



# An Bord Pleanála

## Inspector's Report

**Referral No:** RL06D.3464

**Question:** Whether the relocation of the first floor portion of a retail shop to ground floor level, provision of an emergency door and a coffee dock at Dwarf Oak Shopping Centre, Church Road, Ballybrack Village, Co. Dublin is or is not development or is or is not exempted development.

**Referring Party:** James McCummiskey

**Planning Authority:** Dun Laoghaire Rathdown County Council

**Declaration Reference No:** 316/16

**Decision:** Split

**Date of Site Inspection:** 1<sup>st</sup> June 2016

**INSPECTOR:** Mairead Kenny

## 1.0 BACKGROUND

The referral relates to works and changes to the layout of a long established furniture retail outlet built in the 1980s and located in a neighbourhood centre. This includes installation of a coffee shop.

The stated use of the building was previously related to retailing of furniture at ground, first and attic levels. The referrer indicates that the business declined and the ground floor was reserved for alternative use as a supermarket, with furniture retailing continuing at first floor level. The application for permission was refused for convenience retailing.

The applicant now proposes to return the ground floor to furniture retailing and to install an ancillary coffee shop to retain customers in the store for the relatively long purchase period, thereby supporting the business.

## 2.0 QUESTION

I consider that the question may be formulated as follows.

*Whether the relocation of the first floor portion of a retail shop to ground floor level, provision of an emergency door and a coffee dock at Dwarf Oak Shopping Centre, Church Road, Ballybrack Village, Co. Dublin is or is not development or is or is not exempted development.*

## DETAILS OF DECLARATION

The Planning Authority made a **declaration** under Ref 316 on 8<sup>th</sup> February 2016 that

- the relocation of the first floor portion of the retail shop back to the ground floor is not development
- the new side emergency exit door is exempted development
- the proposed coffee dock is not exempted development.

The planner's report notes:

- the planning history including D13A/0451 (PL06D.243462), D08A/1314, D06A/1486
- 144/15 - enforcement relating to change of use and subdivision of the premises into two retail units without the benefit of permission – file closed

- the **relocation of the retail shop** from the first floor to the ground floor would not constitute a material change of use of the structure and **is not development** – the established use is retail, which ceased temporarily
- the **side door is development and is exempted** under section 4(1)(h) as it would not materially affect the external appearance of the structure
- the **coffee dock would constitute a material change of use** of part of the structure and is development
- the coffee dock will comprise a preparation area, a serving counter and seating area for 28 people as well as toilet facilities
- it would not fall under the definition of a ‘shop’ as the coffee dock would not be subsidiary to the main retail use and would consist of the sale of food and hot drinks for consumption on the premises
- in addition there are no provisions under Schedule 2, Part 1, Class 14 which allows for change of use from a ‘shop’ to a coffee dock or equivalent.

## **THE OWNER/OCCUPIER’S CASE**

I consider that the referrer’s case may be summarised as follows:

- the inspiration is Meadows and Byrne in the Pavilion Centre
- the coffee dock will be ancillary to the main business and will not result in the intensification of business but is hope to improve the business
- the 1976 definition of shop was the one in place at the time of the approval of the property and it applies now to this property and on that basis the change of use of a small area of the existing shop is an exempted development
- moving down the hierarchy of retail usage together with the reduced scale adds to the presumption of exempted development
- the relocation of the shop to the ground floor and the provision of a small coffee dock are exempted development
- the small coffee dock for his customer’s convenience is a necessary part of the service now required as picking furniture takes time
- the local authority have refused this case but granted similar such declarations to others and are not acting in a fair and even handed manner
- the local authority and Board’s consideration of PL06D.222830 is referenced – the referrer objected – works undertaken after permission was refused are described and the local authority decided that these works were exempted

- there is now a not too dissimilar situation and the decision is contradictory
- RL2850 also refers – this supports the client’s assertion that the works complained of are exempted development
- section 4(1)(h) applies and the works are exempted development.

## **PLANNING AUTHORITY’S RESPONSE**

The Planning Authority submission in response to the referral refutes the assertions relating to difficulties between the applicant and the Planning Authority. The application was duly considered under relevant legislation.

The Planning Authority reiterates that the proposed use of part of the retail shop as a coffee dock is not considered to fall under the main definition of a ‘shop’ as the coffee dock would not be subsidiary to the main retail use for the sale of furniture and would consist of the sale of food and hot drinks for consumption on the premises.

There are no provisions under Schedule 2, Part 1, Class 14 of PDR 2001 to allow for a change of use from a ‘shop’ to a coffee dock or equivalent use.

## **FURTHER COMMENTS**

The submission of the referrer to the Board in response to the comments of the Planning Authority refers to the legislative provisions which should apply should relate to those which were in place at the time of the permission. The declaration relates to matters which would fall within the definition of a shop which applied in 1984 when the permission was granted. The coffee dock would not be of a size or prominence that would suggest that it could be considered a shop in its own right.

## **PLANNING HISTORY**

The referrer states that the earliest permission related to the premises is 405/84.

The Board under PL06D.243462 upheld the decision of the Planning Authority under Planning Reg. Ref. D13A/0451 to refuse permission for works to accommodate a shop of 350 square metres gross and all ancillary works.

D08A/1314 – this relates to a permission which was granted but not implemented

D06A/1486 – this relates to a permission which was refused

## **RELEVANT LEGISLATION**

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

#### Section 2 (1)

*“Works” are defined in this section as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and “use” is defined in the same section as in relation to land does not include the use of the land by the carrying out of any works thereon.*

### Section 3(1)

*“Development” is defined as follows:*

*Development means except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.*

Section 4 (1) :- the following shall be exempted development for the purposes of this Act

- (h) Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

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

Article 5 (1) includes definitions for the purposes of exempted development and includes a definition of a 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 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 Act, 1910)*
- (e) *for hairdressing*
- (f) *for the display of goods for sale*
- (g) *for the hiring out of domestic or personal goods or articles,*
- (h) *as a laundrette or dry cleaners,*
- (i) *for the reception of goods to be washed, cleaned or repaired*

*but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for the 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) provides that 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, subject to meeting the conditions and limitations specified in column 2.

Article 9(1)(a) – sets out instances where development to which Article 6 relates shall not be exempted development for the purposes of the Act including where the carrying out of such development would

- Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
- Consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.

Article 10 (1) specifies that 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 a change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

#### Schedule 2, Part 1 Exempted Development

Class 14 - development consisting of the following changes of use would be exempted development -

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

#### Schedule 2, Part 4

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.

## **RELEVANT PRECEDENTS**

### **RL3424 / RL3425, RL3426**

#### **These relate to Starbucks in Cork City (decided in March 2016)**

The Board decided in relation to all three referrals that use as a coffee shop did not constitute use as a “shop” because the scale, nature and layout of the coffee shop was more akin to a restaurant use which is expressly excluded from the definition of ‘shop’ and the change of use raised issues that were material in relation to the proper planning and sustainable development of the area and was, therefore, “development” within the meaning of section 3 of the Planning and Development Act, 2000.

### **RL3023**

#### **Coffee sales area within an existing garden centre at Keane’s Garden Centre, Kilcolgan Village, Co. Galway**

The Board decided in February 2013 that the coffee sales area of 16.8 square metres within an existing garden centre in the absence of seating and toilets is not development. The limited scale of the coffee sales area was also taken into account.

### **RL2939**

#### **Use of a shop as a coffee shop/bistro at Shop Street/North Quay, Drogheda**

The Board decided in September 2012 that the current use had involved “works” to provide for a coffee shop/bistro (restaurant), and as such was not included in the definition of “shop” but was a change of use from a shop to a coffee shop/bistro (restaurant), which did not come within the scope of Class 1, Part 4 of Schedule 2 of the Regulations and was development and was not exempted development. The use included a seating area (approx. 50 covers), and a kitchen where hot food was prepared and served and customer toilets were provided.

### **RL2941**

#### **Partial change of use of a shop to use as a coffee shop at West Street, Drogheda**

The Board decided in September 2012 that there was no material change of use involved. The decision related to the partial change of a Mace convenience shop including the provision of 8 no. tables and chairs and involving the sale of food for takeaway or consumption on the premises. The premises was used primarily as a retail convenience shop with ancillary sale of beverages, sandwiches and other food for consumption on/off the premises. The Board decided that the coffee shop element came under the definition of 'shop' notwithstanding the provision of tables and chairs on the premises.

#### **RL2516**

##### **Change of use of camera shop to a juice bar at 55 St. Patrick's Street Cork**

Board decided in October 2008 that the use of the premises as a juice bar with a sandwich counter constituted use as a "shop". The use included "the sale of cold drinks, fruit, confectionary, sandwiches and coffee", did not involve any seating for customers, did not include the sale of hot food, and that the goods were described as typical of those sold in a convenience shop.

#### **RL2221**

##### **Unit within Wilton Shopping Centre, Cork – use of shop as restaurant**

The Board decided in June 2005 that the change of use from retail to a restaurant came within the scope of "development" as defined in Section 3 of the Act and that the change of use constitutes a material change of use, and was not exempted development.

### **ASSESSMENT**

The question before the Board has three elements namely whether:

- re-location of an existing retail shop from first floor to ground floor
- provision of a new side emergency exit
- provision of a small coffee dock

is or is not development.

I propose to separately address these matters.

##### **Relocation of the retail shop from first floor to ground floor**

The Planning Authority decided that the **relocation of the retail shop** from the first floor to the ground floor would not constitute a material change of use of the structure and **is not development**.



I agree with the Planning Authority that the entire use of the structure is as a retail shop. This is the established use. The referrer states that he has always used both retail floors and the attic but in the context of a decline in business moved the furniture to the first floor pending sub-letting to Tesco's, which did not happen as permission was refused. The area devoted to furniture sales contracted at that time and in particular did not involve the ground floor.

The intention to cease use of the ground floor as a retail shop was not realised. As such the established use was not supplanted by another use. Further, no aspect of the available evidence indicates that cessation of use as a furniture store was of such duration as to constitute abandonment of use. The ground floor use is presently as storage pending customer collection.

I consider that there is no change of use involved in resumption of trading as a shop at ground floor level. Further no works are required to facilitate that relocation of use. As such the question of whether the relocation to ground floor is development must be answered in the negative.

I agree with the declaration of the Planning Authority that the proposed use of the ground floor involving relocation of the first floor trading to the ground floor is not development.

### **Emergency side door**

The location of the side door is such that it would not materially alter the character of the development or render it inconsistent with development in the area.

I consider that the **side door is development and is exempted** under section 4(1)(h) as it would not materially affect the external appearance of the structure.

### **Coffee Shop**

The referrer makes two main points regarding this aspect of the question

- that the coffee facility is ancillary and is necessary for commercial reasons
- that under the definition of 'shop' under the 1976 PDR this would be exempted.

Regarding the coffee shop use I consider that the following must be determined:

- whether the coffee dock constitutes a change of use
- whether that change would be deemed to be a material change of use and is therefore development and

- if so, whether the development is exempted development and if so whether exempted development provisions are restricted in the circumstances of this case.

My consideration on the above is as follows.

#### *Change of Use / Material change of use*

The question is whether the use of this part of the premises falls within the definition of 'shop'. The coffee shop constitutes a change of use from retailing of furniture to sale and consumption of food and drink on the premises. A change of use shall be material for it to be defined as 'development'.

The Board has considered a large number of precedent cases on this matter. I have summarised the most relevant of these above and they form the basis of my approach to consideration of materiality of the change of use. I consider that the relevant issues relate to the nature of the use, the scale and to other factors including its location within the premises.

In terms of the nature of the coffee dock I note the extent of seating proposed (32 seats at tables and space for more tables or for seating / standing at the bar). I consider that this layout could cater for a substantial customer base. Its scale and layout is not dissimilar to free-standing coffee shops / restaurants / cafes.

The submissions of the Planning Authority refer to the fact that the coffee dock provides for consumption 'on' the premises. I agree that this is a very important consideration insofar as the definition of 'shop' provides only for 'the sales of sandwiches or other food or wine for consumption *off*<sup>1</sup> the premises, where the sale of such food or wine is subsidiary to the main retail use ...' The referrer's submissions clarify that the intention is to provide for sales for consumption within the premises. That is the stated purpose of the coffee dock, to provide a space for customers to take a break during consideration of a purchase and discourage them from leaving the premises during that period.

If the Board considers that the coffee dock would provide primarily for sales of food and drinks for consumption on the premises then I suggest that it should also conclude that this is not use as a 'shop'. I submit that there is no evidence to indicate that the coffee dock would serve a customer base primarily related to purchases for consumption off the premises.

Regarding the layout of the coffee dock and whether it is ancillary in nature to the retailing of furniture I note that its position at the front of the premises is suggestive

---

<sup>1</sup> my emphasis

of a unit which would operate separately and draw in customers who are not engaged in purchasing of furniture.

In terms of the scale of the coffee dock, the Board has previously considered a number of referrals related to coffee shops within larger businesses. I refer in particular to the case recently considered at Keane's Garden Centre. The submissions on behalf of the referrer indicates that the coffee dock would not be over 18% of the ground floor and if the entire premises was in use again as a furniture store then the coffee dock would be only 8.25% of the total floor area.

Regarding the scale of the coffee dock, I consider that it is small in relation to the overall floor area of the retail unit. However, I am of the opinion that its scale is not related to the provision of services to customers of the retail unit alone, as an ancillary activity. I simply find that there is no evidence to support that position as the nature of the retail unit would not generate a lot of footfall. The layout and scale of the facility in my opinion is substantially different to the type of service considered to be exempted development at the garden centre by reason of the provision of tables and chairs.

I note the suggestion that the table and chairs in the coffee dock would be for sale and that the area therefore continues to operate as a sales and display area. I reject that argument on the basis that the primary use would be for activities not related to purchase of tables and chairs.

Apart from the nature of the existing retailing I consider that the scale of the coffee dock, together with the food preparation facilities evident from the layout and the number of customers which could avail of the facility all point toward a use which is not ancillary but which is in planning terms a separate use and one which is materially different and has planning consequences. I conclude that the proposed coffee dock constitutes a change of use, which is a material change of use by reason of the planning consequences including additional traffic which it would generate. The use as a coffee shop is development.

#### *Whether the development is exempted development*

I have considered the relevant legislative provisions together with the previous referral cases and conclude that there is no exemption for this development under the Act or Regulations. The proposed coffee dock would constitute a material change of use from a shop to a *sui generis* use for which no exemption applies.

#### *Relevant Legislation*

Regarding the relevant legislation I consider that the relevant definition of 'shop' is that which applies under prevailing legislation at the time of undertaking of a development, in this case involving the installation of a new door, coffee dock etc. I consider that the referrer's comments relating to the Planning and Development Regulations 1977 are not immaterial to a use which would be instigated in 2016. To

interpret the law otherwise would mean that any prospective developer would not be able to avail of exempted development provisions as they are enacted. The Board will note that the referrer goes to considerable lengths to refute that position and claims that the basis of the decision should relate to the permission granted, which should not be construed by reference to legal changes in the interim<sup>2</sup>. I disagree with that argument. The permission granted is not fixed in time but falls to be interpreted within the terms of the permission but also within the context of current legislation.

### *Appropriate Assessment*

Having regard to the nature and scale of the development proposed and to the nature of the receiving environment, namely a suburban and fully serviced location, no appropriate assessment issues arise.

---

<sup>2</sup> This matter is considered in detail in the response to the Planning Authority submission dated 20<sup>th</sup> May 2016 – email of 23<sup>rd</sup> May refers.

## **RECOMMENDATION**

I recommend an order as follows:

**WHEREAS** a question has arisen as relocation of the first floor portion of a retail shop to ground floor level, provision of an emergency door and a coffee dock at Dwarf Oak Shopping Centre, Church Road, Ballybrack Village, Co. Dublin is or is not development or is or is not exempted development

**AND WHEREAS** the said question was referred to An Bord Pleanála by Mr James McCummiskey on the 25<sup>th</sup> day of February 2016:

**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), 9(1) and 10(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Class 14 of Part 1 and Class 1 of Part 4 of Schedule 2 to the said Regulations,
- (d) the established and existing use of the ground and first floors of the premises as a retail outlet,
- (e) the location of the external door at the side of the premises,
- (e) the nature and scale of the proposed coffee dock including the layout, provision of seating, incorporation of a food preparation area and its prominent position to the front of the premises:

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

- (a) retail use at ground floor is an established use
- (b) provision of an emergency door would not materially alter the external appearance of the structure
- (c) the use of the subject premises as a coffee shop does not constitute use as a “shop” 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 said Regulations, and

- (b) the change of use of the subject premises, from use as a shop to use as a coffee shop raises issues that are material in relation to the proper planning and sustainable development of the area and is, therefore, 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 (4) of the 2000 Act, hereby decides that

- (a) the relocation of the first floor retail shop to the ground floor is not development
- (b) the provision of an emergency door is exempted development and
- (c) the use of part of the ground floor of the premises at Dwarf Oak Shopping Centre, Church Road, Ballybrack Village, Co. Dublin as a coffee dock is development and is not exempted development.

**Mairead Kenny**  
**Senior Planning Inspector**  
**3<sup>rd</sup> June 2016**