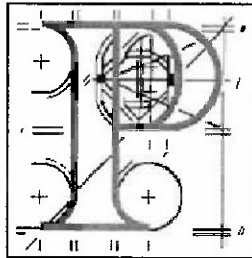


## An Bord Pleanála



### Inspector's Report

**Referral No:** PL06S.RL3520

**Details of Reference:** Whether a material change of use arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development

**Location:** Unit No. 3 Fonthill Retail Park, Fonthill Road, Dublin 22

**Referred By:** PKB Partnership

**Owner/ Occupier:** PKB Partnership

**Planning Authority:** South Dublin County Council

**Inspector:** Caryn Coogan

**Date of Inspection:** 28<sup>th</sup> of February 2017

**Appendices:** Photographs

## 1. INTRODUCTION

- 1.1 This referral is a referral by GVA Consultants, on behalf of PKB Partnership, under Section 5(3)(a) of the 2000 Act, for a determination by the Board on whether or not the subject development is development and whether or not it is exempted development.

## 2. PLANNING AUTHORITY'S DECLARATION

- 2.1 A request was received by South Dublin County Council from PKB Partnership, on 12<sup>th</sup> of August 2016 for a declaration under section 5(1) of the Planning and Development Act, 2000, as amended, on the following;

*'Whether a material change of use at a retail unit No. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.'*

- 2.2 Under a Section 5 Declaration Decision, South Dublin Co. Co. issued an order dated 2<sup>nd</sup> of November 2016 to *Brian Wynne Bilfinger GVA under ED16/0045* stating a change of use at a retail unit by reason of the goods been sold within Unit 3 at Fonthill Retail Park was not declared exempt under the Planning and Development Regulations, 2001 (as amended) and therefore **DOES** require planning permission.

## 3. SITE LOCATION AND DESCRIPTION

- 3.1 The subject site is a unit within Fonthill Retail Park in Clondalkin, Dublin 22. The unit is occupied by the retailing company **Dealz**. Throughout the retail park there is an **Elverys Sports**, **Smyths Stores**, **Wheelwork Bikes**, **Polonez Foodstore**, **Power City** and **Aldi**. These units provide a full range of convenience and comparison goods.

## 4. THE REFERRER'S CASE

- 4.1 The Referrer now claims to the Board, permission was granted for retail use of the premises, with no conditions that restricts the type of retail goods that can be sold from the unit. The permitted use of the unit as a 'shop' is defined under the Regulations 1994. The planning authority has claimed a retail warehouse does not constitute a shop. It is not appropriate to form an opinion on use based on the definition 'retail warehouse' taken from the South County Dublin Development Plan 2016-2022. The parent planning permission (S97A/0791) for the retail units pre-dated the first RPG's published in 2000 and the first South Dublin County Development Plan published in 1998. It was the RPG's that introduced definitional clarity in 2000.

The Referrer, PKB Partnership, has requested the Board to consider the following:

- (a) Is there 'development' i.e. a change of use
- (b) Is the change of use a material change of use

4.2 *Is there a Change of Use*

Section 3 of the Planning and Development states '*the carrying out of any works on, in, over or under land or making of material change in use of any structure or other land.*' This test was not fully considered in the Planner's Report under the Declaration Request on ED16/0025. For article 9(1)(a)(i) to apply it must be clearly demonstrated that a material change of use has occurred.

4.3 The subject retail unit was granted planning permission under S97A/0791. The 'brand' or the current retailer is not a relevant planning consideration per se, but rather the nature of goods to be sold can be relevant in certain instances. Therefore, the question is whether a material change of use arises from the sale of a different type of goods sold at the unit.

4.4 When the unit was permitted planning permission the function of the retail warehouse was for the sale of retail goods, and it is reasonable to assumed that the use of the unit applied for and permitted was retail, and there was no restriction on the type of goods permitted to be sold from the unit by way of condition.

4.5 It is necessary to assess the permission in the context of the planning legislation at the time of making the decision. At the time of granting permission, retail warehousing was not recognised in legislation as a distinct sector of retailing which sold a certain type of retail good. The Planning Regulations at that time were the 1994 Regulations, under which the definition of shop, which included amongst other uses '*the retail sale of goods*'. Therefore the use of the unit permitted was a 'shop' as defined by the Planning and Development Regulations 1994. Under Article 11 of the same Regulations the exempted Changes of Use classes were outlined. The class of uses set out in Part IV of the Second Schedule of the Planning and Development Act 1994 included 'Use as a Shop' in Class 1 of specific planning uses. Taken into account the legislative framework in time of the grant of permission, there was no provision in the legislation that restricted the sale of certain items of retail goods, there are no legal or planning grounds for restricting the type of retail goods that can be sold from the unit. It is not reasonable to interpret the permitted development in the context of current Guidelines and legislation. It is considered that changing the type of retail goods sold from the unit falls within the remit of the original permission for the unit and does not constitute development by way of condition.

4.6 *A material change of use?*

Notwithstanding the above, if it was considered that a change of use in the type of retail goods been sold from the unit would comprise of a change of use,

the next step would be to consider whether the change of use would be material, and constitute development.

4.7 At the time of permitting the planning permission, if the planning authority considered a change of use would occur in the type of goods been sold from the unit, a condition restricting the change of use would have been imposed. The planning authority gave due consideration to the potential for material planning implications as part of the assessment process in permitting the subject retail unit and as such the use permitted at the unit is considered to be 'open retail'.

#### 4.8 *The Question of 'Exempted Development'*

Development can be exempt from the requirement to obtain planning permission under the planning legislation set out in the Planning and Development Act, 2000 and the planning and Development Regulations 2001. However the provisions of exempted development only apply if a development has taken place. Having established that the retail goods sold form at the unit should not be considered a material change of use, and therefore the development, it is not necessary to apply the provisions of exemption.

4.9 However should the Board consider a development has occurred by reason of the type of goods been sold, then then the development should be considered to be exempt development by way of Article 10 of the Planning and Development Act 2000. There was no condition attached to the permission restricting the type of goods to be sold at the unit. Condition No. 2 of Planning reference SD15A/0152 is not applicable in the assessment of the Section 5 Declaration request, as a restrictive condition relates to Unit 3A, and not to unit 3. On this basis it is considered that a change in the type of retail goods sold form the unit would comprise a change of use within Class 1 of Part 4 of Schedule 2 of the Planning and Development Act 2000, that is not restricted by way of Article 9(1)(a)(i).

#### 4.10 *Conclusion*

The Board has to take into consideration the following:

- Planning permission Reg. Ref. S97A/0791 granted permission for a retail use within a warehouse structure. No conditions were attached to the Grant of Planning permission restricting the type of retail goods to be sold form the unit
- Legislation in place at the time of Granting Planning Permission provided that the use of the unit was a 'shop' for the retail sale of goods.
- Changing the type of goods sold from the unit falls within the scope of the original planning permission for the unit and as such does not constitute development by way of a change of use.
- It is considered that the materiality of changing the type of retail goods sold at the unit falls within the scope of the original permission for the unit and does not constitute development by way of condition.

- It is considered that the materiality of changing the type of retail goods sold at the unit falls within the scope of the original permission for the unit and as such does not constitute development by way of a change of use
- Applying current planning legislation and guidance in the assessment of the unit is legally questionable as these documents did not form part of the decision making process
- The provisions of the exempted development are not applicable as a development has not taken place.

## 5. RESPONSES

- 5.1 The planning authority had nothing further to add to the Planning Report on file.

## 6. PLANNING HISTORY

- 6.1 **S97A/0791** - Retail warehouse development (4210sq.m.) granted planning permission.

**SD15A/0152** – New Internal subdivision walls, new loading door arrangement at south elevation, new toilets, 2 new fire exit doors to north elevation, new glazed double doors/ screen to east elevation and signage to west elevation granted planning permission.

**ED16/0025** : Change of Use from former retail warehouse to use as a discount foodstore for sale of non-bulky convenience goods. Declare Non-exempt.

**S7743** – Warning Letter issued regarding alleged unauthorised development consisting of the change of use from a retail warehouse to use as a discount store for the sale of non-bulky goods without planning permission.

## 7. RELEVANT LEGISLATION

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

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

- 7.2 Section 3 (1) states as follows:

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

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

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

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

*“shop” means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public—*

- (a) for the retail sale of goods,*
- (b) as a post office,*
- (c) for the sale of tickets or as a travel agency,*
- (d) for the sale of sandwiches or other food for consumption off the premises, where the sale of such food is subsidiary to the main retail use,*
- (e) for hairdressing,*
- (f) for the display of goods for sale,’*
- (g) for the hiring out of domestic or personal goods or articles,*
- (h) as a launderette or dry cleaners,*
- (i) for the reception of goods to be washed, cleaned or repaired,*

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

- 7.5 Article 6 (1) states as follows:  
*“Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column-1.”*

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

- (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.*
- (xii) further to the provisions of section 82 of the Act, consist of or comprise the carrying out of works to the exterior of a structure, where the structure concerned is located within an architectural conservation area or an area specified as an architectural conservation area in a development plan for the area or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan and the development would materially affect the character of the area,*

7.7 Article 10 (1) relating to changes of use states as follows:  
*“Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—*

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

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

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

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

## 8. RELEVANT CASES

### 8.1 An Bord Pleanála Ref: 21.2988

The Board determined that a change of use had occurred by reason of the class and type of goods been sold at Homestore and More, Unit 5, Sligo Retail Park, Carrowroe, Co. Sligo.

### 8.2 An Bord Pleanála Ref: 14.RL3445

The Board determined the change of use of from a former retail warehouse to use as a supermarket for sale of non-bulky goods was development at the N4 Axis Centre, Longford

## 9. Development Plan

The subject site is zoned RW in the South Dublin County Development Plan 2016-2022 which is the objective to provide for and consolidate Retail Warehousing.

## 10. ASSESSMENT

10.1 I visited the subject site at Fonthill Retail Park on 28<sup>th</sup> of February 2017, and I noted the subject unit is occupied by a Dealz store. The Referrer, PKB Partnership, has built its case to the Board on the basis that Unit 3 was originally granted planning permission under SDCC Reg. No. S97/0791 which was for a 'retail warehouse' of 4210sq.ft. The 17No. conditions attached to the original planning permission did not include any restrictive conditions limiting the types of goods sold within the unit. The case presented claims the decision to grant planning permission pre-dates the Retail Planning Guidelines, the first South Dublin County Development Plan 1998, and the relevant planning legislation is:

- The Local Government (Planning and Development Acts, 1963 as amended

- The Local Government (Planning and Development) Regulations as amended.

The Referrer makes the claim that the parent permission is for a 'shop' as defined by the Planning and Development Regulations 1994. It is further submitted the structure is a warehouse used for retailing, the development description relates to the building only, which it is, and used for retailing products. I do not agree with this argument for the simple reason been that even though the terminology 'retail warehouse' predates the Retail Planning Guidelines definition in 2000, the permitted development at that time, given its scale and located within a large Retail Park, is not fundamentally a 'shop'. It is not reasonable to suggest that because the permitted 'retail warehouse' predated the Retail Planning Guidelines and an informed definition of a retail warehouse, that the structure is not a retail warehouse but is in fact a shop.

In addition, the Referral fails to outline a detailed history of goods sold within the premises since its first occupation, and it has not been specified either when the unit became occupied by the discount retailing company. Yet. It expects the Board to adjudicate on the question whether a material change of use has occurred by reason of the type of goods been sold, yet there is no clear indication of the types of good previously sold on the premises since it was permitted. Therefore, in my opinion, the Board can only assess the case on the permitted use as a **Retail Warehouse** against current use as a **Discount Store**. Therefore, the question arising in this Referral, needs to be reformatted to take account of the permitted and the existing use of the premises in order to establish if a change of use has occurred. The question posed to the Board is vague and does not accurately describe the matters arising.

- 10.2 Therefore, the question should be reformatted to give a clear and accurate description of the activities which have taken place at the subject site to the following:

Whether change of use from a permitted retail warehouse to use as a discount store for the sale of non-bulky goods including the retail sale of convenience goods No. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 is or is not development or is or is not exempted development

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

- 10.4 The development as permitted under S97A/0791 was for a 'retail warehouse', as stated above in my opinion, this is not a shop as defined by the current and preceding Planning legislative framework. At the time of the permission there was no clear definition of a retail warehouse, which came two years later with the Publication of the Retail Planning Guidelines 2000.

The Retail Planning Guidelines 2000 define 'Retail Warehouse' in Annex 1 – Glossary of Terms as follows:



*'A large single-level store specialising in the sale of bulky household goods such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers and often in out-of-centre locations.'*

'Bulky Goods' are also defined in Annex I as follows:

*'Goods generally sold from retail warehouses where DIY goods or goods such as flatpack furniture are of such a size that they would normally be taken away by car and not be manageable by customers traveling by foot, cycle or bus, or that large floor areas would be required to display them e.g. furniture in room sets, or not large individually, but part of a collective purchase which would be bulky e.g. wallpaper, paint.'*

In order to establish whether a change of use has occurred it is necessary to look at the existing retailing activity carried out at the store.

10.4 Unit No. 3 is currently occupied by Dealz. The existing retailing activity is a Discount Store selling food, drink, health and beauty products, home and pet products, stationary and crafts, party and celebrations, and some leisure and entertainment products. The majority of the products for sale within the premises are small products costing €1.50 per item. The items are displayed on rows of shelves similar to a supermarket outlet. It is clear from the site inspection that the retail warehouse unit is used for the sale of non-bulky items of merchandise. In my opinion, it cannot be concluded the unit specialises in the sale of bulky goods, as required by the guidelines. The term 'bulky goods' is qualified in the Guidelines by reference to sizeable goods necessitating car transport. The store is currently devoted to the sale of non-bulky products that can easily be carried away on foot. The items on sale would by their nature and volume require large display areas. In this regard, I consider that the space requirements at the store arise largely from the volume of goods displayed and not the bulky nature of the individual items ( i.e large areas devoted to the display of small items such as cards, party items, candles, toiletries, baby care, etc). It is my opinion, that the retail format employed by occupier fails to satisfy the requirements for **retail warehousing** (the permitted use on the subject site) as set out in the Guidelines.

10.5 The new Retail Planning Guidelines were published in May 2012, and the Board in carrying out its functions is required to have regard to its provisions under section 28 of the Planning and Development, Act 2000, as amended. Annex 1 provides a description of '**retail warehouse**', which is not fundamentally altered from that provided in previous guidance;-

*'A large single-level store specialising in the sale of bulky household goods such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for carborne customers'.*

Bulky Goods are described as follows:-

*Goods generally sold from retail warehouses where DIY goods or goods such as flatpack furniture are of such size that they would normally be taken away*

*by car and would not portable by customers travelling by foot, cycle or bus, or that large floorspace would be required to display them e.g repair and maintenance materials; furniture and furnishings; carpets and other floor coverings; household appliances; tools and equipment for the house and garden; bulky nursery furniture and equipment including perambulators; bulky pet products such as kennels and aquariums; audiovisual, photographic and information processing equipment; catalogue shops and other bulky durables for recreation and leisure.*

*The list is not exhaustive - bulky goods not mentioned in the list should be dealt with on their merits in the context of the definition of bulky goods.*

10.6 It is pertinent to consider the nature of goods been retailed in the context of the zoning objectives and the retail policies of the development plan. The current and previous South Dublin County Development Plans seek to confine retail warehouse development to the sale of large bulky goods and to control on the sale of ancillary items to ensure that impacts on the city centre and neighbouring shopping centres such as the Liffey Valley. It is my opinion, that a materially different consideration arises with regard to the range of goods sold from Unit 3 Fonthill and accordingly that a change of use has arisen on the subject site and having regard to the definition of Retail Warehousing and Bulky Goods, it is material in planning terms. The goods been sold at the premises now as outlined above are convenience goods, and these different materially from Bulky Goods as specified in the development plan and the retail planning guidelines. It is considered therefore that the use of Unit No 3 for retail use other than retail warehouse use constitutes **development** under section 3 of the 2000 Act.

#### **10.8 Is the development, considered to be Exempted Development**

The Board should have regard to Article 10(1) which provides that development which consists of a change of use within any one of the Classes specified in Part 4 of schedule 2, shall be exempted development for the purposes of the Act subject to a number of conditions being satisfied. It is my opinion that the change of use is not exempt under 10(1)(c) in that the current use of the unit is inconsistent with the use specified in the permission ( i.e retail warehousing).

### **11. RECOMMENDATION**

**WHEREAS** a question has arisen as to whether a material change of use at No. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development:

**AND WHEREAS** PKB Partnership, Unit D5, Swords Enterprise Park, Feltrim Road, Co. Dublin requested a declaration on the said question from South Dublin County Council and the said Council issued a declaration on the 2<sup>nd</sup> of November 2016 stating that the said matter is not exempted development:

**AND WHEREAS** the said PKB Partnership referred the declaration for review to An Bord Pleanála on the 28<sup>th</sup> of November 2016:

**AND WHEREAS** An Bord Pleanála decided to reformulate the question as follows:

Whether change of use from a permitted retail warehouse to use as a discount store for the sale of non-bulky goods including the retail sale of convenience goods No. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 is or is not development or is or is not exempted development

**AND WHEREAS** An Bord Pleanála in considering this Referral had regard to:

- (a) section (3)1 of the Planning and Development Act 2000,
- (b) Articles 5(1), 6(1), 9(1), 10(1), 10(1)(c) of the Planning and Development Regulations, 2001, as amended,
- (c) the planning history of the premises in particular planning permission reference S97A/0791 for a Retail Warehouse;
- (d) the definition of a retail warehouse as set out in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment and Local Government 2000,
- (e) the documentation on file including the Inspector's Report:

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

- (a) the permitted use of the premise, as stipulated by the permitted use of the unit granted under planning reference number S97A/0791 is restricted to Retail Warehousing only as defined in the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment and Local Government 2000,
- (b) the retailing activity carried out at the premises includes the retail sale of convenience goods directly to members of the public,
- (c) the retail sale of convenience goods does not come within the scope of the definition of activities of a retail warehouse as set out in the said Guidelines
- (d) accordingly, the use of the unit, constitutes a change of use, and the said change of use constitutes development being a material change of use by reason of the character of the retailing being undertaken and its material

external impacts on the proper planning and sustainable development of the area (including its impacts on town centre retailing, traffic movements and parking), and

(e) the said material change of use would be inconsistent with the use specified and included in the planning permission for retail warehousing granted under S97A/0791

**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 from a former retail warehouse to use as a discount store for the sale of non-bulky convenience goods directly to members of the public at No. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 is development and is not exempted development.

#### **MATTERS CONSIDERED**

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

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

**21/03/2017**