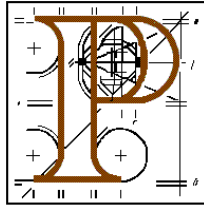


## An Bord Pleanála



## Inspector's Report

<b>Board Reference:</b>	<b>RL3440</b>
<b>Question:</b>	Whether the use of a portion of the ground floor for sale and consumption of teas, coffees and confectionery items, is or is not development, or is or is not exempted development.
<b>Location:</b>	1 O'Rahilly Street, Nenagh, Co. Tipperary
<b>Referrer:</b>	Tipperary County Council
<b>Observer:</b>	Noel and Bridget Duggan
<b>Planning Authority:</b>	Tipperary County Council
<b>Planning Authority Reference:</b>	TUD-15-080
<b>Date of Site Inspection:</b>	24 <sup>th</sup> May 2016
<b>Inspector:</b>	Sarah Moran

## **1.0 INTRODUCTION**

- 1.1 Tipperary County Council has made a referral to the Board under section 5(4) of the Planning and Development Act, 2000, as amended, seeking a decision as to the following:

*Whether the use of a portion of the ground floor for sale and consumption of teas, coffees and confectionary items is or is not development, or is or is not exempted development.*

*Whether the current use of the premises is in accordance with condition no. 2 of PL74.242904.*

## **2.0 SITE LOCATION AND DESCRIPTION**

- 2.1 The site with a stated area of 0.024 ha is a 2 storey / dormer, end of terrace building located close to the centre of Nenagh, Co. Tipperary. It adjoins a dental surgery to the south and the grounds of St. Mary's Church to the north and east. There is a mix of uses in the immediate vicinity including residential dwellings, a solicitor's office, a commercial garage, Nenagh Arts Centre, Nenagh Courthouse, St. Mary's Convent National School, Nenagh Heritage Centre and Nenagh Castle. The site is c. 0.3 km from Pearse St., which is the prime retail area of the town.
- 2.2 The front of the premises has a fascia sign bearing the name 'Steeple Books and More' and a sandwich board advertising books and a café menu. The interior of the premises is laid out as follows, with reference to drawing no. 13.16-402 P1, indicating the original floor layout and submitted with planning history file reg. ref. 13/520031:
- The area indicated as 'existing garage' on the original floor layout is now in use as a book sales area.
  - The area indicated as 'existing kitchen' on the original floor layout is now in use as a kitchen and serving area with an open counter.
  - There are customer toilets in the area originally indicated as 'existing w.c.'.
  - There is an additional internal seating area in the area indicated as 'existing lean-to shed'.
  - There is an outdoor seating area in the yard to the rear of the premises.

## **3.0 PLANNING HISTORY**

### **3.1 Reg. Ref. 13/520031 PL74.242904**

- 3.1.1 Permission was sought by E.E.C. Direct Ltd. for a change of use of the existing house and garage to retail unit for sale of religious goods (76

sq.m.) with ancillary service areas at ground floor level and separate office use (128 sq.m.) at first floor level. The application also sought permission for the construction of an additional retail area at ground floor level, new shopfront, entrance, signage and new service areas. The PA refused permission on 11<sup>th</sup> December 2013, for 2 no. reasons relating to contravention of town centre retail policy and contravention of the relevant zoning objective. The Board granted permission for the development subject to 11 no. conditions. Condition no. 2(a) of the permission limited the shop use to the sale of religious publications and associated items only. Condition no. 2(b) specified that the permitted office use shall not be general office use but only office use in accordance with the SP “Social and Public” zoning under the Nenagh Town and Environs Development Plan 2013 – 2019, including office uses associated with development that is “permitted in principle” or “open for consideration” in the SP zoned area.

#### **4.0 GROUNDS OF REFERRAL**

4.1 The referral has been made by Tipperary County Council. The following points are noted, as stated in the grounds of referral submitted:

- The PA refused permission for a retail unit and offices at the premises under Reg. Ref. 13/520031. This decision was overturned by the Board.
- An issue has arisen regarding use of part of the ground floor for the sale and consumption of teas, coffees and confectionery items. The PA is of the opinion that this contravenes condition no. 2 of the Board condition PL74.242904. The developer argues that this use is ancillary to the sale of books in the shop.
- The PA notes that the Board has adjudicated in a number of similar cases, ref. 07.RL.3023, 54.RL.2941, 54.RL.2040. In each of these cases, the Board concluded that a “coffee shop” constituted use as a “shop” as defined in Article 5 of the Planning and Development Act 2000 (as amended) and did not constitute a material change of use and was not “development”.
- The determination is being sought on the basis of a report of an independent body empowered to deal with such matters. The PA has already issued a warning letter followed by an enforcement notice. Neither have been complied with. The developer has raised the matter of ancillary use and the PA is prepared to have this adjudicated on independently.
- The PA has also submitted Land Registry documents, which identify the landowner as Noel Duggan.

#### **5.0 SUBMISSION OF OBSERVER**

- 5.1 Ivor Fitzpatrick & Company Solicitors made a submission dated 18<sup>th</sup> December 2015, on behalf of Noel and Bridget Duggan. The following points are noted:
- The referral did not disclose how the Board identified Noel and Brigid Duggan as the appropriate respondents as the reference itself does not refer to any third party.
  - The observer does not accept that it was appropriate for the Board to retain correspondence which emanated from the Council as part of any reference not disclosed and queried whether the Board had unilaterally decided to assist the Council.
  - The Board should dismiss the subject referral as it does not set out the grounds and the reasons, considerations and arguments on which the referral is based. The submission therefore does not comply with section 127(1)(d) of the Act and is invalid pursuant to section 127(2)(a) of the Act. The Board is requested to determine the question of invalidity as a preliminary issue.
  - The referral submitted is wholly inconsistent with the Act and accordingly it is impossible to respond to such a referral which does not contain appropriate or adequate grounds.
- 5.2 The Board wrote to the observer on 20<sup>th</sup> January 2016, advising them the referral is being deemed valid in accordance with the provisions of section 127 of the Act, also that a party to a referral shall not be entitled to elaborate in writing upon submissions made or make any further observations in writing unless requested to do so by the Board. Ivor Fitzpatrick & Company Solicitors responded with a request that the Observers be allowed to make a submission on the substantive issues of the case. The Board issued a section 131 notice on 29<sup>th</sup> February 2016, requesting the observers to make a submission.
- 5.3 Ivor Fitzpatrick & Company Solicitors made a further submission on 11<sup>th</sup> March 2016. The following points of same are noted:
- It appears that Tipperary County Council has furnished the name to whom the Board has addressed the letter as the owner / occupier.
  - Fair procedures and natural and Constitutional justice require that such communication which has identified Bridget and Noel Duggan are the owner/occupiers of the premises be forwarded.
  - Section 127(4)(a) of the Act provides that an appeal or referral shall be accompanied by such documents, particulars or other information relating to the appeal or referral as the applicant, the person making the referral, considers necessary or appropriate. The Board should have determined that the name of the owner / occupier is a critical document but has not been furnished to the observer.
  - In the absence of this information, the referral does not comply with the requirements of section 127 and is invalid.

- The observer's clients should not be required to participate in such a referral. If a determination is made, it could amount to a conviction under section 151 of the Act.
- The submission refers to the High Court case Kilross Properties Limited v Electricity Supply Board and Eirgrid Limited [2012 no. 176 MCA], relating to injunction proceedings under section 160 where a section 5 determination has been made.
- It is submitted that the observers are not the occupiers or the developer of the building.
- The submission requests access to the relevant documentation.

5.4 Ivor Fitzpatrick & Company Solicitors made a further submission to the Board on 16<sup>th</sup> March 2016. The following additional points are noted:

- It would be inappropriate for the Board to determine the subject case in the absence of a response from the person who has carried out the development and who occupies the premises.
- The applicant for planning permission to whom the condition is the subject matter is the appropriate person to whom the referral should be directed, i.e. EEC Direct Limited.
- The change of use in question does not amount to development for the purpose of section 5 of the Act. Section 3 of the Act requires that a change of use is material. The Council does not assert that there has been a material change of use in the referral, only that the sale and consumption of teas and coffees "constitute a change of use".
- The use in question relates to a small portion of a retail unit which has a primary use for the sale of religious publications and associated items. The primary use continues to be in terms of space allocated and turnover the use permitted by the Board. The subject use is ancillary to the primary use.
- The submission refers to the case Palmerlane Limited v An Bord Pleanála [1997 No. 343 JR]. McGuinness, J. found that the sale of hot food for consumption off the premises in the context of a Spar convenience store did not amount to a material change of use.
- The submission refers to the case of Rehabilitation Institute v Dublin Corporation (High Court, Unreported, 14<sup>th</sup> January 1998) where it was held that where a use of part of a building was ancillary to the principal use, it is regarded as part of that use.
- The submission refers to the case Waterford County Council v John A Wood Ltd.[1999 1 IR 559], where the Court held that the Board has no jurisdiction to determine the issue of an unauthorised development.
- The submission states that it is entirely inappropriate that the Council should ask the Board to determine whether there has been a breach of the Condition within the terms of a section 5 referral.
- Section 127(1)(d) provides that full grounds of the referral and the reasons, considerations and arguments upon which they are based are set out. This is entirely absent from the submission of the Council as

no grounds are submitted and no reasons, considerations or arguments have been included. In *Heatons Limited v An Bord Pleanála*, Hogan J. in similar circumstances deemed a referral to be invalid. This referral does not comply with section 127(1) and is invalid in accordance with section 127(2) and must therefore be dismissed.

## **6.0 LEGISLATIVE CONTEXT**

### **6.1 Planning and Development Act, 2000, as amended**

#### **6.1.1 Section 2(1)**

*In this Act, except where the context otherwise requires:*

*“exempted development” has the meaning specified in section 4;*

*“unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use.*

*“unauthorised works” means any works on, in over or under land commenced on or after 1 October 1964, being development other than –*

- (a) Exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*
- (b) Development which is the subject of a permission granted under part IV of the Act of 1963 or under section 34 or 37G of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.*

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

#### **6.1.2 Section 3**

Section 3(1) defines development as follows:

*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.*

#### **6.1.3 Section 4**

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

*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 provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principle regulations made under this section are the Planning and Development Regulations, 2001.

#### 6.1.4 Section 5

Section 5(4) of the Act provides that:

*... a planning authority ... may refer any question as to what in any particular case is or is not development or is or is not exempted development to be decided by the Board.*

#### 6.1.5 Section 127

Section 127 sets out provisions for the making of appeals and referrals. Section 127(1) states that an appeal or referral shall:

- (a) be made in writing,*
- (b) state the name and address of the appellant or person making the referral and of the person, if any, acting on his or her behalf,*
- (c) state the subject matter of the appeal or referral,*
- (d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,*
- (e) in the case of an appeal under section 37 by a person who made submissions or observations in accordance with the permission regulations, be accompanied by the acknowledgement by the planning authority of receipt of the submissions or observations,*
- (f) be accompanied by such fee (if any) as may be payable in respect of such appeal or referral in accordance with section 144, and*
- (g) be made within the period specified for making the appeal or referral.*

Section 127(2)(a) provides that an appeal or referral which does not comply with the requirements of subsection (1) shall be invalid.

Section 127(4)(a) provides:

*An appeal or referral shall be accompanied by such documents, particulars or other information relating to the appeal or referral as the*

*appellant or person making the referral considers necessary or appropriate.*

## **6.2 Planning and Development Regulations 2001 (as amended)**

6.2.1 Part 2 and Schedule 2 of the Regulations relate to Exempted Development.

6.2.2 Article 5(1) provides interpretations for the purposes of exempted development and defines a 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,*
- (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.*

6.2.3 Article 9 provides restrictions on exemptions. Article 9(1)(a) specifies development that would:

- (i) Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act*

and

- (xii) Further to the provisions of section 82 of the Act, consist of or comprise the carrying out of works to the exterior of a structure,*



*where the structure concerned is located within an architectural conservation area or an area specified as an architectural conservation area in a development plan for the area or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan and the development would materially affect the character of the area,*

6.2.4 Article 10(1) provides:

*Development which consists of a change of use within any one of the classes of use specified in Part 4, Schedule 2, shall be exempted development for the purposes of the Act, provided the development, if carried out, would not:-*

- (a) involve the carrying out of 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.*
- (e) A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.*

6.3.6 Schedule 2 of the Regulations lists exempted developments. Part 4 of Schedule 2 sets out classes of use including Class 1 'Use as a shop'.

## **7.0 NENAGH AND ENVIRONS DEVELOPMENT PLAN 2019-2019**

7.1 The site is located within the town boundary and has the zoning objective 'SP' 'To provide and improve Social and Public Facilities'. Table 10.1 of the plan provides a zoning matrix. The use 'restaurant' is generally not permitted under the SP zoning objective, defined in section 10.1 of the plan as follows:

*Proposed use will not be favourably considered, except in exceptional circumstances and in such instances, the development may represent a material contravention of this plan. This may be due to envisaged negative impact on existing and permitted uses, incompatibility with policies and objectives contained in the Plan.*

- 7.2 The site is located within Nenagh Architectural Conservation Area (ACA), as per Map 7.1 of the plan. *Policy BH1: Architectural Conservation Areas* applies:

*It is the policy of the Councils' to ensure the conservation and enhancement of the Architectural Conservation Areas. The Councils' in assessing proposals for re-development will have regard to:*

- a) the impact of the proposed development on the character and appearance of the Architectural Conservation Area in terms of compatibility of design, colour and finishes, and massing of built form;*
- b) the impact of the proposed development on the existing amenities, character and heritage of these areas; and*
- c) the need to retain important architectural and townscape elements, such as shop fronts, sash windows, gutters, down pipes, decorative plasterwork etc.*

*Policy BH4: Vernacular Structures* also applies:

*It is the policy of the Councils' to encourage the protection, retention, appreciation and appropriate revitalisation and use of the vernacular heritage in Nenagh and its environs.*

## **8.0 RELEVANT REFERRALS**

### **8.1 RL2221 Unit 50 Wilton Shopping Centre, Wilton, Cork**

- 8.1.1 Relating to a retail unit located within an extension to a shopping centre. The unit was in operation as a café / restaurant. The original permission for the extension included retail / restaurant use with no definitive assignment of uses to units or allocation of floor spaces to individual uses. The Board concluded that the change of use from retail to restaurant comes within the scope of the definition of “development” as defined in section 3 of the Act and considered that the change of use of Unit 50 constitutes a material change of use.

### **8.2 RL2516 55 St. Patrick's Street, Cork**

- 8.2.1 Relating to the conversion of a premises formerly used as a camera shop into a juice bar involving the sale of cold drinks, fruit, confectionary, sandwiches and coffee. The Board concluded:
- The use of the premises as a juice bar with a sandwich counter constitutes use as a “shop”, as defined in article 5(1) of the Regulations and, therefore, does not constitute a material change of use from camera shop and is not “development”, as defined at section 3(1) of the Act.

### **8.3 RL2821 Reeks Gateway, Ardnamweely, Killarney, County Kerry**

8.3.1 Relating to a medical centre and a pharmacy with a coffee / juice bar within the pharmacy. There was an extant permission for retail and commercial use of the premises. The question arose as to whether (1) the use of the upper floors of Block 1 & 2 as a medical centre and (2) the incorporation of a juice bar / coffee station as part of the ground floor retail pharmacy unit is or is not exempted development. The second aspect of the referral is relevant to the subject case. The owner and occupier argued that the café was ancillary to the pharmacy use. The pharmacy area was partitioned from the café by way of screens and a doorway with a thoroughfare to a lift and stairwell in between. Tables and chairs were provided adjacent to the café. The Board decided that the proposed uses were development and not exempted development, as follows:

- The medical use was considered to be specifically excluded from the permitted retail and commercial use in the Regulations and not in the same use class,
- The café use was not considered to be ancillary to the pharmacy use. The subdivision of the retail unit also materially contravened condition no. 9 of planning reg. ref. 04/4259, which prevented the subdivision of retail units on the site. It was also considered that a café does not come within the same use class as a shop and therefore is not exempted development.

### **8.4 RL2939 Corner of Shop Street / North Quay, Drogheda, Co. Louth**

8.4.1 Relating to a change of use from clothing retail to a coffee shop / bistro. The case raised the question of whether the use was that of a coffee shop or that of a restaurant and whether that use fell within the same use class a traditional retail shop. The Board decided that the use was development and was not exempted development, as follows:

- The use of the subject site is a “shop” as defined under article 5(1) of the Regulations. A “shop” as defined under Article 5(1) does not include use as a coffee shop / bistro (restaurant). The change of use was therefore development;
- The uses “shop” and “coffee shop/bistro (restaurant)” did not fall within the same Class of Use under Part 4 of Schedule 2 of the Regulations, and the use classes under Part 4 of Schedule 2 did not provide any exemption in relation to change of use from a shop to a coffee shop/bistro (restaurant).

### **8.5 RL2941 West Street, Drogheda, Co. Louth**

8.5.1 Relating to the partial change of use of a Mace convenience store to a coffee shop. An area to the front of the store comprised a small coffee shop with a serving counter for food and beverages and approximately 8 no. tables and chairs. It appeared that there was a mix of takeaway and sit in custom generated by the coffee shop. Food available for takeaway or consumption on the premises included muffins, scones and deli sandwiches. The retail area sold mostly confectionary, newspapers, magazines, etc. There were customer toilets located to the rear of the shop. The Board concluded that:

- The existing use of the site is a “shop” as defined under article 5(1) of the Regulations,
- A ‘shop’ as defined under Article 5(1) of the Regulations, is for the retail sale of goods,
- The use of the front of the premises allows for consumption of food items purchased on the premises,
- The existing use of part of the site is a coffee shop which falls within the scope of a shop for the purposes of Class 1 of Part 4 of Schedule 2 to the said Regulations, and there has been no material change in use of the premises:

## **8.6 RL3023 Keane’s Garden Centre, Kilcolgan Village, Co.Galway**

8.6.1 Relating to the proposed provision of a coffee sales area within an outbuilding at an existing garden centre. The outbuilding was in use for display / storage of merchandise associated with the garden centre, such as ceramic pots and baskets. The proposed use comprised a coffee sales area, to be ancillary to the retail unit, which would be used for the sale of pots, confectionary and minerals. The proposed sales area was relatively small (16.8 sq.m.) compared with the overall site area. No customer seating was proposed and no customer toilets were to be provided. The Board decided that the proposed coffee sales area was not development, as follows:

- The proposed partial use of an existing retail premises for coffee sales comes within the scope of the definition of “shop” in article 5(1) of the Regulations. Account was taken of the planning history of the site as an established retail unit, the existing use of the retail unit and the nature of the proposed coffee sales area, which represented a relatively small part of the premises which did not include seating or customer toilets. It was, therefore, considered that the proposed use did not constitute a material change of use.

## **9.0 ASSESSMENT**

9.1 This referral relates to the question of whether the use of part of the permitted ground floor shop for the sale and consumption of teas, coffees

and confectionery items is or is not development, or is or is not exempted development. The relevant matters may be considered as follows:

- Procedural issues
- Whether the change of use is development
- Whether or not it is exempted development
- Whether any restrictions on exempted development apply

## **9.2 Procedural Issues**

9.2.1 The first issue to be decided is a procedural matter, that is, whether or not the Board should accept this present case as a valid referral, pursuant to Section 5 of the Act.

9.2.2 The subject referral follows several previous attempts by Tipperary County Council to lodge a referral relating to the same issue at the subject site. The first referral, ref. RL3405, was invalid as it was not accompanied by a fee. The second referral, ref. RL3421, was declared invalid as it was not accompanied by a statement of the grounds of referral. A third referral, ref. RL3427, was also declared invalid on the grounds that it did not contain a statement of the grounds of referral.

9.2.3 The observer submission on file, which has been lodged by a solicitor on behalf of the site owners, submits that the subject referral should be declared invalid on the basis that it does not comply with the requirements of section 127 of the Planning and Development Act 2000, as amended, as it does not include an adequate statement of the grounds of referral by the PA. In addition, the observer submits that the PA did not follow fair procedures in disclosing the names of the site owners to the Board, also that the Board cannot adequately assess the referral in the absence of full information as to this issue. The site owners do not occupy the premises and did not carry out the subject change of use. The observer also states that the Board has no jurisdiction to determine the issue of unauthorised development in relation to whether there has been a breach of a condition of permission, within the terms of a section 5 referral. The observer's submission refers to the case 'Heatons Limited v An Bord Pleanála'. I presume that this actually relates to the case *Heatons v Offaly County Council* [2012 No. 536 J.R.]. There were two separate substantive issues in the Heatons case, both of which are both relevant to the subject appeal, i.e. (1) the validity of the referral with regard to section 127 of the Act and (2) whether a planning authority could make a referral to the Board under section 5(4), without notice to the relevant landowner and, if so, whether a reference which asks whether the occupier of the premises is operating in compliance with relevant planning conditions is a valid reference for this purpose. All of these issues may now be considered separately as follows, with regard to the Heatons case and other matters.

9.2.4 Validity of the Referral with Regard to Section 127(1) of the Planning and Development Act 2000, as amended

Section 127(1) of the Act, as set out above, lists the requirements for a valid referral. In particular, section 127(1)(d) requires that it shall:

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

I note that the preliminary view of the Appeals Processing Section was that the case was valid, and a letter was issued on 20<sup>th</sup> January 2016 indicating that the Board was validating the referral.

In the Heatons case, the applicant maintained that the referral was invalid because neither the letter of reference nor any of the accompanying documentation stated the grounds of the referral or the reasons, conditions an arguments on which it was based. The judgement by Hogan, J. refers to a previous case, O'Reilly Brothers (Wicklow) Ltd. v An Bord Pleanála [2006] IHEC, [2008]1 I.R. 187, in which the grounds of a referral by the PA were stated in the referral letter and the full reasons, consideration and arguments on which it was based were not in the letter but could be inferred from the accompanying documentation. The Board decision was upheld in the O'Reilly Brothers case. Paragraph 24 of the Heatons judgement states:

*“... as Quirke, J found, the reasons, considerations and arguments were in fact contained in the reference in O'Reilly brothers, albeit heavily camouflaged in a jumble of other documentation. Moreover, the letter from the planning authority did, in any event, identify the issue on which the Council sought a reference. Critically, however, even that cannot be said in the present case, since the letter of reference was framed at the highest level of generality and was entirely silent on the issues of the reasons, consideration and arguments. One could perhaps infer from both the terms of the letter and the accompanying documentation what issues actually subtended the reference, but even this would require some degree of supposition on behalf of the Board. Just as importantly, potentially important documentation – such as the Simon Clear correspondence – was not included in the reference.”*

The Heatons referral was quashed on the basis that the PA referral did not adequately set out in the reasons and considerations on which it was based and did not comply with the requirements of section 127(1)(d). Of importance was the issue that other parties would be at a disadvantage in

being obliged to respond to the referral in circumstances where its true basis was not explicitly stated.

In the subject case, the PA grounds of referral, as submitted to the Board on 7<sup>th</sup> December 2015, clearly state the subject of the referral. It describes the change of use in question and provides some background information regarding the planning history of the site. It also refers to several relevant referral cases, where the Board has made a determination in relation to similar issues. The arguments of the applicant and of the PA are stated. The letter is accompanied by a copy of the PA decision reg. ref. 13/520031. The PA subsequently submitted additional documentation to the Board on 15<sup>th</sup> December 2015, comprising Land Registry documents identifying the site owner and details of the planning history. I consider that the original submission, while brief, is adequate to comply with the requirements of section 127(1), in particular section 127(1)(d). I also consider that it is adequate to inform all parties of the relevant issues, which was an important consideration in the Heatons case.

#### 9.2.5 Validity of the Referral with Regard to the Notification of the Site Owners and Occupiers

The observer raises the issue of whether a planning authority could make a referral to the Board under section 5(4), without notice to the relevant landowner. Section 127(4)(a) provides that a referral shall be accompanied by such documents, particulars or other information relating to the referral as the person making the referral considers necessary or appropriate. In this case, the PA has submitted details of the planning history only in the original referral. The Land Registry documents were subsequently submitted in response to a request by the Board. I accept that the business premises at the site are not occupied by the landowner, however there is no express requirement under section 127(4), to submit details of the site occupant. I also note paragraph 48 of the Heatons judgement by Hogan, J., which states:

*“There was no need to consult prior to the making of the reference because Heatons’ procedural rights would be fully protected by the Board in line with s. 129 of the 2000 Act.”*

Section 129 provides that the Board shall circulate copies of a referral to each party, in order to give them the opportunity to comment. As noted above, the original referral document is considered adequate to inform all parties of the substantive reasons, considerations and arguments.

#### 9.2.6 Non-Compliance with Conditions and Unauthorised Development

I now turn to the issue of whether the Board can consider the matter of non-compliance with a condition of permission in the context of a referral. This matter has been established in case law, in particular the cases of *Palmerlane Ltd v Dublin Corporation* [1999] I.E.H.C. 92, and *Grianan an Aileach Centre v Donegal County Council* [2004] 2 I.R. 625. These cases support the argument that it is acceptable to interpret a planning condition in order to determine a question of whether or not a use (proposed or existing) is development or is exempted development.

#### 9.2.7 Conclusion

To conclude, it is my recommendation that the Board should accept the referral as valid and should consider it on its merits.

### 9.3 **Whether the Change of Use is Development**

#### 9.3.1 Section 3(1) of the Act defines development as follows:

*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*

The first part of the question to be examined is whether or not a change of use has occurred and if any change of use is material and therefore development. If any change of use is not material, no further question arises but if on the other hand there is a material change of use, then development has occurred and the Board must determine whether it is exempted development. It is well established that “material” in the phrase “material change in the use” in section 3(1) of the Act means “material for planning purposes”, for example the judgment of Keane J. Felix<sup>257</sup> in the High Court in *Monaghan County Council v. Brogan* [1987] I.R. 333 at p.338. Therefore, if the use would require planning permission, then it is a material change of use.

#### 9.3.2 Article 5(1) of the Regulations provides an interpretation of a “shop” for the purposes of exempted development. A “shop” means a structure used for inter alia the retail sale of goods or 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 where the sale, display or service is principally to visiting members of the public. This definition does not include any use 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 where the sale of food or wine is subsidiary to the main retail use as described above. Permission is therefore required for a change from shop to a restaurant. I note that the subject of the referral is the use of part of the shop “for the sale and consumption of teas, coffees and



*confectionery items*". Having inspected the site, I note the following with regard to the overall layout of the premises:

- Part of the front of the premises is laid out of a book shop.
- The book shop is internally connected to café seating areas to the side and rear. There is a serving area at the rear of the premises. I estimate that the seating and café area occupy at least 60% of the overall ground floor area.
- The premises offers a normal café menu, i.e. teas, coffees, sandwiches, lunches, cakes, etc.
- There is an additional external seating area in the rear yard of the premises.
- There is a small kitchen at the rear of the building.
- Customer toilets are provided.

9.3.3 The developer argues that the subject use is ancillary to the sale of books in the shop. With regard to the site inspection, I consider that the café use is not subsidiary to the permitted book shop. There is a small area dedicated to book sales at the front of the premises, however the remainder of the ground floor is laid out as a café with seating areas, serving counter, customer toilets, etc. An extensive café menu is on offer. I therefore consider that the overall premises does not come within the scope of the definition of a "shop" provided in article 5(1) and is therefore a material change of use that would require permission and is development. I note in this regard the conclusion reached by the Board in referral RL2221, as outlined above, i.e. that the change of use from retail to café / restaurant comes within the scope of the definition of "development" as per section 3 of the Act.

9.3.4 I note that under RL2516, the Board concluded that a sandwich counter and juice bar involving the sale of cold drinks, fruit and confectionary, sandwiches and coffee constitutes use as a "shop" as defined in Article 5. That case involved the sale of sandwiches and juice drinks prepared on the premises, for consumption off the premises. There was no seating at the premises, therefore it is not relevant to the subject case. In RL2914, the Board concluded that the use of a small part of a Mace convenience store for the consumption of food items purchased on the premises came within the overall definition of a "shop" as per article 5(1). However, in the current case, the function of the retail area, as permitted under PL74.242904, is "*the sale of religious publications and associated items*". This does not involve the sale of food items, unlike in the case of RL2914, therefore the consumption of such items on the premises could not be considered to be incidental to its main use. In the case of RL3023, the sale of coffees, etc. within a garden centre was considered ancillary to the main use on the basis that the sales area was small relative to the overall size of the operation and that no customer seating or toilets were provided. That is not the case at the subject site.

9.3.5 Having reviewed the operation I conclude that the café is a distinct use and is not ancillary to the book shop. It therefore constitutes development.

#### **9.4 Whether the Change of Use is Exempted Development**

9.4.1 Under article 10(1) of the Regulations, development consisting 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, subject to conditions. Class 1 of Part 4 of Schedule 2 refers to “Use as a shop.” The critical issue is whether or not the subject and permitted uses can both be classified as a “shop” and therefore exempted development. As discussed above, the subject use is not considered to come within the scope of the definition of a “shop” provided in article 5(1) of the Regulations. Therefore, the exemption provided under article 10(1) does not apply in this case. I therefore conclude that the subject development is not exempted development.

#### **9.5 Whether any Restrictions on Exempted Development Apply**

9.5.1 I will now consider whether any restrictions on exemption would apply in this case, notwithstanding the above conclusion that the subject change of use is development and is not exempted development, in order to provide as full an assessment as possible.

9.5.2 Article 9 of the Regulations provides restrictions on exemptions. Article 9(1)(a)(i) specifies development that would:

*(i) Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.*

Condition no. 2(a) of PL74.242904 specified:

*The shop use hereby permitted shall only be for the sale of religious publications and associated items. Notwithstanding the provisions of legislation relating to exempted development, no other use, even within the same planning category, shall be implemented without a prior grant of planning permission ...*

*Reason: To comply with the zoning objective for the subject site, as set out in the Nenagh Town and Environs Development Plan 2013 – 2019.*

The use of the premises for the sale and consumption of teas, coffees and confectionery items for consumption on the premises contravenes condition no. 2(a). The use is therefore not exempted development,

notwithstanding any conclusion that the Board might reach on whether it constitutes a material change of use and is therefore development, as discussed above. I also note that the existing internal layout is not consistent with the permitted ground floor plan as per drawing no. 13.16-403PI of Reg. Ref. 13/520031.

9.4.2 The site is located in Nenagh Architectural Conservation Area (ACA) as per Map 7.1 of the plan. Article 9(1)(xii) specifies that development which consists of works to the exterior of a structure located within an ACA and which would materially affect the character of the area, shall be restricted from exemption. The development in question does not involve significant external works to the premises.

9.4.3 To conclude, it is considered that the subject use would contravene a condition of an extant permission at the subject site. Therefore, article 9(1)(a)(i) applies, i.e. the change of use is not exempted development.

## **9.5 Conclusion**

9.5.1 The use of the premises as implemented is considered to constitute development and is not exempted development.

## **10.0 CONCLUSION AND RECOMMENDATION**

10.1 Having considered the contents of the file, and following inspection of the site and surrounding area, I conclude the change of use as described constitutes development. Accordingly, I recommend a decision order in the following terms: -

### **SCHEDULE**

**WHEREAS** a question has arisen as to

**WHETHER** whether the use of a portion of the ground floor of 1 O'Rahilly Street, Nenagh, Co. Tipperary, for sale and consumption of teas, coffees and confectionery items, is or is not development, or is or is not exempted development.

**AND WHEREAS** Tipperary County Council referred the issue for determination to An Bord Pleanála on the 7<sup>th</sup> day of December 2015:

**AND WHEREAS** An Bord Pleanála, in considering this reference, had regard particularly to:

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended;

- (b) Articles 5, 6, 9 and 10 of the Planning and Development Regulations, 2001, as amended;
- (c) Class 1 of Part 4, Schedule 2 of the Planning and Development Regulations 2001 as amended;
- (d) the planning history of development on the site and
- (e) the existing use of the retail unit and the layout of the premises as now constituted:

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

- (a) The use of part of the ground floor retail unit for the sale and consumption of teas, coffees and confectionery items is not ancillary to the retail use,
- (b) the use would constitute a material change of use and would therefore constitute development within the scope of Section 3(1) of the Planning and Development Act, 2000, as amended,
- (c) the change of use is not within the scope of the exemption provided in Article 10(1) of the Planning and Development Regulations 2001, as amended.
- (d) the planning permission granted in respect of the premises provided for use of the shop for the sale or religious publications and associated items only,
- (e) the development does come within the scope of the restrictions on exemption provided in Article 9 of the Planning and Development Regulations 2001, as amended.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the use the permitted retail premises at No. 1 O'Rahilly Street, Nenagh, Co. Tipperary for the sale and consumption of teas, coffees and confectionery items is development and is not exempted development.

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**Sarah Moran,**  
**Senior Planning Inspector**  
**25<sup>th</sup> May 2016**

