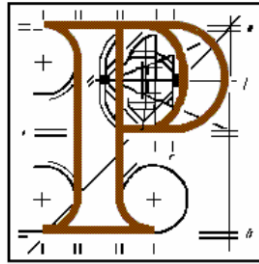


## An Bord Pleanála



## Inspector's Report

**Referral No:** PL93.RL.3444

**Details of Reference:** Whether the partial change of use of a shop to a coffee shop is or is not development or is or is not exempted development.

**Location:** Pennys, 31-37 Barronstand Street, Waterford

**Referred By:** Primark Ltd.

**Owner/ Occupier:** Primark Ltd.

**Planning Authority:** Waterford City and County Council

**Inspector:** Caryn Coogan

**Date of Inspection:** 24<sup>th</sup> of March 2016

**Appendices:** Photographs

## **1. INTRODUCTION**

- 1.1** This referral is a referral by Kiaran O Malley and Co. on behalf of Primark Ltd, under Section 5(3)(a) of the 2000 Act, for a determination by the Board on whether or not the subject development is development and whether or not it is exempted development.

## **2. BACKGROUND**

- 2.1** There has been no application for a Declaration under Section 5 (1) of the Planning and Development Act made in relation to this case by the owner/ occupier of the site.
- 2.2** The development relates to the partial change of use of a Pennys Store in Waterford City to a coffee shop. The permitted use of the premises is a “shop”. The shop was recently refurbished and extended under planning reference No. 10500208 which was granted by the planning authority in August 2011.

## **3. SITE LOCATION AND DESCRIPTION**

- 3.1** The subject site is located in the heart of Waterford City, and it is a large Pennys store which fronts onto 32-37 Barronstrand Street alongside John Robert’s Square, the major focal and commercial point in Waterford City centre. The location is pedestrianized. The existing Pennys store has a two storey front with a parapet roof, and functions as a three storey retail outlet.
- 3.2** Internally the ground floor is a typical open plan retail sales area. There are a set of escalators on one side of the ground floor leading to the first floor retailing area. On the first floor to the rear of the escalators is the *Insomnia* coffee shop (120sq.m.), the subject of this referral.
- 3.3** The coffee shop area is not enclosed but forms part of the open plan area of Pennys. It has a display cabinet for confectionary, a counter, and a pay area with seating. There is a coffee machine, a toasted sandwich maker, a small fridge and other appliances behind the counter, but there is no kitchen or preparation area.

## **4. THE REFERRER’S CASE**

- 4.1** The Referrer, Primark Limited, has requested the Board to consider the following:
- (a) Is there a Change of Use  
(b) Is the change of use a material change of use

4.2 *Is there a Change of Use*

Pennys is a shop defined in Article 5(1) and Class 1 of Part 4 of Schedule 2 of the Planning and Development Regulations.

A new coffee shop, 120sq.m. within the existing Pennys store at first floor level, is a change of use from retail to coffee shop.

4.3 *Is the change of use a material change of use?*

The coffee shop entails the sale of hot and cold food and drinks for consumption on and off the premises. The sale of hot and cold food for consumption off the premises clearly comes within the definition of a shop at Article 5(1) where such sales are subsidiary to the main retail use. The Insomnia unit is clearly a Class 1 'shop' use.

4.4 Article 5(1) is silent in respect of selling sandwiches or other food items for consumption on the premises. This was considered by the Board under Reference 54RL2941 in Drogheda and the circumstance relating to that case are identical to this case. The Board determined the use of part of the shop as a coffee shop is not development and the coffee shop use is also a shop use. The Board determined there was no material change of use at the premises. The other relevant case is also in Drogheda 54RL2940 in which the Board determined the change of use of a bank to a coffee shop is a change of use from a Class 2 bank to a Class 1 coffee shop. What is important, is that the coffee shop was classified as Class 1 Shop in the assessment.

4.5 In terms of Waterford City and County council's determination in this case, the planning report does not adequately explain the Council's decision in that the report focuses on the distinction between consumption of food and/or drinks on and off the premises, and states the coffee shop is designed and intended to be a sit down café/ coffee shop while the occasional patron who wishes to purchase food for consumption off the premises will be facilitated. The report also states the change of use is for consumption of food and beverages on the premises and this is evidenced by the substantial seating and the provision of two customer toilets. This assessment is flawed and it has no regard for the two cases cited in Drogheda in the submission. Crucially the main reasons and considerations cited in Referral Order 54RL2941 refer to the consumption on the premises of food items.

4.6 The Planning Officer's Report concurs with the Board's Inspector's assessment on 54RL2941, but the Board rejected the Inspector's recommendation, and it confirmed a coffee shop is a Class 1 shop use and there is no material change of use involved. Both of the cases cited in Drogheda classify a coffee shop as Class 1. The introduction of toilets is not significant to the central question in this case. Some Penny's stores have toilets and others do not. Permission is not required to install toilets within the existing shop building.

## 5. RESPONSES

- 5.1 The planning authority has responded to this referral stating a Warning Letter issued to in respect of the coffee shop on 21<sup>st</sup> of October 2015 to Primark Limited.

## 6. PLANNING HISTORY

### 6.1 10500208

Planning permission granted to refurbish and extend the Pennys store in August 2011.

### PL31.219213

Permission granted by An Bord Pleanala in April 2008 to demolish front portion of existing Pennys store and adjacent Egan's bar, construct new three storey building incorporating sales retailing area, stockrooms, staff rooms and offices, plant, boiler house, refurbishment of existing stock rooms, to construct a two storey stockroom extension, new signage and all associated site development works.

## 7. RELEVANT LEGISLATION

- 7.1 In order to assess whether or not the works to be carried out constitute development or exempted development, regard must be had to the following items of legislation:

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

- 7.2 Section 3 (1) states 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."*

- 7.3 Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act and includes (h) *'development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.'*

- 7.4 Section 4 (2) provides for the making of Regulations. The main Regulations are the Planning and Development Regulations, 2001.

### ***Planning and Development Regulations, 2001***

- 7.5 Article 5 (1), Part 2 provides interpretations for the purposes of exempted development. The following is relevant to this case:

*“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 for consumption off the premises, where the sale of such food is subsidiary to the main retail use,*
- (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 for consumption off the premises, except under paragraph (d) above, or any use to which class 2 or 3 of Part 4 of Schedule 2 applies;*

**7.6** Article 6 (1) states as follows:

*“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.”*

**7.7** Class 14 of Part 1 of Schedule 2 includes development consisting of a change of use -

- (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,*
- (b) from use as a public house, to use as a shop,*
- (c) from use for the direction of funerals, as a funeral home, as an amusement arcade or a restaurant, to use as a shop,*
- (d) from use to which class 2 of Part 4 of this Schedule applies, to use as a shop.*

**7.8** Article 9 (1) (a) sets out the instances where development, to which Article 6 relates, shall not be exempted development for the purposes of the Act if the carrying out of works 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.*

*(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,*

**7.9** Article 10 (1) relating to changes of use states as follows:

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

*(a) involve the carrying out of any works other than works which are exempted development,*

*(b) contravene a condition attached to a permission under the Act,*

*(c) be inconsistent with any use specified or included in such a permission, or*

*(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.”*

**7.10** Class 1 of Part 4 of Schedule 2 refers to:

*“Use as a shop.”*

## **8. RELEVANT CASES**

### **8.1 An Bord Pleanala Ref: 54.RL.2941**

The Board determined the use of part of a shop as a coffee shop is not development because the coffee shop use is also a shop.

### **8.2 An Bord Pleanala Ref: 54.RL.2940**

The Board determined the change of use of a bank to a coffee shop is not development because of Article 10(1) and Class 14(d) of Schedule 2 of the regulations. The Board classified the coffee shop which includes consumption of food items on the premises as a shop as per Class 1 of Part 4 of Schedule 2 of the Regulations.

## **9. ASSESSMENT**

### **9.1** I visited the Penny’s Store at 31-37 Barronstrand Street in Waterford on 24<sup>th</sup> of March 2016. I noted the ground floor of the shop was an open plan Penny’s shop and I noted the first floor also included an open plan retailing area also. The subject coffee shop, *Insomnia*, is located to the rear of the escalators on the first floor level in the front corner area of the Penny’s store. I noted a service counter, a food display area and a seating area to the front of the counter area.

- 9.2 The Referrer to the Board, Primark Ltd, has asked the Board to consider whether a change of use has occurred from a Penny's shop to a coffee shop on the first floor level of the Pennys store and of the change is material taking into consideration two relevant cases in Drogheda references Ref: 54.RL.2940 and Ref: 54.RL.2941, as outlined above. The planning authority declared that a change of use had occurred and the change is material and the local authority has issued a warning Notice in respect of the alleged unauthorised use.

*The Question of Whether or not a Change of Use has Occurred*

- 9.3 Article 5 (1), Part 2 of the *Planning and Development 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.

- 9.6 The previous use of the premises as a shop falls under Class 1 of Part 4 of Schedule 2 of the *Planning and Development Regulations*. However, the issue with respect to this referral is whether or not the current use can be classified as a "shop" and therefore would be considered exempted development. If it is decided that a coffee shop does not fall under the definition of "shop", the change of use is not exempted development under Class 14(d) of Part 1 of Schedule 2.

*The Question of whether or not the material change of use is exempted development*

- 9.6 On the application for declaration of exempted development to Waterford City and County Council, the existing use is described as **SHOP (Fashion Retail)** and the proposed use is described as **SHOP (Coffee shop)**. The name of the business is 'Insomnia' and the sale of coffee occupies a significant element of the business. There is no food prepared on the premises, the menu includes an extensive range of coffee products as well and other hot and cold beverages. Food on offer includes paninis/ wraps, sandwiches, bagels, pastas, fruit, confectionary and salads. The display unit located beside the service counter and till, includes a range of pre-prepared foods.
- 9.7 A coffee shop could be defined as a shop were coffee is sold or drunk. This would include a substantial proportion of coffee purchased and taken off the premises. Having inspected the site I noted there was only one employee during my inspection, and I would not consider the premises to be operating as a restaurant. Patrons were purchasing takeaway and seated coffees, it is

not solely a sitdown business, and there was nobody served at a table, all transactions occurred at the counter likewise with a normal 'shop'.

**9.8** I have considered the two cases cited by the Referrer relevant to this case, Ref: 54.RL.2940 and Ref: 54.RL.2941, both of which were located in Drogheda, one involving a coffee shop within a Mace store and the other involving a coffee shop within a former building society premises. I note the content of the Inspector's Report on each case and the fact the Board did not agree with the determination in both cases made by the reporting inspectors. The Board came to the conclusion that in both instances the use of the sites as coffee shops fell within the scope of a 'shop' for the purposes of Class 1 Part 4 of Schedule 2 of the Regulations, as it fell within the description of the retail sale of goods as described within Article 5(1) of the Regulations.

**9.9** The primary use of the Penny's store premises is a 'shop' and in my opinion, the Insomnia coffee shop it does not come within the scope of a restaurant because it operates similar to a shop or retail outlet. There is no food preparation area, no kitchen, and there is no table service or waiting staff. I note the planning authority stated the level of seating and the provision of toilets was a significant factor in determining a change of use had occurred. The toilets serve patrons of Pennys also and are not exclusively dedicated to Insomnia patrons who must access the premises via the larger Pennys shop. In addition the toilets would not require planning permission. There is no material change to the exterior of the building, and internally the coffee shop has to be accessed via Pennys, it is not an independent area and it is not isolated or enclosed from the main retailing floor area of Pennys. In my opinion, the only change of use that has occurred on the premises is that the product sold has changed, but the underlying principle of retailing goods remains the same. There is no sale of hot food off the premises only hot drinks. There are sandwiches, bagels, fruit, scones etc that can be purchased for consumption off the premises however this comes within the scope of a 'shop'. The seating area is incidental to the main retailing use of the premises, and it is an optional facility or service associated with the coffee shop.

## **10. RECOMMENDATION**

**WHEREAS** a question has arisen as to whether the partial change of use of a shop to use as a coffee shop at Pennys, 31-37 Barronstrand St. Waterford is or is not development or is or is not exempted development:

**AND WHEREAS** the said question was referred to An Bord Pleanála by Primary Limited on the 15<sup>th</sup> of December 2015:

**AND WHEREAS** An Bord Pleanála, in considering this referral, had regard particularly to -



(a) Articles 5(1) and 10(1) of the Planning and Development Regulations, 2001, as amended, and

(b) Class 1 of Part 4 of Schedule 2 to the said Regulations:

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

(a) the existing use of the subject site is a “shop” and defined under Article 5 (1) of the Planning and Development Regulations, 2001, as amended by Article 3 of the Planning and Development Regulations, 2005,

(b) a “shop” as defined under Article 5(1) of the said Regulations, as amended, is for the retail sale of goods,

(c) the use of the front of the premises allows for consumption of food items purchased on the premises,

(d) 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

(e) there has been no material change in use of the premises:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the said use of part of the Pennys shop as a coffee shop at 31-37 Barronstrand Str. Waterford is not development.

### **MATTERS CONSIDERED**

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

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**Caryn Coogan**  
**Planning Inspector**

**31/03/2016**