



An
Bord
Pleanála

Inspector's Report RL29S.RL3495

Referral under Section 5 of the 2000 Planning and Development Act (as amended)

Question: Whether the use of 1.16sq.m of shop area at 'Go' Kylemore Service Station as a Deli is or is not development and is or is not exempted development.

Referrer: Bernard Byrne

Location: 'Go' Kylemore Service Station, Kylemore Road, Dublin 8

Planning Authority: Dublin City Council

Planning Authority Reg. Ref. 0173/16

Planning Authority Decision: Not Exempt

Date of Site Inspection: 29th of September 2016

Inspector: Angela Brereton

1.0 INTRODUCTION

A referral case has been received by An Bord Pleanála pursuant to Section 5 of the Planning and Development Act 2000 (as amended) whereby the referrer has sought a determination as to whether or not the use of 1.16sq.m of shop area at 'Go' Kylemore Service Station as a hot food deli counter is or is not development and is or is not exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).

2.0 SITE LOCATION AND DESCRIPTION

The subject site is located on the western side of the Kylemore Road (R112) to the north of the junction with the Old Naas Road. The Carmac river forms the boundary of the site to the north and west with an existing motor sales outlet being located beyond this to the north and City Link Business Park to the west. The site is bounded by a single storey dwelling unit to the south. Sheldon Park Hotel is located on the opposite side of the road.

The site which has a stated area of 0.217 hectares (2,170sq.m) consists of an existing service station, which includes retail shop 'Gala', forecourt and pumps, some on-site parking, canopy and signage. On inspection it was apparent that the Deli counter has been erected at the rear of the shop. Hot and cold food is sold there. There was signage on the forecourt area and adjacent to the forecourt Totem pole sign advertising the Gala Meal Deals. The majority of the shop floor remains in retail use with goods stocked and refrigerated. There is no seating area for consumption of food and there is a general till area.

3.0 REFERRAL HISTORY

3.1 Extant Permissions

Dublin City Council refers to the following permissions relevant to the subject site:

- Reg.Ref.4117/15 – Permission was granted by the Council subject to conditions for an extension to the opening hours permitted under Reg.Ref.2685/14 to allow for 24 hour opening of the service station. The 24 hour operation of the premises to relate solely to the use of the filling pumps in the forecourt area and the sale of fuel and other goods via a sales hatch in the service station building.

Condition no.4 of this permission provided: *The terms and conditions of the permission for the original development, which was issued under Reg.Ref.2685/14 shall be fully complied with, except where modified by this permission.*

Reason: To provide for an acceptable standard of development.

- Reg.Ref.2660/15 – Permission granted subject to conditions for the retention (permitted under Reg.Ref.2685/14) of service station signage.
- Reg.Ref.2685/14 – Permission granted subject to conditions for the construction of a single storey service station building (c.100sq.m retail sales area), forecourt and canopy (c.5.4m in height), various signage (details given) fuel storage tanks, a service area, 11no. customer parking spaces and 6no. bicycle parking spaces. Permission was also sought for 1no. single storey motor services unit (c.97.5sq.m), all associated site development, landscaping and boundary treatment works including the re-instatement of 2no.

access/egress points onto the Kylemore Road. The development to have an overall g.f.a of 265sq.m.

It is noted that this is the parent permission and the permitted floor plans show the retail area as 100sq.m. Condition no.9 of that permission is of note and is discussed in the Assessment below.

Reg.Ref.3129/12 – Permission refused by DCC and upheld on appeal to construct an 80 seater drive-thru restaurant (294.7sq.m) and associated works and services. This was refused by ABP (Ref.PL29S.242037) for the following reason:

The proposed development is located within a Z6 Employment/Enterprise Zone in the current Dublin City Development Plan 2011-2017, wherein the use as a takeaway is neither permissible nor open for consideration. In addition, the Naas Road Lands LAP adopted in January 2013 indicates that this is a Key Developing Area and Innovation Corridor with high quality public transport routes. Accordingly, it is considered that the proposed development would contravene materially policies and objectives set out in both the Dublin CDP 2011-2017 and the Naas Road Lands LAP 2013 and would, therefore, be contrary to the proper planning and sustainable development of the area.

3.2 Enforcement

- F0042/15 refers to the enforcement action (warning letter) issued for the non-compliance with financial condition no.8 attached to PP 3651/13.
- E0268/15 refers to enforcement action regarding noncompliance with PP 2685/14.

3.3 Planning Authority Declaration

On the 3rd of June 2016 Dublin City Council, having regard to the planning history and to Article 9 of the Planning and Development Regulations 2001 (as amended) declared that the provision of a deli, providing for the sale of hot food on the premises at the Go Kylemore Service Station, would not be exempt from the requirement to obtain planning permission and that therefore a Certificate of Exemption under Section 5 of the Planning and Development Act 2000 (as amended) should not be issued.

- They provided that this was in breach of Condition no.9 of Reg.Ref.3365/15 which specifically excludes such development.

Note this Ref. is in error and as referred to in the Planning History Section above the reference should be: Reg.Ref.2685/14.

4.0 REFERRER'S SUBMISSION TO AN BORD PLEANALA

Subsequent to the Council's Declaration, Brock McClure Planning and Development Consultants have made this Referral on behalf of Bernard Byrne to An Bord Pleanala as per the provisions of Section 5(3) of the Planning and Development Acts 2000 - 2010.

They provide the issue for determination by the Board is: *Whether the use of 1.16sq.m of shop area at GO Kylemore Service Station as a Deli is or is not development and is or is not exempted development.*

Their Referral includes the following:

- It is their professional planning opinion that the use of 1.16sq.m of shop area to serve heated food does not materially contravene the requirement of Condition 9 of Reg.Ref.3365/15.
- They consider that the proposal constitutes exempted development.
- They have regard to the Planning History and provide that the principle of service station use with ancillary retail has been established on the subject site for over 30years.
- The area relevant to this Referral is the shop, which is ancillary to the main petrol station use. The shop extends to 100sq.m and is located adjoining a motor service unit, which is currently not let to a tenant.
- They provide that the shop is in accordance with the definition provided in Art. 5 (1) of the Regulations, selling a range of retail goods from food and drink to household supplies, stationery and newspapers. It provides a range of convenience goods to customers of the petrol station. (They include photographs).
- They have regard to Sections 2 and 3 of the Planning and Development Act 2000 (as amended) and consider it clear that the installation of deli area in the shop constitutes 'works' and thus constitutes 'development'.
- They have regard to the Ground Floor Layout Plan which indicates the layout of the permitted retail unit and note the vast majority of the floor area is in retail use.

- They note that there is an area extending to 3.12sq.m which is in use for the preparation of deli food items. The area occupied by the cold deli space is 1.96sq.m and the area occupied by hot food is 1.16sq.m.
- All food is prepared and cooked by Cuisine de France on a daily basis and delivered to the shop. No food is cooked on the premises. The food is kept warm until sold to customers. It is sold at the main till area, therefore there is no possibility it could be considered as a takeaway.
- Having regard to the Council's declaration, it remains their professional opinion that the contravention of the condition should be tested as a matter of degree and scale of hot food activity - should be the relevant benchmark.
- They acknowledge that the issue of hot food sales frequently arises in referrals to ABP and note a number of precedent cases. While these cases demonstrate where the Board has concluded that the sale of hot food from a shop is not a material planning consideration, they also note that there are numerous cases where the Board has found that the sale of hot food did give rise to a material planning issue.
- They provide that each case must be considered on its merits and that the key tests for the Board are the intensity and nature of hot food sales and whether a change of use has occurred.
- They submit that the use remains wholly that as permitted – a retail shop selling goods in accordance with Article 5 of the Regulations. The convenience shop remains a shop and the temperature of food items sold therein should not be a material planning consideration.

- They invite the Board to conclude that the operation of this area within the shop does not breach condition no.9 and should have been considered *de minimus* as it represents 1% of the overall area of a busy service station shop.
- They provide that the subject layout complies with the definition of a Shop as set out in the Regulations and should be considered to be in compliance with the spirit and intent of Condition no.9 of the parent permission.

5.0 PLANNING POLICY

5.1 Dublin City Development Plan 2011-2017

As shown on Land Use Zoning Map G the site is located with the 'Z6' *Employment and Enterprise Zone*, where the objective is: *To provide for the creation and protection of enterprise and facilitate opportunities for employment creation.*

Section 17.25 provides the Retail policy and objectives. Section 17.26 refers to Takeaways.

6.0 LEGISLATIVE CONTEXT

In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

6.1 The Planning and Development Act, 2000 (as amended)

Under **Section 2(1)**, the following is the interpretation of 'works':

“...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...”

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.”

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

“(h) development consisting of the use 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)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

6.2 **Planning and Development Regulations 2001-2015**

Article 5. Part 2 refers to Exempted Development and provides an interpretation for this Part. This includes:-

‘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, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,

(e) for hairdressing,

(f) for the display of goods for sale,

(g) for the hiring out of domestic or personal goods or articles,

(h) as a launderette or dry cleaners,

(i) for the reception of goods to be washed, cleaned or repaired,

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies;

Article 6 (1) provides: Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of

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

Article 9 (1) provides: 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) provides: 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...

Class 14 of Schedule 2 Part 1 relates to *Exempted Development – Changes of use* and this 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,

Part 4 relates to *Exempted Development – Classes of Use*.

Class 1 – Use as a shop.

7.0 ASSESSMENT

7.1 Is it or is it not development?

Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) it is considered that the installation of the hot food deli counter area at the 'Go' Kylemore Road Service Station constitutes development and the carrying out of works inside the retail premises.

7.2 Is the Development Exempted Development?

The Referrer submits that the deli area is exempted development and is seen as wholly subsidiary to the main retail use. The floor area of the retail shop is 100sq.m with the cold deli measuring 1.75m x 1.12sq.m (1.96sq.m) & hot deli 1.14sq.m x 1.02sq.m (1.16sq.m). The overall area amounts to 3.12sq.m or 3% of the entire retail unit. This is an extremely small proportion of the overall retail floorspace and the sales make a modest contribution to the overall sales figures. Only 1% of the overall floor area of the retail unit is dedicated to the sale of heated food items. They provide that there is no difference between pre-packaged sandwiches on the shelf or those filled directly by a staff member, at a customer's request. The items are not sold separately at the deli counter and must be paid for in full at the regular cash till for which goods and fuel are paid for. There is therefore no possibility that the deli area could be considered a separate take-away element to the retail unit. There is no cooking or dining area in the premises. They contend that the sale of heated goods is wholly ancillary to the main purpose of the business of the service station.

As shown on the floor plans submitted, the deli counter is at the rear of the retail floor area of the premises and is visible in the context of the existing retail, in view of its location opposite the door when entering the Gala shop. It is noted that there is signage relative to 'Gala Meal Deals' on the forecourt of the service station, which includes reference to the sale of 'hot food'.

The Referrer contends that Condition no.9 should not be used to prevent customers buying a heated pastry or wrap whilst paying for fuel. The ancillary sales of such heated items should be considered entirely *de minimus* and does not represent a contravention of Condition no.9. An abbreviated form of the Latin Maxim *de minimis non curat lex*, "the law cares not for small things." A legal doctrine by which a court refuses to consider trifling matters. The *de minimis* doctrine is used in law to avoid the resolution of trivial matters that are not worthy of judicial scrutiny. Appellate courts also use the *de minimis* doctrine when appropriate. (Legal Directory).

However it is noted that there is no specific definition of what constitutes *de minimis* stated in the Planning Acts or Regulations. The issue in this Referral is relative to whether or not having regard to the Planning Act and Regulations the Question which has been raised by the Referrer can be considered to be exempted development.

7.3 **Regard to Condition no.9**

Condition no. 9 of the parent permission Reg.Ref.2685/14 for construction of the service station including c.100sq.m of retail sales area and all associated works is of note and provides the following:

The sale of goods from a petrol station is an ancillary use to the use as a petrol filling station and any sale of food shall be confined to food as defined under 'shop' in Section 2 of the Planning and Development Regulations 2001, as amended, and will not include the sale of hot food on or off premises.

Reason: To clarify the extent of the development and in the interests of the proper planning and sustainable development of the area.

Regard is had as noted in the Legislative Section above to Article 9 (1) (a)(i) of the Planning and Development Regulations 2001. This provides a restriction on exemption, if the carrying out of such development for the purposes of the Act would contravene a condition to a permission under the Act or would be inconsistent with any use specified in that condition. In this case Condition no.9 clearly provides a restriction on the premises to operate as a retail shop. Article 5(a) of the Regulations relates to the definition of shop *for the retail sale of goods*. Article 5(d) includes: *For the sale of sandwiches or other food ... for consumption off the premises, where the sale of such is subsidiary to the main retail use*. The Referrer provides that the deli counter selling hot and cold food is wholly subsidiary to the main retail use.

It must be noted that Article 5 which provides the interpretation of 'shop' does not include the sale of hot food, in fact it explicitly excludes such. The Referrer submits that the contravention of the condition should be tested as a matter of degree and the scale of hot food activity should be the relevant benchmark, and notes in this case that is minimal. However, Condition no.9 of the parent permission specifically excludes the sale of hot food. Therefore it is considered that the deli counter despite its small floor area relative to the deli use and to hot food counter in contrast to the greater retail sales area, cannot in this case be considered exempted development relative to the restriction on exemption in Article 9(1)(a)(i) of the said Regulations.

7.4 Regard to Precedent Cases

The Referrer has regard to a number of precedent cases relative to hot food sales. Regard is had to these and some other such precedent cases below:

RL2179 – In this case the Question was – ‘Whether the use of a portion of the grocery store for the sale of hot food for consumption off the premises at Glendalough Stores, Laragh East, County Wicklow is or is not development or is or is not exempted development.’ The Board concluded (notice dated 18th of November 2004) that: (a) the sale of hot food for consumption off the premises is in this particular case subsidiary to the principal shop use, and (b) the sale of hot food for consumption off the premises to the limited extent which occurs at Glendalough Stores does not on this account result in a material change of use from the use of this shop. In this case it is noted that the Inspector (Par. 8.3) was satisfied that the provisions of Article 9(1)(a)(i) would not apply.

RL2333 – In this case the Question asked was: Whether the partial use of a Spar Retail Unit at Beaufield Shopping Centre, Maynooth as a pizzeria with delivery service is or is not development or is or is not exempted development. The Board concluded (Notice dated 15th of November 2006) that this did not result in a material change of use from the use of this shop and was not development. In that case the Inspector had regard to the planning history and noted that the Board did not re-impose a restrictive condition limiting the use of the shop.

RL2111 – In this case the Question asked was: Whether the provision of a home delivery service at Apache Pizza, Main Street, Lucan is or is not development or is or is not exempted development. The Board concluded (6th of April 2004) the delivery service for the sale of hot food for consumption off the premises contravened a condition of an earlier permission, constitutes a significant element in the use of the premises and constitutes a material change of use.

Other Precedent Cases

RL2590 – In this case the Question was asked as to Whether the sale of hot food for consumption off the premises at an existing shop premises in the Athlone area is or

is not development or is or is not exempted development. The Board concluded (Notice dated 17th of July 2009) that the sale of hot food for consumption off the premises in this particular case is not subsidiary to the principal shop use and results in a material change of use from the use of this shop for the retail sale of groceries.

RL3402 – In this case a Question was asked as to: Whether the change of use of part of the existing retail premises for sale of hot food in Kilcullen, Co. Kildare is or is not development or is or is not exempted development. The Board conclusion (Notice dated 29th of April 2016) included, that the sale of hot food for consumption off the premises is not subsidiary to the principal shop use and having regard to the definition of ‘shop’ under article 5(1) of the Planning and Development Regulations, 2001, as amended, this has resulted in a change of use within this shop from the main retail use.

Copies of the Inspector’s Reports and Decision Notices relative to the above referral cases are attached to this Report.

7.5 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.

8.0 CONCLUSION

While these precedent cases are of interest, it is not considered that any of these is of specific relevance to the subject case. Each case is considered on its merits.

Having regard to the subject case, and in particular to the restrictions imposed by Condition no.9 of the parent permission it is considered that this development does not come within the scope of exemptions from the general obligation to obtain

planning permission, as provided under the planning legislation. Accordingly, it is not considered to be exempted development.

9.0 RECOMMENDATION

I recommend that the question referred to the Board by Bernard Byrne be decided as follows:-

WHEREAS a question has arisen as to whether the use of 1.16sq.m of shop area at GO Kylemore Service Station for the sale of hot food is or is not development or is or is not exempted development

AND WHEREAS the said question was referred to An Bord Pleanála by Brock McClure on behalf of Bernard Byrne on the 30th day of June 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) The definition of 'shop' under article 5(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Articles 6, 9 and 10 of the Planning and Development Regulations, 2001 as amended, and Part 4 of Schedule 2 of these Regulations,
- (d) The planning history of the site, including planning register number 2685/14, whereby planning permission was granted for the Service Station and associated retail sales area on this site, in particular the restrictions imposed by Condition no.9 of that permission.

AND WHEREAS An Bord Pleanála has concluded that –

- (a) Having regard to the restrictions imposed by Condition no.9 of planning register reference number 2685/14, the sale of hot food for consumption on or off the premises in this particular case is not subsidiary to the principal shop use and
- (b) The sale of hot food for consumption on or off the premises results in a material change of use within this shop from the retail sale of groceries.
- (c) This development does not come within the scope of exemptions from the general obligation to obtain planning permission, as provided under the planning legislation.

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 said change of use of part of the existing retail premises for the sale of hot food is development and is not exempted development.

Angela Brereton,
Planning Inspector

6th of October 2016