



An
Bord
Pleanála

Inspector's Report RL04.RL3509.

Details of Reference:

Whether the use of part of the building for storage of cheese and packaging is or is not development or is or is not exempt development.

Location:

Laragh, Bandon, Co. Cork

Planning Authority

Cork County Council

Planning Authority Reg. Ref.

D/237/16.

Referrer

Futura Frames Ltd

Owner/Occupier

Futura Frames Ltd

Planning Authority Decision

Is not exempted development

Date of Site Inspection

08/12/2016

Inspector

A. Considine

1.0 **Site Location and Description**

- 1.1. This is a referral, by the referrer, of the Declaration made by Cork County Council on 20th September 2016, under Section 5(3) of the Planning & Development Act, of the question as to whether the use of part of the building for storage of cheese and packaging is or is not development or is or is not exempt development at Laragh, Bandon, Co. Cork.
- 1.2. The site the subject of this referral comprises part of a building which was granted planning permission as an extension to a factory under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596. The building is located within the IDA Industrial Estate at Laragh, Bandon and is located approximately 4km to the west of the town of Bandon. Access to the Industrial Estate is via the Regional Road, the R586. The permission associated with the building the subject of this referral was made by Futura Frames Ltd and was subject to 31 conditions.
- 1.3. The building itself, is occupied by storage shelves which rise from floor to ceiling. In addition, staff facilities are provided for within the building.

2.0 **Section 5 Declaration Request:**

The question arising in relation to this Section 5 Declaration request is presented as follows:

Whether the use of extension to factory which was permitted under Planning Register Ref. No. 04/2973 and 07/5596 to provide ancillary storage for the adjoining factory at Laragh, Bandon is development and is or is not exempted development.

Having regard to the information presented in the declaration request, I consider it appropriate to reword the declaration request to read as follows:

Whether the use of part of the permitted factory extension, permitted under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596, for storage of cheese and packaging is or is not development or is or is not exempt development at Laragh, Bandon, Co. Cork.

3.0 Reports on Planning Authority File

- 3.1. There are no interdepartmental reports from Cork County Council with regard to the subject referral.
- 3.2. The Planning Report noted the planning history associated with the subject site as well as the referrers case. In the initial assessment, the Planning Officer noted that inadequate information was provided, in terms of no scaled maps or internal floor plans, and required that further information be sought in relation to these issues. In addition, the PA requested information in relation to traffic movements to and from the premises.
- 3.3. Following receipt of the response to the above request, the Planning Report concluded that 'the use of part of the building for the storage of cheese and packaging does not fall under Class 4 (light industrial building), of Part 4 of Schedule 2 of the Planning & Development Regulations as it falls under Class 5 (wholesale warehouse or as a repository). The change of use is considered to be a material change of use and it is therefore development and not exempted development.' The Board will note that the SEO co-signed the report in agreement with this conclusion.

4.0 Decision of the Planning Authority

Cork County Council determined that the use of part of the building for storage of cheese and packaging is considered to be a material change of use as this use comes within the scope of Class 5 of Part 4 of Schedule 2 of the Planning & Development Regulations, 2001 whereas the existing use comes within the scope of Class 4 of Part 4 of Schedule 2 of the Regulations. The development therefore, is

not exempted development under the provisions of Section 4, subsection (1) – (3) of the Planning & Development Act, 200 (as amended).

5.0 **Relevant History**

The following is the relevant planning history associated with the subject site:

- 5.1. **ABP ref PL04.104291 (PA ref 97/2971):** Permission was granted for the construction of light industrial advance factory and offices. Condition 14 of this grant of permission was appealed to An Bord Pleanála and stated:

14. The premises shall be used for light industrial use only. Before industrial use commences full details of specific use shall be submitted and agreed with the Planning Authority and shall provide for the following:

- (a) Details of existing waste water treatment plant including capacity.
- (b) Details and calculations for proposed discharges to the foul and storm sewers.
- (c) Details of watermain connection to site

Reason: In the interests of orderly development.

The Board decided that the above condition should be attached.

- 5.2. **PA ref 04/2973:** Permission was granted, to Future Frames Ltd, to extend existing factory, offices, yard area, car parking and access road, subject to 31 no. conditions including condition 2 which stated as follows:

2. The proposed structure shall be used solely as that permitted herein and no change of use shall take place without a prior grant of permission of the Planning Authority, notwithstanding the exempted

development provisions of the Planning & Development Regulations 2001, as amended.

Reason: To safeguard the amenities of the area and because it is considered that any change of use would warrant the making of an application for and the grant of planning approval.

The Board will note that the plans and particulars for this extension identified the current subject referral area as 'Proposed Extension to Production Area'.

- 5.3. **PA ref 07/5596:** Permission granted to Future Frames Ltd for the construction of an electrical substation and for the retention of extension to window manufacturing factory. This area comprised a floor area of 200m² and included an office, WC, canteen and store with roller shutter doors.

6.0 Policy Context

The subject site is located approximately 4km to the west of the town of Bandon in Co. Cork. The Cork County Development Plan, 2014 is the relevant policy document and the subject site is located within the Greater Cork Ring Strategic Planning Area. Above this, the site is located within an established IDA Industrial Estate.

7.0 Legislative Context

I consider the following to be the statutory provisions relevant to this referral case:

- 7.1. Planning & Development Act, 2000 – 2012
- 7.1.1. Section 2 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, except where the context otherwise requires – ‘development’ has the meaning assigned to it by Section 3 ...”

In Section 2 (1) of the Act “works” are interpreted 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”.

7.1.2. Section 3 (1) of the 2000 Planning and Development Act states as follows:-

“In this Act, ‘development’ means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or other land.”

7.1.3. Section 4(1) of the Planning and Development Act identifies what may be considered as exempted development for the purposes of the Act, and Section 4(2) of the Act provides that the Minister, by regulations, provide for any class of development to be exempted development. The principal regulations made under this provision are the Planning and Development Regulations, 2001.

7.2. Planning & Development Regulations, 2001-2013

7.2.1. Article 5(1) provides the following meanings

- “industrial building” means a structure (not being a shop, or a structure in or adjacent to and belonging to a quarry or mine) used for the carrying on of any industrial process;
- “light industrial building” means an industrial building in which the processes carried on or the plant or machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit;
- "industrial process" means any process which is carried on in the course of trade or business, other than agriculture, and which is-

(a) for or incidental to the making of any article or part of an article, or

(b) for or incidental to the altering, repairing, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article, including the getting, dressing or treatment of minerals,

and for the purposes of this paragraph, "article" includes-

(i) a vehicle, aircraft, ship or vessel, or

(ii) a sound recording, film, broadcast, cable programme, publication and computer program or other original database;

- "repository" means a structure (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than business incidental to such storage;

7.2.2. Article 6(1) of the Planning & Development Regulations, 2001 as amended 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."

7.6 Article 9(1) of the Planning & Development Regulations, 2001 as amended, provides a number of scenarios whereby development to which article 6 relates shall not be exempted development for the purposes of the Act. Of relevance is the following

(1) 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,

7.7 Article 10 deals with changes of use and provides as follows;

- (1) 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.

7.8 Class 4 of Part 4 (exempted development – Classes of Use) of Schedule 2 refers to 'Use as a light industrial building', while Class 5 of the same Part 4 of Schedule 2 refers to 'Use as a wholesale warehouse or repository'.

8.0 The Referral

8.1. This request has been sought by McCutcheon Halley Walsh on behalf of Future Frames Ltd. The request at the outset, notes that Cork County Council issued a determination advising that the proposal for the use of the factory extension to

provide additional storage space in Laragh, Bandon, Co. Cork is not exempted development.

8.2. The grounds of reference are summarised as follows:

- The declaration is flawed as the planning report fails to address the issue of material change.
- There is no reference to case law or An Bord Pleanála precedents.
- Case law is cited including *McMahon v Dublin Corporation* and *Galway County Council v Lackagh Rock Ltd* which established the two criteria for the test of materiality.
- The reference concludes requesting that the Board confirm that the current use of the premises for storage of cheeses and packaging:
 - Is within the scope of the governing permissions
 - Is ancillary, and incidental, to the established industrial activities
 - Does not involve any change in the essential nature of the industrial activity on the wider site
 - Does not have any planning consequences

And therefore, does not involve a material change of use and is not “development” as defined in Section 3 of the Planning Act.

Planning Authority Response

8.3. The Planning Authority submitted a letter advising no further comments.

Other Party Responses

8.4. None

9.0 Assessment

- 9.1. The question has been posed as to whether the use of part of the permitted factory extension, permitted under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596, for storage of cheese and packaging is or is not development or is or is not exempt development, at Laragh, Bandon, Co. Cork.
- 9.2. In terms of this assessment, I note the planning history associated with the subject site, planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596 refer, and indeed, the particular conditions attached to the permissions which control the use of the building as constructed, for use as light industrial. I acknowledge the report and determination of Cork County Council in relation to the question posed, as well as the submission made on behalf of the referrer. I also note the reference to the 'adjoining factory'.
- 9.3. The first question to be considered is whether or not a change of use has occurred and if any such change of use is *material* and therefore development. If any change of use is not material, no further question arises but if on the other hand there is a material change of use, a second question arises as to whether or not the material change of use is exempted development by reference to the Act and Regulations.
- 9.4. Article 5 of the Planning & Development Regulations, 2001 as amended, describes "industrial building" means a structure (not being a shop, or a structure in or adjacent to and belonging to a quarry or mine) used for the carrying on of any industrial process. In addition, a "light industrial building" means an industrial building in which the processes carried on or the plant or machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit. In terms of the relevant planning permissions associated with the subject building, it is clear that the production of the window frames, as originally permitted, constitutes an industrial process which is carried out in a light industrial building. The current use of

the site for the storage of cheese and packaging is more akin to a “repository”, which the Regulations state, means a structure (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than business incidental to such storage.

9.5. Clearly, and notwithstanding the submission of the referrer regarding the storage of window frames as the final product as part of the permitted light industrial use, there is a difference in the uses. In order to determine whether a *material* change of use has taken place, I am required to consider the character of the existing use and how the proposed use might affect or alter that character. In addition, the potential impacts of the change of use are required to be assessed. The existing building was originally part of the Futura Frames Ltd operation. As permitted, the overall building operated to produce window frames. At some point, an internal block wall was erected to sub-divide the building, and the area the subject of this referral now comprises a cold storage area for Bandon Vale Cheese Ltd. The Bandon Vale premises does not adjoin the area the subject of this referral as indicated in the reference documents. It is actually located to the south west of the subject building and across the estate road of the Industrial Estate. I am of the opinion that a change of use has clearly taken place within part of the permitted light industrial building, and that the change of use is material. Therefore, development, as defined under Section 3 (1) of the Planning and Development Act, 2000 (as amended), has taken place within the defined area of the subject building on the site. The second question as to whether the said material change of use is exempted development or not requires to be considered.

9.6. In terms of the subject referral, the Board will note Part 4 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, which is considered relevant. Class 4 of Part 4 (exempted development – Classes of Use) of Schedule 2 refers to ‘Use as a light industrial building’, while Class 5 of the same Part 4 of Schedule 2 refers to ‘Use as a wholesale warehouse or repository’. The two uses are identified as being different and therefore, it has to be concluded that a change of

use, which I consider material, has occurred. The development is therefore considered not to constitute exempted development.

- 9.7. Article 9 (1) relating to restrictions on exemption states that 'development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would (inter alia), (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.
- 9.8. In particular, Article 10 of the Regulations deals with changes of use and states that (1) 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.

In terms of Article 10, I am satisfied that the development, the subject of this referral, contravenes a condition attached to a permission under the Act and would be inconsistent with the used specified and included in the relevant planning permissions.

10.0 Conclusion & Recommendation

Conclusion:

10.1. Having regard to the above, I am satisfied that the general question raised in this referral can be determined as follows:

- The referral relates to the use of part of a permitted factory extension, permitted under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596, for the production of window frames, to Futura Frames Ltd., for storage of cheese and packaging for the adjoining factory. The referral question poses is whether this use is or is not development or is or is not exempt development, Laragh, Bandon, Co. Cork.
- The subject area of the permitted factory is delineated on the maps and plans submitted to Cork County Council on the 11th day of July, 2016, and further information received by the Planning Authority on 30th day of August, 2016. This area does not adjoin Bandon Vale, the factory for which the referral area is used as storage for cheese and packaging, as stated in the referral documents.
- The factory extension the subject of this appeal was permitted under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596 for the production of window frames, to Futura Frames Ltd., and which included conditions to control the use of the building, notwithstanding the exempted development provisions of the Planning & Development Regulations, 2001, as amended.
- It is determined that the said use amounts to a material change of use and therefore, development, as defined under Section 3 (1) of the Planning and Development Act, 2000 (as amended), has taken place within the defined area of the subject building on the site.

- The material change of use arises due to the change of use from the permitted Class 4 of Part 4 of Schedule 2 of the Planning & Development Regulations, as amended to Class 5 of Part 4 of Schedule 2 of the Regulations, which is not exempted development.

Recommendation

10.2. I recommend therefore that the Board find as follows:

WHEREAS a question has arisen as to whether the use of part of the permitted factory extension, permitted under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596, for storage of cheese and packaging is or is not development or is or is not exempt development at Laragh, Bandon, Co. Cork;

AND WHEREAS McCutcheon Halley Walsh, on behalf of their client Futura Frames Ltd., requested a declaration on the said question from Cork County Council and the said Council issued a declaration on the 20th day of September, 2016 decided that the said matter is not exempted development:

AND WHEREAS the said question was referred to An Bord Pleanála for review by McCutcheon Halley Walsh, on behalf of their client Futura Frames Ltd., on the 17th day of October, 2016;

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

- (a) Sections 2, 3 and 4(1) of the Planning and Development Act, 2000, as amended;
- (b) Article 5(1) of the Planning and Development Regulations, 2001, as amended, and the definitions of Industrial Building, Light Industrial Building and Repository;

- (c) Article 10, Class 4 and Class 5 of Part 4 of the Second Schedule of the Planning and Development Regulations, 2001, as amended
- (d) The nature of the change of use and the conditions of planning permissions associated with the factory, planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The referral relates to the use of part of a permitted factory extension, delineated on the maps and plans submitted to Cork County Council on the 11th day of July, 2016, and further information received by the Planning Authority on 30th day of August, 2016 and does not adjoin Bandon Vale at Laragh, Bandon, Co. Cork.
- (b) The factory extension the subject of this referral, was permitted under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596 for the production of window frames, to Futura Frames Ltd., and which included conditions to control the use of the building, notwithstanding the exempted development provisions of the Planning & Development Regulations, 2001, as amended.
- (c) It is determined that the said use amounts to a material change of use and therefore, development, as defined under Section 3 (1) of the Planning and Development Act, 2000 (as amended), has taken place within the defined area of the subject building on the site.
- (d) The material change of use arises due to the change of use from the permitted Class 4 of Part 4 of Schedule 2 of the Planning & Development Regulations, as amended to Class 5 of Part 4 of Schedule 2 of the Regulations, which is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, as amended, hereby decides that the use of the permitted factory extension, permitted under planning references ABP ref PL04.104291 (PA ref. 97/5596) and PA refs 04/2973 and 07/5596, for storage of cheese and packaging, is a material change of use, is development and is not exempted development, at Laragh, Bandon, Co. Cork.

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.

A. Considine
Planning Inspector,
25th January, 2017