



An  
Bord  
Pleanála

## Inspector's Report RL 91.RL3522

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<b>Question</b>	Whether the use of Unit 1 for the type and class of goods being sold by "The Range" is or is not development and is or is not exempted development.
<b>Location</b>	Childers Retail Park, Childers Road, Limerick.
<b>Declaration</b>	
Planning Authority	Limerick City & County Council
Planning Authority Reg. Ref.	EC16/48
Applicant for Declaration	Save Our Town Centres Ltd.
Planning Authority Decision	None.
<b>Referral</b>	
<b>Referred by</b>	Limerick City & County Council
<b>Owner/ Occupier</b>	Harcourt Life Assurance Designated Activity Company/CDS (Superstores International) Ltd.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	3 <sup>rd</sup> February 2017.
<b>Inspector</b>	Michael Dillon

## 1.0 Site Location and Description

1.1. The site comprises a large, single-storey retail unit (Unit 1) at the southern end of the Childers Retail Park, which is located within the eastern suburbs of the City of Limerick. The retail park is accessed by way of a signal-controlled junction off Childers Road (R509). The retail park has a shared car-parking facility and a totem pole sign at the vehicular entrance.

1.2. Other units within the Retail Park include the following-

- Dunnes Stores (Food, household & clothing)
- Smyths Toy Store
- Boots Chemist
- Life Style Sports
- Argos
- Maplin Electronics
- Heatons
- Planet Health Club
- Next
- Wallis/Burton/Evans/Dorothy Perkins
- Sports World
- Harry Corry Interiors
- Kentucky Fried Chicken
- Costa Coffee
- Pizza Hut

1.3. Goods on sale in “The Range” include the following-

- Home Décor
- Arts & Crafts

- Furniture
- DIY
- Homeware/Kitchenware
- Garden Centre
- Petcare
- Stationery
- Lighting
- Leisure/Toys
- White goods

The unit contains a large café – located to the rear of the premises.

## 2.0 The Question

Whether the use of Unit 1 (former Atlantic Homecare unit) for the type of goods being sold by “The Range” (the new occupant), is or is not development and is or is not exempted development.

## 3.0 Planning Authority Declaration

There is no Planning Authority declaration, as the question has been referred to the Board by Limerick City & County Council.

## 4.0 Planning History

**Ref. P.03/181:** Permission granted for a retail park development of convenience/comparison goods store; six retail warehouse units and one ancillary garden centre; two comparison goods outlets; one leisure/fitness centre; two restaurants; one filling station with associated forecourt shop; and all associated parking and signage. Condition 17 stated as follows- “Prior to occupation of any unit the applicant shall submit full layout plans including details of signage for the written agreement of the planning authority. In this respect the applicant shall have regard to the retail planning guidelines and any other national guidelines”.

**Ref.P.04/134:** Permission granted to Atlantic Homecare Ltd. for erection of 265sq.m garden centre canopy to the side of Unit 1, together with modifications to staff and storage areas within the unit. This development was carried out.

**Ref. P.05/22:** Permission granted to Atlantic Homecare Ltd. for signage at Unit 1.

**Ref. 16/495:** Permission granted to CDS (Superstores International) Ltd. on 19<sup>th</sup> July 2016, for change of use of c.240sq.m of Unit 1 from retail to ancillary café, subject to conditions – principal amongst which was a requirement that the use be ancillary to the retail use and that the café shall not have an independent access from the Retail Park. This development has been carried out.

## 5.0 Policy Context

The relevant document remains the Limerick City Development Plan 2010-2016, pending the making of a new development plan which covers both the city and the county areas. The site is zoned '5A' for mixed-use development.

## 6.0 The Referral

### 6.1. Referrer's Case

6.1.1. The referral from Limerick City & County Council, received by the Board on 25<sup>th</sup> November 2016, can be summarised in bullet point format as follows-

- On 11<sup>th</sup> April 2016, the Council received notification from Tony Bamford Planning, agent on behalf of CDS (Superstores International) Ltd, to state that its client was proposing to take over the lease of Unit 1 – formerly occupied by Atlantic Homecare – with the new occupant to be The Range. The new occupier would use the unit primarily for the sale of bulky goods – with 20% non-bulky goods as required by the Retail Planning Guidelines 2012.
- Condition 17 of permission ref. 03/181 requires the developer, prior to occupation, to submit for the written agreement of the planning authority, full layout plans and signage.
- On 23<sup>rd</sup> May 2016, the Council indicated that the compliance submission received on 11<sup>th</sup> April 2016, was acceptable.

- A section 5 declaration was lodged by Save Our Town Centres Ltd. on 28<sup>th</sup> September 2016 – referencing requirement for bulky goods sales from this unit.
- Following an inspection of the premises by Limerick City & County Council (date not specified), the planning authority decided that it was not in a position to determine whether or not the goods being sold come within the scope of bulky goods or whether they come within the 20% ancillary non-bulky goods fraction as required by the Retail Planning Guidelines 2012.
- As the Planning Authority is not in a position to determine the question, it is referred to the Board for determination.

6.1.2. The referral is accompanied by the following documentation-

- Copy of permissions ref. P.03/181, P.04/134, P.05.22 and 16/495.
- Compliance submission letter, dated 11<sup>th</sup> April 2016, from Tony Bamford Planning, in relation to permission ref. P.03/181.
- Letter from Limerick City & County Council, dated 23<sup>rd</sup> May 2016, in relation to compliance submission of 11<sup>th</sup> April 2016.
- Letter to Limerick City & County Council from Save Our Town Centres Ltd, dated 27<sup>th</sup> September 2016.
- Copy of correspondence/drawings/black & white photographs from Save Our Town Centres Ltd, to Limerick City & County Council in relation to request for Declaration under Section 5.

## 6.2. **Owner/Occupier's response**

Unit 1 is owned by Harcourt Life Assurance Designated Activity Company, and leased by CDS (Superstores International) Ltd, for 'The Range' – as per information received from Limerick City & County Council. There is correspondence on file to indicate that the owner of the Childers Retail Park is Irish Life Assurance plc. The Board circulated the owner and occupier with details of the referral.

### 6.2.1. Occupier's Response

The response of Tony Bamford Planning, agent on behalf of the occupant, CDS (Superstores International) Ltd, received by the Board on 10<sup>th</sup> January 2017, can be summarised in bullet point format as follows-

- The referral does not comply with the requirements of section 127(1)(d) of the Planning and Development Act 2000, and is, therefore, invalid.
- The referral fails to state the grounds on which it is made.
- In relation to *Heatons Ltd. v Offaly County Council*, the High Court invalidated the referral for a single reason relating to lack of clear grounds.
- Reasons, considerations and arguments have not been presented by Limerick City & County Council, and none can be found in the original question submitted by Ann Woods (Save Our Town Centres Ltd.).
- Some degree of supposition is required by the Board to infer the nature of the referral and what issue(s) is/are in question.
- It is not clear from the photographs submitted by Save Our Town Centres Ltd, whether photographs were all taken in the Limerick store. There are numerous 'The Range' stores in the UK and one in Ballymena, Co. Antrim.

Should the Board decide that the Referral is a valid one, then the following should be taken into consideration-

- There is no condition attached to permission ref. P.03/181 restricting the use to the sale of goods in any single unit to the display and sale of bulky goods, or to any particular use.
- Condition 17 of permission ref. P.03/181 does not restrict the retail sales to a particular range of goods and could not reasonably be interpreted to do so.
- Unit 1 is in use as a retail warehouse. Retail warehouse is not defined in the planning acts or regulations made thereunder.
- The former use was Atlantic Homecare – any change of use to the current use is exempted development.
- Sale of goods from a property is within the definition of a shop as provided for in Regulation 5. Use of a shop for any purpose is exempted development under Part 4, Second Schedule, Class 1.

### 6.2.2. Owner's Response

The response of Tom Phillips Associates, agent on behalf of the owner, Irish Life Assurance plc, received by the Board on 24<sup>th</sup> January 2017, can be summarised in bullet point format as follows-

- The use of a bulky goods unit for use as 'The Range' is the only mention by Save Our Town Centres Ltd. which might approximate to a valid question in terms of section 127 of the Planning and Development Act 2000.
- Framing by Limerick City & County Council of the question in terms of Section 5, may or may not be a reasonable interpretation of the correspondence from Save Our Town Centres Ltd. – 'Whether the use of Unit 1 (Former Atlantic Homecare Unit) for the type and class of goods being sold by 'The Range' is or is not development or is or is not exempted development'.
- No grounds, considerations or arguments are provided either by Save Our Town Centres Ltd. or Limerick City & County Council. In the light of this, the Board may wish to consider this referral invalid.
- The Board will be aware that sometimes Section 5 is being used to determine compliance with a condition of a permission rather than to determine if something is or is not development, or is or is not exempted development.
- There is no restrictive condition on the type of goods that can be sold from Unit 1. There is no record that Unit 1 is a bulky goods warehouse – as the relevant Limerick City Council planning file has been lost. Notwithstanding, the owner accepts that the unit has been used for the sale of bulky goods.
- The judgement of Finlay-Geoghegan J, in the case of Roadstone Provinces v An Bord Pleanála (2008) clearly stated that the Board had no jurisdiction on a reference under section 5(4) of the Act to determine what is or is not unauthorised development. It may only determine what is or is not development.
- The Board should consider whether use of Unit 1 by The Range constitutes a material change of use from its previous use by Atlantic Homecare, such that it constitutes a change of use requiring planning permission.

- The Range and Atlantic Homecare sell/sold the same range of bulky and non-bulky goods. Atlantic Homecare is no longer trading, but sold a large range of non-bulky items such as small garden hand tools, small DIY products, small houseware products, small car-care products and small pet-care products.
- The Board should either reject the referral or concede that it cannot safely be determined at this remove.

The response is accompanied by a series of website pages in relation to sale of Atlantic Homecare products.

### 6.3. **Original Complainant's Response**

The response of Ann Woods, Save Our Town Centres Ltd, received by the Board on 21<sup>st</sup> February 2017, can be summarised in bullet point format as follows-

- The Range are selling lines which are not bulky goods.
- There is limited sale of bulky goods from this unit – furniture, large mirrors, bags of pet food and rugs.
- The shop mainly consists to office stationery, soft furnishings, duvet covers, towels, candles, ornaments, health & beauty and cutlery.
- The Board is urged to visit this store to calculate the precise areas involved in different types of sales.

## 7.0 **Statutory Provisions**

### 7.1. **Planning and Development Act, 2000**

S.3(1) – 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 structure or other land

### 7.2. **Planning and Development Regulations, 2001**

**A.5(1)** In this Part-



'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,

**A.10(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.

#### **Part 4 – Exempted development- Classes of Use**

##### **CLASS 1**

Use as a shop.

## **8.0 Assessment**

### **8.1. Is or is not development**

- 8.1.1. The point made by Tom Phillips & Associates, agent on behalf of the site owner, that section 5 referrals to the Board are sometimes being used to determine compliance with a condition of a permission is noted. In this instance I would be satisfied that there is no such compliance condition referred to. Condition 17 of permission ref. P.04/134 requires that prior to occupation of any unit, the applicant shall submit full layout plans including details of signage for the written agreement of the planning authority. It would appear that this was done in the case of change of occupant of Unit 1 – from Atlantic Homecare to The Range. The submission to Limerick City & County Council of 11<sup>th</sup> April 2016 would appear to have been for the purposes of compliance with condition 17. The Council indicated that the compliance submission

was acceptable – by letter dated 23<sup>rd</sup> May 2016. It would appear that there the matter should have ended. Limerick City & County Council is the competent authority to decide whether or not a condition of a planning permission (issued by Limerick City Council) has been complied with. The Board does not have any function in this regard.

8.1.2. On 28<sup>th</sup> September 2016, the Council was contacted by Save Our Town Centres Ltd., seeking a Section 5 Declaration in relation to the use of this unit, questioning the proportion of bulky goods which were being sold from this unit. The Council inspected the site and decided it was not in a position to determine whether or not the good being sold come within the scope of bulky goods or whether or not they come within the 20% or ancillary non-bulky goods as per the Retail Planning Guidelines 2004. As the planning authority for the area cannot determine such a question, it is difficult to see how the Board could be expected to.

8.1.3. The agents for the owner point out the following-

- That no valid question has been made in the Referral – with only vague reference to use of a bulky goods unit for use as ‘The Range’.
- There is no restrictive condition on the type of goods that can be sold from Unit 1. There is no record that the unit is a bulky goods retail warehouse, as the relevant file has been lost by Limerick City & County Council.
- The Board has no authority to determine what is unauthorised development – it may only determine what is or is not development.
- The Range and Atlantic Homecare sell/sold similar types of goods.
- ‘Retail Warehouse’ is not defined in the planning acts/regulations.

8.1.4. Article 5 of the Planning & Development Regulations 2001 (as amended) defines “shop” as follows- ‘means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting member of the public’. The first category refers to- ‘for the retail sale of goods’. The Range is clearly a “shop” as defined in the Regulations. The classification ‘Retail Warehouse’ is generally used to refer to a unit selling bulky goods – often within a retail park outside of the central business district of a town/city. Notwithstanding the references made by an agent for the applicant that the relevant parent permission drawings with Limerick City &

County Council cannot be located, I would be satisfied that Unit 1 is one of the six retail warehouse units referred to in permission ref. P.03/181 – one of which is described as having an ancillary garden centre (which Unit 1 does have).

- 8.1.5. The agents for the occupier and owner of Unit 1 question whether a properly worded referral has been made to the Board, and are of the opinion that the referral should be dismissed. I would be satisfied that there is a referral before the Board – namely whether the use of Unit 1 for the type and class of goods being sold by ‘The Range’ is or is not development and is or is not exempted development.
- 8.1.6. Article 10 of the 2001 Regulations provides 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, *inter alia* – involve the carrying out of any works other than works which are exempted development or contravene a condition attached to a permission under the Act. Class 1 of Part 4 of Schedule 2 refers to ‘Use as a shop’. I would consider that use as an Atlantic Homecare store and use as The Range, could both be considered ‘Use as a shop’. Therefore, there has been no change of use, as envisaged by Article 10.
- 8.1.7. The unit was formerly occupied by Atlantic Homecare Ltd, a type of DIY/Hardware store. This company is no longer trading. The agent for the owner has helpfully submitted copies of website pages in relation to the types of goods which were for sale in an Atlantic Homecare store. I would consider that the types of goods for sale in The Range are not so wholly different from the range of goods which were sold in Atlantic Homecare. It would appear that the range of goods currently for sale is tending more towards household items, whereas formerly there was more emphasis on DIY goods and hardware. I would not consider that sales from Atlantic Homecare could have been classed as principally ‘bulky goods’, any more than is the case with The Range.
- 8.1.8. I would, therefore, consider that there has been no change of use (as set out in Section 3(1) of the Planning and Development Act, 2000) in this instance, and consequently, no development has taken place.

## 8.2. Is or is not exempted development

- 8.2.1. As no development has taken place, the issue of exempted development does not arise.

## 9.0 Recommendation

- 9.1. 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 use of Unit 1, Childers Road Retail Park, Limerick, for the type and class of goods being sold by “The Range” is or is not development and is or is not exempted development:

**AND WHEREAS** Limerick City & County Council has referred this question to An Bord Pleanála under section 5(4) of the Planning and Development Act 2000 (as amended) on the 25<sup>th</sup> day of November, 2016:

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

- (a) Section 3(1) of the Planning and Development Act, 2000,
- (b) Articles 5(1) and 10(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Part 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (d) the planning history of the site,
- (e) the pattern of development in the area:

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

- (a) The type and class of goods being sold by The Range is similar in

nature to the type and class of goods being sold by the previous occupant of Unit 1;

(b) Change of use has not taken place at Unit 1 and, therefore, no development has been undertaken;

**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 use of Unit 1, Childers Road Retail Park, Limerick, for the type and class of goods being sold by “The Range”, is not development.

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Michael Dillon  
Planning Inspector

28<sup>th</sup> February 2017