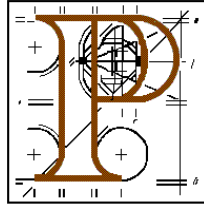


**AN BORD PLEANÁLA**



**FILE REFERENCE:** **RL06F.RL3481**

**QUESTION:** Whether the change of use of part of the unit from a toy shop to use as a coffee shop by Starbucks is or is not development or is or is not exempted development.

**LOCATION:** Unit 1A Airside Retail Park, Crowcastle, Swords, Co. Dublin.

**OWNER/OCCUPIER:**

1. IPUT Management Services and Irish Life Ass
2. Smyth's Toys Headquarters
3. Starbucks / Tanrat Limited

**REFERRER:** Fingal County Council

**DATE LODGED:** 18/05/2016

**INSPECTOR** Fiona Fair

**SITE INSPECTION** 9<sup>th</sup> September 2016

## **1.0 INTRODUCTION**

This is a referral by Fingal County Council under Section 5(4) of the Planning and Development Act 2000. The referral relates to *‘Whether the change of use of part of the unit from a toy shop to use as a coffee shop by Starbucks is or is not development or is or is not exempted development’* at Unit 1A Airside Retail Park, Crowcastle, Swords, Co. Dublin.

## **2.0 DESCRIPTION OF DEVELOPMENT AND LOCATIONAL CONTEXT**

The site is located at Unit 1A Airside Retail Park, Crowcastle, Swords, Co. Dublin. The Airside retail warehouse park is located approx. 1 - 2 Km to the south west of Swords town centre and the Pavillions shopping centre and approx. 1.5 Km north of Dublin Airport. The site is bounded to the west by the R132, Old Dublin Road. It is easily accessible, by both public and private transport, off the M1 Motorway and by dual carriageway from Swords and the Airport.

Smyth’s toys occupy Unit 1 which is part of a number of permitted retail units within Airside Retail park. Unit 1 comprises a corner unit located to the western end of the retail park. The unit has a cylindrical frontage with a large amount of glazing to the front and a pop up element to the building, denoting the corner unit and addressing the road frontage. Two large high level ‘Smyths Toys’ signs are present on the front elevation and an individual lettered ‘Starbucks Coffee’ sign is located at nameplate level with trade mark emblem located at high level.

## **3.0 BACKGROUND**

I note that numerous planning permission relate to Unit A, Airside Retail Park, see planning history section of this report below. Under the original planning permission for Airside Park, Phase 1, (Reg. Ref. F99A/0884) which was granted in 2000, Unit A1 and A2 were one unit. Subsequently planning permission has

been granted to subdivide the unit and to re-amalgamate the unit. I note that some of the permissions granted have not to date been carried out.

The planning authority referral information submitted to the Board indicates that the planning enforcement section carried out a site inspection on the 22/01/16 and again on the 11/03/16 following a complaint that a retail unit has been converted to a coffee shop without planning permission. The inspection form submitted indicates that a warning letter was issued on the 10<sup>th</sup> of November to Starbucks and a reply was received dated 3<sup>rd</sup> December 2016 from Tanrat Ltd. (operators of Starbucks in this unit) stating that it is a shop as governed by Class 1 of Part 4 of Schedule 2 of the Planning and Development Regulations 2001. No further details of warning letter or response is attached to the file.

On the 18<sup>th</sup> May 2016 a referral was received by An Bord Pleanála.

#### **4.0 PLANNING HISTORY**

**4.1** The original planning permission for Airside Retail Park – Phase 1 (unit 1 – 10) is **Reg. Ref. F99A/0884** and planning permission was granted in 2000.

*A condition of this permission states: 'This permission relates to the use of the retail warehouse units for retail warehouse use, only, together with a fast food outlet and garden centre as indicated in the application. Retail warehouse use relates to the retail sale of bulky items of non-food, non-clothing goods, the sale of which is not normally feasible in conventional shopping centres. Such items would include building materials, electrical goods, garden equipment, floor covering and D.I.Y. products, items which normally require the use of a vehicle for transportation'.*

**4.2 Reg. Ref. F04A/1642** Permission granted for a change of use from a fast food/restaurant unit previously granted under Reg. Ref. F99A/0884 to a retail unit.

**4.3 Reg. Ref. F05A/0027** Permission granted for a subdivision of Unit A Retail Warehouse (gross floor area 2,628 sq.m.) into Unit A1 (gross floor area 1,353 sq.m.) and Unit A2 (gross floor area 1,275 sq.m.). The development will involve construction of a new shop front, entrance and entrance feature to match adjoining shopfronts, a new fire exit door, roller shutter door and other minor external works.

Condition 5. of this permission restricts advertisements, symbols, logos, or other devices, including those which are designated Exempted Development – Advertisements, from being displayed on the proposed frontage, including the windows without the prior written permission of the Planning Authority or an Bord Pleanála on appeal save those shown on drawing no. PL04 submitted the 13th January 2005.

**4.4. Reg. Ref. F10A/0354** Permission Refused for change of use of Unit A1 (1,353 sq.m. gross floor area) from retail warehouse to discount foodstore (to include off-licence use). The development includes the reinstatement of the existing wall at openings between Unit A1 and Unit A2 and associated works.

**4.5 Reg. Ref. F12A/0389** Planning Permission Granted for Construction of internal mezzanine floor for retail warehouse use with gross floor area of 1045 sq. m and all associated internal alterations within existing retail warehouse Unit A1 of existing gross floor area of 1353 sq. m The proposed development will result in an increase in the total gross floor area of the unit from 1353 sq. m to 2,398 sq. m. This permission to date has not been carried out.

**4.6 Reg. Ref. F14A/0442** Planning Permission Granted for the amalgamation of existing Unit A1 and A2 into one unit with the removal of existing internal dividing wall and the construction of an additional internal mezzanine floor for ancillary storage and staff use with gross floor area of 627 sq.m. within existing retail warehouse unit A2. Units A1 and A2 were originally permitted as one unit in 2000 under Ref. Ref. F99A/0884. The proposed development will result in an increase of 644 sq.m. in the total gross floor area of the combined unit A1 and A2 from 2,625 sq.m. to 3,269 sq.m.

Condition 3 of this permission states: *'Details of all occupiers/ end users of this building shall be submitted for the written agreement of the Planning Authority prior to such occupation. Any change in occupiers shall also be subject to the written agreement of the Planning Authority prior to such occupation.'*

Condition 6 of this permission states: *'The range of goods sold from the retail warehouse units shall be restricted to bulky household goods or goods which are not portable by customers travelling by foot, cycle or bus as set out in Annex 1 of the Retail Planning Guidelines, 2012 (including carpets, furniture, furnishings, tools and equipment for the house and garden etc).'*

*REASON: To ensure that the premises are used for retail warehousing purposes as described in the Retail Planning Guidelines 2012 and to ensure that town/centres are not adversely impacted upon'.*

Planning permission has been granted for a number of internal mezzanines in the units in Airside Park.

#### **4.5 Enforcement:**

Enforcement Ref. 15/155A. From information submitted by the planning authority, it noted, there on going enforcement with respect to Unit 1A. Information on file

states: *'This change of use (class 1 shop) has had numerous conflicting Section 5 declarations. These appear to be site specific.*

*It would appear that this is a restaurant use because of the layout and seating area (see notes below and copy of declaration).*

*To clarify in this instance, I recommend that a section 5 Declaration be sought by Fingal County Council to support possible court action if proceeded with as the issue of an enforcement would require operations to cease and remove all equipment / fixtures.'*

**Inspectors Note:** No declaration on file by the planning authority.

## **5.0 SUBMISSION BY REFERRER**

The referral by Fingal County Council set's out the following;

- The unit has been subdivided with a new use occurring which is not subsidiary to the main use of selling toys and various games.
- A considerable number of tables and seating for customers to consume food on the premises with customer toilets provided it would be more regarded as a restaurant than a stated coffee shop.
- A restaurant has not a particular class in Part 4 (sui generis) but the definition of a shop does not include any use associated with the provision of a restaurant.
- The sign is displayed as Starbucks Coffee
- A coffee shop existed in this unit when Reid's Furniture was the tenant prior to Smyth's Toys taking over the unit
- While it is the opinion of the planning authority that a change of use has occurred and that internal works have been carried out to facilitate this use should an enforcement notice be issued the use would have to cease and all internal works and fixtures and fittings removed
- If authorized use 4(1)(h) would cover these works

- Court action if preceded eventually could be muddied with the various Section 5 decisions for and against this particular change of use around the country.
- Referral accompanied with
  - Site Location Map, taken from Ref. Ref. F14A/0442
  - Grant of Permission Ref. Ref. F14A/0442
  - Photograph
  - Planning Enforcement Inspection Form 1

## **6.0 SUBMISSION BY JOHN SPAIN ASSOCIATES ON BEHALF OF TANRAT LIMITED OPERATOR OF THE STARBUCKS UNIT**

The submission is summarized as follows:

- There are a number of instances where the information provided by Fingal County Council (FCC) refers to enclosed documents, where such documents are not enclosed; such as a 'Section 5 Declaration'.
- FCC acknowledges that a coffee shop existed in this unit when Reids Furniture was the tenant prior to Smyth's toys taking over the unit.
- The FCC report states that 'this is a difficult case to determine if a change of use has occurred on the premises.'
- Starbucks use is entirely subsidiary to the retail warehouse unit and as such does not change the primary use of the unit and does not comprise a material change of use.
- The catering / café facility will serve the staff and customers of Smyth's toys.
- Not uncommon
- The use is entirely within the envelope of Unit 1, it is accessible from the Smyth's toys retail area.
- There is no kitchen associated with the Starbucks
- The Starbucks element represents c. 192 sq. m gross, or 5.9% of the total gross floorspace of the overall unit.

- The concept of an ancillary / subsidiary / incidental use within an overall primary use of a planning unit.
- No material change of use since there is no change in the planning unit issue of subsidiarity in planning terms is of relevance – Rehabilitation Institute v Dublin Corporation
- In Palmerlane Limited v An Bord Pleanála it was found that where the use is ancillary to the principle use, it forms part of that use and therefore the activity did not amount to a change of use.
- Internal works are exempt by way of Section 4(1)(h) of the Planning and Development Act 2000, as amended.
- It is common for a catering facility as part of a larger unit to have controlled access arrangements due to health and safety and food safety requirements.

## **7.0 SUBMISSION BY THE PLANNING AUTHORITY**

No further submission received from the planning authority.

## **8.0 STATUTORY PROVISIONS**

In order to assess whether or not the work carried out is or is not development or is or is not exempted development regard must be had to the following items of legislation.

### **Planning and Development Acts, 2000-2010 (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, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper,*



*tiles or other material to or from the surfaces of the interior or exterior of a structure.*

*“use” is defined 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, 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 the 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.*

In addition to the specified exemptions in the Act, Section 4(2) provides that the Minister may by regulations provide for any class of development being exempted development. Section 4(2)(a)(1) of the Planning and Development Act, 2000, states:-

*“By reasons of the size, nature or limited effect on its surroundings, the development belongs to that class, the carrying out of such development would not offend against the principle of proper planning and sustainable development”.*

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

Article 5 (1) of the Planning and Development Regulations, 2001 provides interpretations for the purposes of exempted development. The following are relevant in the context of the subject referral.

*“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 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, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite mention of that class in the said column 1.

Article 9(1) provides that Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) If the carrying out of such development 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.

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 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 as 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.

*Part 2 of Schedule 2: Exempted Development – Advertisements*

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

*Class 1:* Use as a shop.

## **9.0 PREVIOUS BOARD DECISIONS**

**9.1 RL3424** - Whether the use of a premises as a coffee shop and the erection of associated signage at 11 Emmet Place, Cork is or is not development or is or is not exempted development. The Board decided that the use was development and was not exempted development. Particularly it has decided that the use as a coffee shop did not constitute use as a “shop” as defined in Article 5(1) 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’ under Article 5(1). Also that 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.

**9.2 RL3425** - This referral concerned the change of use of a shop unit to use as a 'coffee shop' (trading as 'Starbucks') which sold hot beverages and food

products for consumption both on and off the premises. The central question related to whether or not use of the subject premises as a coffee shop constituted use as a “shop” as defined in Article 5(1) of the Planning and Development Regulations 2001, as amended. The Board decided that the use was development and was not exempted development for similar considerations as RL3424.

**9.3 RL3426** - This referral concerned the change of use of a shop unit to use as a coffee shop (trading as 'Starbucks') which sold hot beverages and food products for consumption both on and off the premises. Again the central question was whether or not a 'coffee shop' constituted use as a “shop” as defined in Article 5(1) of the Planning and Development Regulations 2001, as amended. The Board again decided that the use was development and was not exempted development for the same considerations as those set out in RL3425, set out above.

**9.4 RL3315** – In the case of partial change of use of a shop (protected structure) to use as a coffee shop at ground floor level is or is not development or is or is not exempted development at No 4 Quay Street Galway it was decided that the partial change of use of a shop to use at a coffee shop would be subsidiary to the main retail use of the site and would come within the scope of the definition of a “shop”, as defined in Article 5(1), therefore it does not constitute development as no material change of use has occurred.

**9.5 RL 3023** – The case involved the use of part of an existing retail unit at Keanes Garden Centre, Kilcolgan as a coffee sales area. The floor area of the coffee sales area was c 21.5% of the gross floor area of the retail unit. No seating was proposed. The reporting Inspector considered that the coffee sales area would be subsidiary to the main retail use as a garden centre, and as such would come within the definition of “shop”.

The Board agreed (February 2013) that the coffee sales area comes within the scope of the definition of “shop” and does not constitute a material change of use and was not development.

**9.6 RL2941** – The Board reached a similar decision in a case involving the partial change of use of a shop to use as a coffee shop at West Street Drogheda. The Board considered that the coffee shop element came within the scope of the definition of “shop” and did not constitute development

**9.7 RL2940** – The Board concluded that the change of use of a bank to a coffee shop, whilst it involved a material change of use from Class 2 (financial services) to Class 1 (Shop) it was exempted by virtue of Class 14(d) which allows for a change of use from Class 2 to Class 1.

**9.8 RL 2516** –The Board decided (October 2008) that the use of the ground floor of a premises as a juice bar with a sandwich counter, which was formerly used as a camera shop, at 55 Patrick Street Cork did not constitute development. The Board concluded that the activity, including the type and range of goods, constituted the retail sale of goods to visiting members of the public and came within the definition of ‘shop’.

**9.9 RL2821** - The Board held that the use of part of the ground floor as a café at the Reeks Gateway, Ardnamweely, Killarney, Co. Kerry was development which was not exempted development.

**9.10 RL2887** - The Board held that the change of use of Unit 23B from optician for the sale of ice-cream at Wilton Shopping Centre, Cork was development which was not exempted development. Consideration was had to the nature and range of goods sold on the premises and the layout and service provided to visiting members of the public in particular extent of seating provided.

**9.11 RL3072** - The Board held that the change of use of a premises from banking use to coffee shop at Stephen's Green Dublin was development which was not exempted development.

## **10.0 DEVELOPMENT PLAN**

The operative development plan for the referral site is the Fingal County Development Plan 2011 – 2017 (CDP). The site is zoned for Retail Warehousing.

## **11.0 ASSESSMENT**

The question before the Board in this instance can be stated as follows:

“Whether the change of use of part of unit 1 (known as unit 1A) from a toy shop to use as a coffee shop (Starbucks) is or is not development or is or is not exempted development.”

**Inspectors Note.** I note the associated ‘Starbucks’ signage affixed to the front of Unit 1A Airside Retail Park. The planning authority while noting the signage in their notes on file have not included in the question put before the Board whether the erection of associated signage is or is not development and is or is not exempted development. I am cognisant that the planning authority is solely responsible for planning enforcement and separate proceedings may be occurring with respect to this matter, therefore I intend to deal solely with the question put before the Board.

### **Is it development?**

Having carried out a site inspection and following a review of the available information, it is clear that a part of retail warehouse unit 1 has been converted to a Starbucks Coffee outlet. The converted area measures approx. 32m x 6m =192 sq. m A toilet area also measures an additional 4m x 3 m = 12 sq. m approx.

An internal wall / partition has been erected between Smyth's Toy Store and the new unit, however, an internal door allows access between the floor areas. The Starbucks Coffee area can be accessed directly from the front footpath and internally from Smyth's.

The internal layout of the new unit consists of approx. 15 tables of different sizes with seating for approx. 70 - 80 people. A display cabinet and a service counter with sandwiches, cakes and other foodstuffs on display for consumption on and off the premises. Coffee machines with tea and minerals are also present. A small staff / store area is located adjoining the toilet / restrooms at the rear of the premises.

Section 3(1) of the Planning and Development Act, 2000, defines 'development' as meaning, 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 structure or other land'*.

'Works' are defined under Section 2 of the Act as including *'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'*.

Therefore, it is considered having regard to the above definitions that the alterations carried out to the interior of the structure involve 'works' and 'development' within the meaning of the Act.

A further question arises as to whether the use of part of the retail warehouse premises as a coffee shop (starbucks) constitutes a material change in the use and therefore is or is not development.



The definition of development in section 3 includes the making of any material change in the use of any structure or other land. The building has an established retail use (Smyths Toys), which falls within the definition of 'shop' under article 5 of the Regulations, being used for the 'display of goods for sale' (toys) and the retail sale of goods (toys). The unit has been split and approx. 192 sq. m is in use as a Starbucks coffee shop. The overall unit occupied by Smyths Toys including the Starbucks element, is stated as 3,269 sq. m gross. It is submitted that the Starbucks element represents approx. 5.9% of the total gross floorspace of the overall unit. It is evident that the nature of the use conducted on site primarily involves the sale of hot / cold beverages and foodstuffs for consumption both on and off the premises in addition to the sale of secondary items incl. mugs, coffee pots and packages teas and coffee.

The case has been put forward by the site operator that the current use of the subject premises constitutes a 'shop' as per Article 5(1) of the Regulations. It is submitted that the Starbucks use is entirely subsidiary to the retail warehouse unit and as such does not change the primary use of the planning unit and does not comprise a material change of use. *Rehabilitation Institute v An Bord Pleanála* is referred to. In this case a question arose as to whether part of the rehabilitation institute had a separate and distinct planning use as it was used as a workshop. Judicially it was found that there was a single planning unit as the workshop use was ancillary to the principal use where the use is ancillary to the principle use, it forms part of that use and therefore the activity did not amount to a change of use. The submission on behalf of the operator also refers to *Palmerlane v An Bord Pleanála*, this case relates to a shop in Dame Street which was selling food for consumption off the premises, again it was found that the use was ancillary to the principle use.

As set out above the Starbucks coffee shop comprises a cabinet area and counter displaying food stuffs and beverages while there is a service area that provides for staff access to the display cabinets in addition to the related food

and drink preparation areas incl. coffee grinders, a heating grill and water taps / sinks. A seating area for approx. 70 – 80 people with tables and chairs which allow customers to consume their purchases on site in addition to a separate wash up area and customer toilets. Notably access to the premises can be obtained from both within the foyer of Smyths Toy store (shared access) and directly from the footpath to the front of the unit.

The Board has adjudicated on a number of cases (RL3318, RL3023, RL2941, RL2940 and RL2516) which are relevant in the consideration of the current proposal. Each of these cases involved either the partial change of use of an existing retail area for use as a coffee shop / coffee sales area (RL3315, RL3023 and RL 2941) or the change of use of the entire floor area (PL2940 and RL2516). In the case of referrals for partial change of use from Class 1 (shop) to coffee shop where no seating was proposed and the food and drinks etc. prepared on site were expressly for consumption off the premises, it is considered, that the activity, including the type and range of goods, constituted the retail sale of goods to visiting members of the public and came within the definition of ‘shop’ and does not constitute a ‘material change of use’ and was not ‘development’. It is notable that in such cases reference was made to absence of seating areas and customer toilets within the establishments.

The Board in its determination of RL3424, RL3425 and RL3426 which relate to change of use of a ‘shop’ unit to use as a ‘coffee shop’ (trading as Starbucks) which sold hot beverages and food products for consumption both on and off the premises, decided that the use was ‘development’ and was not ‘exempted development’. While noting that in the subject case instance the change of use relates to approx. 6% of the overall retail warehouse and that the cases referred to concerned the change of use of an entire shop unit to use as a coffee shop I consider them of particular relevance.

Having considered the foregoing, and the argument put forward by the occupier with regard to ancillary nature of the use, it is my opinion that the overall nature and scale of the operation in question 192 sq. m in area with extensive seating provided 'in house' and the inclusion of customer toilets is a critical consideration in the assessment of the subject referral. Furthermore, on the basis of previous referrals determined by the Board I am of the opinion that the existing use of the subject premises as a coffee shop is clearly akin to a café / restaurant than to a shop and thus it would be appropriate to follow the precedents set by RL2887, RL3424, RL 3425 and RL3426.

The Board in its determination of previous cases have accepted that a distinction exists between use as a 'coffee shop' and use as a café / 'restaurant', the primary purpose of the latter being the consumption of food and beverages on the premises, supported by food preparation areas, seating, customer toilets provided. The unit under consideration has all of the elements to operate as a restaurant / café, with the exception, it is noted, of a kitchen for food preparation on the premises. It also has an independent and separate access / egress than that linked with the overall retail warehouse unit. Accordingly, in my opinion, the change of use is 'material', not ancillary to the main use of toys sales and thus constitutes development within the meaning of Section 3 of the Planning and Development Act, 2000, as amended.

### **Is or Is Not Exempted Development**

I am of the opinion that the alterations carried out to the interior of the structure involve 'works' and 'development' which would be exempt by virtue of Section 4 (1) (h) of the Planning and Development Act 2000, as amended.

*(h) Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which effect only the interior of the structure or which do not materially effect the external*

*appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures”*

I am of the opinion that the change of use of part of the unit (192 sq. m) from a toy shop to use as a coffee shop by Starbucks is a material change of use which is not exempted development.

Cognisance is had to the Boards determination in respect of RL2324, RL3425 and RL3426 wherein it was determined that use as a coffee shop did not constitute use as a ‘shop’ as defined in Article 5(1) 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’ under Article 5(1). Also that 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.

I am of the opinion that the subject case is similar to the three Starbucks referral cases in Cork where it was considered by the Inspector in consideration of the case that the use in question is akin to a ‘sui generis’ café / restaurant use and that said use constitutes development which is not exempted development given the absence of any exemption in the Regulations which would otherwise permit such a change of use.

### **Restrictions on Exempted Development**

Given that it has been determined that a change of use from retail to restaurant / café use constituted ‘development’ which is not ‘exempted development’, I am of the opinion that, in this instance, restrictions on exempted development is not of relevance.

## 12.0 RECOMENDATION

I recommend that the Board should decide this referral in accordance with the following draft order:

**WHEREAS** a question has arisen as to *“Whether the change of use of part of unit 1 (known as unit 1A) Airside Retail Park, Crowcastle, Swords, Co. Dublin from a toy shop to use as a coffee shop (Starbucks) is or is not development or is or is not exempted development”*.

**AND WHEREAS** Fingal County Council requested a declaration on this question from An Bord Pleanála on the 18<sup>th</sup> May 2016

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

- (a) Sections 2(1) of the Planning and Development Act, 2000 as amended,
- (b) Sections 3(1) of the Planning and Development Act, 2000 as amended,
- (c) Sections 4(1)(h) of the Planning and Development Act, 2000 as amended,
- (d) Sections 4(2)(a)(1) of the Planning and Development Act, 2000 as amended,
- (e) Article 5(1), Article 6(1), Article 9(1) and Article 10(1) of the Planning and Development Regulations, 2001, as amended.
- (f) Class 14 of Part 1 and Class 1 of Part 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended.
- (g) The previous use of the unit as a retail warehouse for sale and display of Toys.
- (h) The scale, nature and layout of the coffee shop, the range of goods sold on the premises and the layout and services provided to visiting members of the public, in particular, customer toilet facility, separate access / egress

from the unit, independent of Smyth's Toy store, and the extent of seating provided.

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

(a) The use of the subject premises as a coffee shop does not constitute use as a “shop” as defined in Article 5(1) of the Planning and Development Regulations 2001, as amended, because the scale, nature and layout of the coffee shop is more akin to a restaurant use which is expressly excluded from the definition of ‘shop’ under Article 5(1) of the said Regulations, as amended,

(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 *the change of use of part of* the unit from a toy shop to use as a coffee shop by Starbucks, at Unit 1A Airside Retail Park, Crowcastle, Swords, Co. Dublin, is development and is not exempted development.

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Fiona Fair  
Planning Inspector  
04.10.2016