



An  
Bord  
Pleanála

## Inspector's Report PL.91.3556

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<b>Question</b>	Whether the partial use of unit H3 for local retail convenience, to primary use of the unit as a wholesale and distribution hub is or is not exempt development.
<b>Location</b>	Unit H3, Eastway Business Park, Ballysimon, Limerick
<b>Referrer</b>	Polish Family Foods
<b>Planning Authority</b>	Limerick City and County Council
<b>Planning Authority Reg. Ref.</b>	EC17/04
<b>Observer</b>	None
<b>Date of Site Inspection</b>	13 <sup>th</sup> June 2017
<b>Inspector</b>	Kenneth Moloney

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## 1.0 Site Location and Description

- 1.1. The referral site is located within a Business Park which is situated on the eastern perimeter of Limerick City. The Business Park, i.e. Eastway Business Park, has a range of uses including a Health and Safety Training Centre, NCT Testing, a childrens play centre, auto part sales and a wholesale furniture outlet.
- 1.2. The referral property itself operates as a ground floor mini supermarket unit with associated office at first floor level.
- 1.3. There is car parking located to the front of the unit.

## 2.0 The Declaration

- 2.1. The Planning Authority issued a declaration on the 23<sup>rd</sup> February 2017, to the effect that the partial use of unit H3 for local retail convenience, ancillary to the primary use of the unit as a wholesale and distribution hub for selected units nationwide along with supporting office and administration, is development and not exempted development as the partial use of Unit H3 for retail convenience constitutes a material change of use. This Declaration has now been referred to the Board, pursuant to Section 5 of the Act, for review.
- 2.2. The main points upon which the Declaration decision was based, is summarised as follows: -
  - Planning permission for the demolition of existing house and construction of industrial / warehousing park was granted in 1977 subject to 10 conditions.
  - Condition no. 2 states that no retail outlets shall be provided on the site.
  - There is an enforcement case on the subject site in respect of the change of use of industrial / warehousing unit to shop / retail use. A warning letter was issued on 23<sup>rd</sup> March 2016 and an enforcement notice issued on 26<sup>th</sup> January 2017.
  - A declaration is now sought for the use of the unit H3 for retail sales.
  - The relevant legislation is Section 9(1)(a)(i) of the Regulations and Section 10(1)(b) and (c).

- Condition no. 3 of planning permission (L.A. Ref. 96/2681) requires that no retail outlets shall be provided on the site.
- The use of the existing warehouse for retail sales is restricted by Section 9(1)(a)(i).
- Retail use comes within Class 1 of Part 4, i.e. shop.
- Section 10 (1) only allows for a change of use within any one of the classes specified in Part 4 of Schedule 2.
- As such a change of use from Class 5 use to Class 1 use would require planning permission.

### 3.0 The Question

*“Whether the partial use of unit H3 for local retail convenience, ancillary to the primary use of the unit as a wholesale and distribution hub for selected units nationwide along with supporting office and administration, at Unit H3 Eastway Business Park, Ballysimon, Co. Limerick, is or is not development and is or is not exempted development”.*

### 4.0 Policy Context

#### 4.1. Local Area Plan

The operational Development Plan is the Castletroy Local Area Plan, 2009 – 2015 (extended until 2019).

The referral site is zoned Industrial where the land-use objective is *‘to facilitate the development and expansion of existing and new industrial uses within Castletroy’*.

There is a restriction in relation to retail within this zoning objective as it is stated that any retail provision shall be compliant with the Retail Planning Guidelines and does not detract from the viability of the District centre core retail areas.

In accordance with the Landuse zoning matrix table 'local shops' and 'retail warehousing' are open for consideration.

## 5.0 The Referral

5.1. The following is the summary of the referral;

- The relevant statutory plan is the Castletroy Local Area Plan and the current zoning is industrial.
- The landuse zoning matrix provides for 'Local Retail' as an acceptable use.
- It is submitted that as the applicants are providing retail as an ancillary use then they do not require planning permission.
- It is submitted that there are numerous other enterprises offering a small goods retail element which does not involve bulky goods in close proximity.
- It is submitted that the basis of the referral is set out in the original cover letter to the Planning Authority.

5.2. The following is a summary of the original cover letter submitted to the Planning Authority;

- The business is primarily a wholesale cash and carry business serving trade customers and a distribution hub for supplying selected polish stores nationwide with imported polish goods.
- The business has a back office.
- It is submitted that ancillary to the primary use the existing owners operate a small retail use.
- The retail customers are a mixture of polish families and workers in Eastway Park and other neighbouring business parks.
- Local Shop is allowed within industrial zoning.
- It is considered that as the use is ancillary to the main use that it is exempted development.

- The submission includes images of Unit H3 internally and externally to support the above arguments.
- The submission also includes images of other retail operations. It is considered that should the subject business be considered unauthorised then there are countless other businesses in the local area unauthorised.

## 6.0 Evaluation

### 6.1. The Facts of the Case

The facts of the matter include the following;

- In October 1977 planning permission was granted for the demolition of an existing house and the construction of industrial / warehousing park. Condition no. 2 stated that 'no retail outlets shall be provided on the site'.
- A Warning Letter was issued on the 23<sup>rd</sup> March 2016.
- An Enforcement Notice was issued on 26<sup>th</sup> January 2017.
- On the 8<sup>th</sup> of February 2017 a first party **Section 5 application** was submitted to Limerick City and County Council asking the question whether the partial use of unit H3 for local retail convenience, ancillary to the primary use of the unit as a wholesale and distribution hub for selected units nationwide along with supporting office and administration, at Ballysimon is or is not development and is or is not exempted development.
- On the 23<sup>rd</sup> of February 2017 Limerick City and Council issued a **declarataion** that the planning authority considered that the said works are development and not exempted development as the partial use of the Unit H3 for retail convenience sales constitutes a material change of use.
- On the 8<sup>th</sup> of March 2017 a **first party referral** was received by Adam Kearney, Planning Consultant, on behalf of Polish Family Foods Ltd. in accordance with the provisions of Section 5(3)(a) of the 2000 Act.

## 6.2. **Statutory Provisions**

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

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

Section 2 (1) states: - 'development' has the meaning assigned to it by Section 3, and 'develop' shall be construed accordingly;

"use", in relation to land, does not include the use of the land by the carrying out of any works thereon;

Section 3 (1) states:-

"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 of use of any structures or other land."

Section 4 (1) sets out various forms and circumstances in which development is exempted development for the purposes of the Act.

Section 4 (2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations, 2001.

### 6.2.2. **Planning and Development Regulations, 2001(as amended)**

Article 6(1) of the Regulations states as follows:- "(a) Subject to article 9, development consisting 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) of the Regulations sets out circumstances in which development to which Article 6 relates shall not be exempted development. Article 9 (1) (a) (i) states that development would not be exempt 'if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act'.

Schedule 2, Part 1, Class 14 sets out changes of use which are exempted development.

Schedule 2, Part 4 sets out the classes of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development.

### 6.2.3. Planning and Development Regulations, 2005.

These Regulations define a shop. 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 a travel agency
- (d) for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and 'wine' is defined as any intoxicating liquor which may be sold under a wine retailer's off-licence (within the meaning of the Finance Act (1909 1910) Act, 1910



- (e) for hairdressing
- (f) for the display of goods for sale
- (g) for the hiring out of domestic or personal goods or articles
- (h) as a launderette or 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 off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of the second Schedule applies.

### 6.3. **Assessment**

I would consider that a number of questions have arisen and these would include whether the retail use is ancillary to the main established use, secondly has development occurred and finally if development has occurred would it fall under the exempted development provisions of the Planning and Development Act, 2000, or the Planning and Development Regulations, 2001 (as amended).

#### 6.3.1. Ancillary Use

Firstly in considering whether the retail use is ancillary to the main established use I will set out the context. The referral site is located within a warehouse type building which is located within a Business Park, i.e. Eastway Business Park. I understand from the information on the file that planning permission was obtained in 1977 for the demolition of an existing house and the construction of an industrial / warehouse park. Condition 2 of this permission is relevant as it states that '*no retail outlets shall be provided on the site*'.

I inspected the subject premises as part of my site inspection and I noted that the unit had the appearance of a small supermarket or mini-market, although selling

primarily polish products aimed at the polish community. I also noted that the vast majority of products were for sale on an individual basis rather than bulk as one might expect in a wholesalers / distribution unit. I also noted a number of customers purchasing a small number of products and exiting the premises including a customer purchasing a single product. The business also had a deli counter selling fresh produce and again for sale on an individual basis. Overall I would consider that it would be difficult to determine that the existing use, i.e. retail mini-market, is an ancillary use on the basis of my site inspection. Admittly my site inspection had no regard to any online retail or wholesale activity that may exist within the business and what portion of trade that this may account for. Notwithstanding this I would consider that the onus is on the referrer to demonstrate any on-line trade that relates to the overall business and any other aspects of the wholesale trade that are not evident from the documentation on the file. I would consider, on the basis, of my site inspection and the information available on the file that the predominant use on the referral site is a retail mini-supermarket use and would not be an ancillary use as stated by the referrer.

#### 6.3.2. Has development taken place

The planning permission on the site relates to wholesale business and condition no. 2 of this permission states that 'no retail outlets shall be provided on the site'. I have outlined above that it is not evident that the existing retail use is ancillary to a wholesale use based on my site inspection. However development as defined in Section 3 of the Planning and Development Act, 2000 (as amended), only occurs where a material change of use has taken place.

Having regard to case law I would acknowledge that there are generally two tests to establish whether a material change of use has occurred from the antecedent use to the subsequent use.

The first test to consider, in accordance with case law, is the external effects of the change of use on the amenities of the area. Thus, for example, if the change would result in an increase in noise, traffic or odours, the change is probably material. In *Galway County Council v. Lackagh Rock Ltd.*<sup>49</sup> Barron J. suggested a test in the following terms:

*“To test whether or not the uses are materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If the matters are materially different, then the nature of the use must be materially different”.*

The second aspect of the test seems to suggest that even in the absence of external effects arising from the change, there may nevertheless be development. The second test requires a consideration of the character of the antecedent and subsequent uses of the land. Thus the High Court in *Cusack v Minister for Local Government*, 1980, considered that a change from a dentist's practice to use as a solicitor's office would involve a material change in use. In this regard, the court concentrated on the character of the two uses, stating that the professions were completely different in their training, in their skills and in their general nature, and did not appear to regard the fact that there might be similarities in terms of the external effects to be relevant.

I note from case law therefore that if changes to a planning unit give rise to fresh planning considerations this should be considered a material change of use. I would be of the view that a retail mini supermarket as opposed to wholesale use would give rise to different planning considerations. In this regard I would consider that there would be a greater volume of traffic and shoppers to the local area as retailers generally purchase small amounts of items on a more regular basis as opposed to

the bulk buying associated with the wholesale business. This shopping pattern is likely to generate more trips. Another fresh planning consideration is the impact that the retail activity, as in current case, would have on the vitality and vibrancy of an established town centre or local neighbourhood centre. I would consider that the mini-market that currently exists in the Business Park, based on a visual observation of the area, would contribute to the vitality and vibrancy of a town centre or local neighbourhood and its removal or omission from a town centre or neighbourhood centre would in my view detract from the vitality and vibrancy of these centres. This is a fresh planning consideration that would not have been considered for a wholesale / distribution outlet. I would conclude that the change of use which is the subject of this referral would be a material change of use and as such would be development.

#### 6.3.3. Is the change of use exempted development

In relation to whether aforementioned change of use is exempted development the following must be considered (a) the Planning and Development Act, 2000, (as amended), and (b) the Planning and Development Regulations, 2001, (as amended).

In relation to the Planning and Development Act, 2000, as amended, Section 4 sets out exemptions and I would consider that there are no specific exemptions in relation to the subject change of use.

I would note that Class 14, Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) and Part 4, Schedule 2 of the same regulations sets out changes of use which are exempted development. However none of these changes of use would cover the change of use which is the subject of this referral. It is also important to note Article 9 (1) (a) (i) of the Planning and Development Regulations, 2001 (as amended) which states that development would not be exempt 'if the carrying out of such development would contravene a condition

attached to a permission under the Act'. In the current case before Board a condition, i.e. condition no. 2, to the original permission stated '*that no retail outlets shall be provided on the site*'. The retail use in operation, as I have outlined above, is not ancillary to the primary use and in my view would be a retail use that would contravene condition no. 2 of the original permission. Article 10 (1) (b) of the Planning and Development Regulations, 2001 (as amended), states Part 4 of Schedule 2 would not apply if development carried out would contravene a condition attached to a permission under the Act.

In conclusion therefore I have examined the Planning and Development Regulations, 2001, (as amended) and I would consider that there are no specific exemptions in relation to a change of use from wholesale / distribution to retail.

## 7.0 Recommendation

### 7.1. Conclusions and Recommendations

*It is considered that the change of use from a wholesale / distribution unit to retail outlet is a material change of use and would therefore be development and would not be exempted development in accordance with the provisions of the Planning and Development Act, 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended).*

*Accordingly, I would recommend an order along the following lines: -*

**WHEREAS** a question has arisen as to "*Whether the partial use of unit H3 for local retail convenience, ancillary to the primary use of the unit as a wholesale and distribution hub for selected units nationwide along with supporting office and administration, at Unit H3 Eastway Business Park, Ballysimon, Co. Limerick, is or is not development and is or is not exempted development*".

**AND WHEREAS** *the said question was referred to An Bord Pleanála by Adam Kearney, Planning Consultant, on behalf of applicants Polish Family Foods Ltd., Unit H3 Eastway Business Park, Ballysimon, Co. Limerick .*

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

- a) section 3 of the Planning and Development Act, 2000 (as amended),*
- b) to articles 6, 9 and 10 of the Planning and Development Regulations, 2001, (as amended),*
- c) Part 4 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, and*
- d) Case Law,*

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

- a) The current use of the premises as a retail use represents a new and separate use*
- b) The level and pattern of traffic resulting from the retail use is materially different from the use as a wholesale / distribution unit.*
- c) The impacts that the current retail use would have on vitality and vibrancy of a town centre or neighbourhood centre would be materially different to the impacts that a permitted wholesale / distribution unit would have on a town centre or neighbourhood centre.*

**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 said change of use from wholesale / distribution unit to retail outlet is not exempted development.*

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Kenneth Moloney  
Planning Inspector

20<sup>th</sup> June 2017