 5(1) of the Regulations as opposed to a café / restaurant and that a number of previous referrals determined by the Board concerning comparable 'coffee shop'

uses serve to confirm this position. In contrast, the referrer asserts that the present use of the property is more akin to a café / takeaway than a 'shop' and that said use is *sui generis* on the basis that it is not covered by any of the exempted development provisions or use classes set out in the legislation and thus requires planning permission in and of itself.

7.2.8 In considering whether or not the subject use as a 'coffee shop' can be classified as a 'shop' or a 'café / restaurant / takeaway' it is notable that similar issues have recently arisen in the UK with regard to the opening of several 'Starbucks' outlets in retail premises when local authorities have adopted differing interpretations of the 'Use Classes' set out in the Town and Country Planning (Use Classes) Order, 1987. For example, within that jurisdiction some local authorities have taken the stance that a 'Starbucks' can be categorised as an 'A1' use which is defined as a 'shop' that provides for a variety of uses including the retail sale of goods other than hot food, as a post office, the sale of tickets or as a travel agency, and the sale of sandwiches or other cold food for consumption off the premises. However, other local authorities have formed the opinion that a 'Starbucks' is essentially a café / restaurant subject to Class 'A3' i.e. use for the sale of food or drink for consumption on the premises or of hot food for consumption off the premises. Indeed, the situation can be complicated further with the alternative position that the definition of a café/coffee shop such as 'Starbucks' is a mixed use class and I note that the High Court case of *The Queen on the Application of Nero Holdings Limited -v- the Secretary of State for Communities and Local Government* referred to a similar establishment to Starbucks as being a mixed use of 'A1' and 'A3'.

7.2.9 However, whilst the aforementioned references to practice in the UK provide an insight into the difficulties experienced within that jurisdiction in classifying 'coffee shops' as a particular 'use class', I do not propose to rely on same in my determination of the subject referral.

7.2.10 Having reviewed the available information, and following consideration of those referrals previously determined by the Board which are in my opinion of most relevance to the assessment of the subject referral, I am inclined to suggest that the specific circumstances of the case at hand serve to differentiate it from a number of those referrals already referenced in Section 3 of this report in that the subject matter concerns the overall use of the entirety of a commercial premises as distinct from the use 'in part' of either a larger 'shop' area or a planning unit. Indeed, I am inclined to suggest that the determinations made by the Board in respect of ABP Ref. No. RL54.RL2941, RL07.RL3023 & RL61.RL3315 effectively

held that the partial use of a retail premises for the sale of coffee / hot drinks for consumption on / off site the premises was ancillary or subsidiary to the principle retail or 'shop' use. Accordingly, I would draw the Board's attention in particular to ABP Ref. Nos. RL28.RL2516, RL28.RL2887, RL54.RL2939, RL54.RL2940 & RL29S.RL3072 which I would suggest are of more immediate relevance to the determination of the subject referral in that they each concerned the use of a single premises for the sale of food / beverages for consumption either on or off the premises.

7.2.11 In its determination of ABP Ref. No. RL28.RL2516 the Board held that the use of a former camera shop as a juice bar with a sandwich counter constituted use as a "shop", as defined at Article 5 of the Planning and Development Regulations, 2001, as amended, and, therefore, did not constitute a material change of use from a camera shop and was not "development". Notably, in that instance, it would seem that given the absence of any reference to seating areas within the establishment that the juice drinks etc. prepared on site were expressly for consumption off the premises and thus the circumstances of that case are not directly comparable to the subject referral which concerns a use that provides for a substantial 'sit-down' area for the 'in-house' consumption of food / beverages.

7.2.12 With regard to ABP Ref. No. RL28.RL2887, I am inclined to suggest that the Board's determination of same is perhaps of more relevance to the subject referral in that the overall nature of the business then under consideration (i.e. a 'milkshake bar') included for the sale of certain (cold) foods / drinks such as milkshakes, ice-cream & yoghurt etc. for consumption both on and off the premises with approximately 60% of the floor area dedicated to customer seating. In that case the Board had regard to the nature and range of the goods sold on the premises in addition to the layout and services provided to visiting members of the public, with particular reference to the extent of seating provided. Furthermore, the Board Direction stated that the use in question was considered to be *'more akin to a café than a shop'* due to the extent of seating and thus the use of the premises as a 'milkshake bar' was deemed not to constitute use as a shop as defined by Article 5 of the Regulations and involved a material change of use which was development and was not exempted development. In my opinion, notwithstanding the difference in the types of food products sold from that premises when compared to the subject site (i.e. food / drinks of the 'hot' and 'cold' variety), it is clear that there are wider similarities between the overall nature of the two business formats in that they each involve the sale of foodstuffs / beverages for consumption both on and off the premises and include for the provision of significant 'in-house' seating areas. Accordingly, on the basis of the

foregoing, there is a case to be made that the current use of the subject site as a 'coffee shop' is also more akin to a 'café' use than a 'shop' and has therefore involved a material change of use.

7.2.13 Whilst the Board's subsequent determination of ABP Ref. No. RL54.RL2939 would also seemingly lend support to the proposition of the referrer in the subject case that the change of use of No. 11 St. Patrick's Street to use as a coffee shop would amount to development by reason of there having been a material change of use, I would accept that the specifics of that case are not directly comparable to the subject referral in that the premises then under consideration more closely resembled a 'restaurant' given its dedicated kitchen area with cooking facilities etc. and the actual nature of the services on offer which included the sale of wine.

7.2.14 It is at this point that I would draw the Board's attention to its determination of ABP Ref. No. RL54.RL2940 wherein it was held that the change of use of a bank (protected structure) to use as a coffee shop was development which was exempted development. In that instance it is of relevance to note that the Board considered the use of the premises as a 'coffee shop' as falling within the scope of a 'shop' for the purposes of Class 1 of Part 4 of Schedule 2 of the Regulations. Furthermore, from a review of the available information, it would appear that the overall nature and layout of the said coffee shop would be generally comparable to that set out in the subject referral (e.g. it was indicated in ABP Ref. No. RL54.RL2940 that the coffee shop model would not be engaged in any form of food preparation as all food for sale would be sourced from HSE registered suppliers, would be pre-packaged, and ready for direct sale to customers). Therefore, on the basis of the foregoing, I would accept that the Board's determination issued in respect of ABP Ref. No. RL54.RL2940 would seemingly serve to support the assertion made on behalf of the owner / operator of the subject premises that the use of same as a coffee shop can be categorised as a 'shop' use pursuant to the Regulations and thus there has been no material change of use. However, it should be noted that in its adjudication on ABP Ref. No. RL54.RL2940 the Board had particular regard to the available drawings of the coffee shop which did not include any kitchen facilities (despite the fact that the reporting inspector referenced the presence of a small kitchen area within the premises at ground level adjacent to the stairwell to the basement). Accordingly, I am inclined to suggest that this absence of kitchen facilities from the submitted drawings played a key role in the Board's determination of ABP Ref. No. RL54.RL2940 wherein it ruled that the coffee shop amounted to use as a shop contrary to the conclusions drawn by the reporting inspector. However, in my

opinion, this reliance on the presence or otherwise of a 'kitchen' area in ascertaining whether or not a coffee shop use can be considered to be either a 'shop' or *'more akin to a café / restaurant'* raises certain difficulties, particularly in light of the Board's earlier determination of ABP Ref. No. RL28.RL2887 wherein it was held that a 'milkshake bar' (with a substantial portion of the premises being dedicated to customer seating), which included for the sale of cold foods / drinks such as milkshakes, ice-cream & yoghurt etc. for consumption both on and off the premises and thus would seemingly not have necessitated any on-site kitchen / cooking facilities, was more akin to a 'café' use than a 'shop'.

7.2.15 The final reference which I consider to be of direct relevance to the subject referral is the Board's determination of ABP Ref. No. RL29S.RL3072 wherein it was held that the change of use of a premises from banking use to coffee shop was development which was not exempted development. In that instance the Board had particular regard to *'the information submitted by the referrer regarding the scale, nature and layout of the proposed coffee shop'* and concluded that *'the proposed use as a coffee shop does not constitute use as a 'shop' as defined in Article 5 (1), as amended, because the scale, nature and layout of the proposed coffee shop is more akin to a restaurant use which is expressly excluded from the definition of 'shop' under Article 5 (1) of the said Regulations, as amended'*. Notably, the referrer expressly stated that the proposed coffee shop operation would be similar in nature to 'Costa Coffee' or 'Starbucks' and that the internal works would include the provision of a counter and serving area in addition to the installation of *'standard coffee-shop fittings such as tables and chairs'*. Indeed, that premises is presently trading as a 'Starbucks' outlet following a subsequent grant of planning permission.

7.2.16 Having considered the foregoing, and following a review of the available information, it is my opinion that the overall nature and scale of the operation in question, with particular reference to the extent of seating provided 'in-house' and the inclusion of customer toilet facilities is a critical consideration in the assessment of the subject referral. Furthermore, on the basis of previous referrals determined by the Board I am not convinced that the absence of any dedicated cooking / kitchen facilities (other than equipment for the re-heating of pre-packaged foodstuffs) within the premises is a paramount consideration in deciding whether or not the proposed use is a 'shop' or more akin to a café / restaurant (contrary to the notable emphasis placed on same by the site occupier / operator). In my opinion, it is clear that any determination as to whether or not a 'coffee shop' constitutes use as a 'shop' as defined by Article 5(1) of the Regulations or is otherwise a 'sui generis' use such as a café / restaurant must

be assessed on a case-by-case basis. In this instance, I am satisfied that the existing use of the subject premises as a coffee shop is clearly more akin to a café / restaurant than to a shop and thus it would be appropriate to follow the precedents set by ABP Ref. Nos. RL28.RL2887 & RL29S.RL3072. In this regard I note that notwithstanding the actual proportion of food / drink items purchased on site for consumption off the premises as has been set out in the submitted information, it is clear that a significant majority of the overall floor area of the unit in question is specifically aimed at facilitating the consumption of the food and beverage items available for purchase on site within the confines of the premises. For example, the considerable extent of customer seating located at ground floor level in addition to the provision of toilet facilities for patrons serves to support my assertion that the operation of the existing 'coffee shop' is focussed on serving 'in-house' patrons and thus is more akin to a café / restaurant than a shop. Whilst I would acknowledge that 'Starbucks' coffee houses are perhaps more well-known for their takeaway coffees / hot beverages, this does not diminish the fact that the outlet under consideration serves a wide variety of foodstuffs and beverages, including sandwiches, cakes, pastries, biscuits and other confectionery, beyond those typically associated with the corporate brand, which has the effect of reinforcing its café / restaurant usage.

7.2.17 Therefore, on balance, in my opinion, it is entirely reasonable to conclude that the use of the subject premises does not constitute a 'shop' as defined by the Regulations and instead comprises a 'sui generis' use that is more akin to a café / restaurant. Furthermore, I am satisfied that the change of use from a shop to a 'coffee shop' in this instance is materially different in planning terms in that it gives rise to matters that would normally be considered in any assessment of a planning application by the Planning Authority. For example, there would be a need to ensure that the use in question accorded with the relevant zoning and development objectives of the City Development Plan. In addition, the likelihood would seem that the nature and overall operation of the existing 'coffee shop' could potentially give rise to wider amenity considerations, including the possibility of fugitive emissions and littering in the area, whilst the traffic and pedestrian safety implications associated with such a use would also require examination given the likely requirement for the regular delivery of foodstuffs etc. Accordingly, in my opinion, the change of use in question is 'material' and thus constitutes development within the meaning of Section 3 of the Planning and Development Act, 2000, as amended.

7.2.18 In conclusion, in light of the Board's determination in respect of ABP Ref. No. RL28.RL2221 wherein it was determined that a change of use from retail to

restaurant use constituted development which was not exempted development, I am of the opinion that, in this instance, the existing use in question is akin to a 'sui generis' café / restaurant use and that said use of 11 St. Patrick's Street, Cork, constitutes development which is not exempted development given the absence of any exemption in the Regulations which would otherwise permit such a change of use.

7.3 Appropriate Assessment:

7.3.1 Having regard to the nature and scale of the development under consideration, the nature of the receiving environment, the availability of public services and the proximity of the lands in question to the nearest European site, it is my opinion that no appropriate assessment issues arise and that the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any Natura 2000 site.

8.0 RECOMMENDATION

It can be concluded, given the foregoing, having regard to the relevant provisions of the Planning and Development Act, 2000 and the Planning and Development Regulations, 2001, as amended, that the use of premises as a coffee shop at 11 St. Patrick's Street, Cork, is development and is not exempted development.

A draft order is set out as follows.

ORDER

WHEREAS a question has arisen as to whether the use of a premises as a coffee shop at 11 St. Patrick's Street, Cork, is or is not development and is or is not exempted development:

AND WHEREAS the said question was referred to An Bord Pleanála by Cork City Council on the 22nd day of October, 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) Articles 5(1), 6(1), and 10(1) of the Planning and Development Regulations, 2001, as amended,

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- c) Class 14 of Part 1 and Class 1 of Part 4 of Schedule 2 to the said Regulations,
 - d) the previous use of the premises as a shop,
 - e) the information submitted on behalf of the site occupier / operator regarding the scale, nature and layout of the coffee shop, and
 - f) the nature and range of goods sold on the premises and the layout and services provided to visiting members of the public, in particular, the extent of seating provided:

AND WHEREAS An Bord Pleanála has concluded that –

- a) the use of the subject premises as a coffee shop does not constitute use as a “shop” as defined in Article 5 (1), as amended, because the scale, nature and layout of the coffee shop is more akin to a restaurant use which is expressly excluded from the definition of ‘shop’ under Article 5 (1) of the Planning and Development Regulations, 2001, as amended,
- b) the change of use of the subject premises, from use as a shop to use as a coffee shop is material and is therefore “development” within the meaning of Section 3 of the Planning and Development Act, 2000,

NOW THEREFORE An Bord Pleanála in exercise of the powers conferred on it by Section 5 of the 2000 Act, hereby decides that the use of a premises as a coffee shop at 11 St. Patrick’s Street, Cork, is development which is not exempted development.

Signed: _____

Robert Speer
Inspectorate

Date: _____