



An
Bord
Pleanála

Inspector's Report PL29S.RL3809.

Question

Whether the change of use from car showroom to café and ancillary retail, business to business wholesale, outdoor seating and new gates is or is not development or exempted development.

Location

7A Sussex Terrace, Dublin 4.

Declaration

Planning Authority

Dublin City Council

Planning Authority Reg. Ref.

0285/17.

Applicant for Declaration

David Mc Nicholas.

Planning Authority Decision

Split.

Referral

Referred by

David Mc Nicholas.

Owner/ Occupier

Brendan Horan.

Observer(s)

None.

Date of Site Inspection

10th of January 2018.

Inspector

Karen Hamilton

1.0 Site Location and Description

- 1.1. The subject site is located along Sussex Road, c 55m south of the Grand Canal in Dublin 4. The site is accessed through a courtyard which fronts directly onto Sussex Road. There is a row of terraced dwellings to the north of the site fronting onto Sussex Road and there is a restaurant with upper floor apartments, to the south,
- 1.2. The site consists of a retail unit selling coffee related goods such as industrial coffee machines and associated paraphernalia. There is a takeaway counter at the entrance of the building selling takeaway coffee and food.

2.0 The Question

- 2.1. Whether the change of use from car showroom to café and ancillary retail, business to business wholesale, outdoor seating and new gates is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

Decision to grant exemption (Schedule 1) for:

- The sale of hot and cold food for consumption off the premises, included within the definition of shop in Article 5(1) of the Planning and Development Act 2000 (as amended) where such sale are subsidiary to the main retail use.

Decision to refuse exemption (Schedule 2) for:

- Business to business wholesale area,
- Outdoor seating and new gates.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The report of the area planner reflects the split decision and may be summarised as follows:

- The use of goods for sale within the premises was noted and it was considered that the sale of food off the site came within the terms of Article 5 (1) as per previous Board decision PL54.RL2941.
- In terms of change from business to business wholesale area the subject premises does not fall within the definition of “wholesale warehouse” as it functions as a normal shop/ retail unit.
- The outdoor seating area was considered development and was subject to an appeal which was before the Board PL29S.248876.

3.2.2. Other Technical Reports

None received.

4.0 Planning History

29S.248876 (Reg Ref WEB1414/16)

Permission refused for the re-use of driveway as garden courtyard for use of shop customers including bench, seating, fabric awning, bicycle parking etc. as the proposed development is ancillary to use of the site as a coffee shop which was not permitted on the site (section 5 for a shop) and therefore there is little need for the works.

EXPP 0357/15

Section 5 declaration by Dublin City Council, that the proposed change of use from a premises for the sale and display of motor vehicles to the use as a shop is DEVELOPMENT and is EXEMPT development.

5.0 Policy Context

5.1. Dublin City Development Plan 2016-2022

The site is located on lands zoned Z2 Residential Neighbourhoods (Conservation Areas) where it is an objective “To protect and/or improve the amenities of residential conservation areas.”

Section 14.6 Non- Conforming Uses

Section 14.8.2 Residential Neighbourhoods (Conservation Areas)- Zone Z2

Section 16.38 Car Parking Standards.

5.2. **Natural Heritage Designations**

South Dublin Bay and River Tolka Estuary SPA (site code 004024) c.2.6km

South Dublin Bay SAC (site code 00210) c.2.6km

6.0 **The Referral**

6.1. **Referrer's Case**

The section 5 referral has been made by an agent on behalf of a resident in the vicinity of the site (152 Leeson Street) as they disagree with the decision of the planning authority and consider that the change of use has taken place at No 7A Sussex Terrace which is DEVELOPMENT and is NOT EXEMPTED development for the reasons listed below:

- There is no mention in the planners report to the conditions imposed on a historic permission for development, and the change of use contravenes planning conditions as the outdoor seating area was required to be reserved for the occupants of the two flats (150 and 151 Lesson Street).
- The previous Section 5 declaration (Reg Ref 0357/15) is not relevant as the development has not taken place as applied.
- The applicant's website (www.3fe.com) includes a section on wholesale warehousing which indicates that the applicant is for uses outside the normal Class 1 retail. The sale of large restaurant and café type coffee machines does not involve the public walking off the street.
- The remaining shop operates as a café selling tea, coffee and complimentary food.
- It is accepted that the outdoor seating area requires planning permission but it is argued that it is in conjunction with the entire unauthorised use.

6.2. **Planning Authority Response**

No response received.

6.3. **Owner/ occupier's response**

No response received.

7.0 **Statutory Provisions**

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

Section 2, the following interpretation of "works":

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

Section 3 (1), states the following:

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

Section 4 (1)(a)- (i) set out what is exempted development for the purpose of the Act-

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

Section 4 (2) provides for the making of the Regulations, Planning and Development Regulations, 2001.

Section 5 (3) (A) states the following:

"Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such a fee as may be prescribed, refer a declaration for review by the Board within 4weeks of the date of issuing the declaration."

7.2. Planning and Development Regulations, 2001

Article 5 (1) In this Part—

“Shop” means a structure used does 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,

Article (6) (1) Exempted development, states the following:

“Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.”

Article (9) (1) Development to which article 6 relates shall not be exempted development for the purposes of the Act-

- a) If the carrying out of the 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,
 - viii) consist of or comprise the extension, alteration, or repair or renewal of an unauthorised structure or structure the use of which is unauthorised.

Article 10: Change of Use 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

Schedule 2

Part 1- Exempted development - General

Class 14: Development consisting of a change of use-

- a) from use for the sale of hot food for consumption off the premises, or for the sale or leasing or display for sale or leasing of motor vehicles, to use as a shop,
- b) from use as a public house, to use as a shop,
- c) from use for the direction of funerals, as a funeral home, as an amusement arcade or a restaurant, to use as a shop,
- d) from use to which class 2 of Part 4 of this Schedule applies, to use as a shop,
- e) from use as 2 or more dwellings, to use as a single dwelling, of any structure previously used as a single dwelling,
- f) from use as a house, to use as a residence for persons with an intellectual or physical disability or mental illness and persons providing care for such persons.

Part 4- Exempted Development- Classes of Use

Class 1: Use as a shop

Class 2: Use for the provision of

- a) financial services,
- b) professional services (other than health or medical services),
- c) Any other services (including use as a betting office), where the services are provided principally to visiting members of the public.

Class 5: Use as a wholesale warehouse or repository.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. The referrer asks the question whether the change of use from car showroom to café/shop with ancillary retail area and business to business wholesale and outdoor seating area and new gates is or is not development. The current use on the site is operating following a Section 5 declaration (Reg Ref 0357/15) for a change of use from display of motor vehicles to a shop, as per Schedule 2, Class 14 (Change of Use), of the Planning and Development Regulations, 2001 (as amended), which I consider a reasonable determination. The referral is made from a resident in the vicinity of the site who states that there is a greater emphasis on the use of the site as a café rather than shop as originally intended. I note the difference in the use of both the café and retail from that original use which was for a car showroom, and I consider that both the product offer and the attraction of the public for each use significantly differs, namely a greater flow of public to the retail/café.
- 8.1.2. The referrer also raises concern in relation to use of part of the site for wholesale business use, rather than retail, as per information contained on the operator's webpage www.3fe.com. The Regulations include a definition of business premises as;

“any structure or other land (not being an excluded premises) which is normally used for carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons”

and define wholesale warehouse as;

“a structure where business, principally of a wholesale nature, is transacted and goods are stored or displayed but only incidentally to the transaction of that business”.

Having regard to the definition of “business premises” and “wholesale warehouse” included in the Regulations, I consider any change of use from business to wholesale warehouse is material and therefore is development.

8.1.3. Section 3 (1) of the development act refers to the meaning of “development”, except where the context otherwise requires, as 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. I am satisfied that, having regard to the change of use from a car showroom to café/shop with ancillary retail area and also, the change of use from business to business wholesale that both include material differences and therefore the proposed development is deemed DEVELOPMENT.

8.2. Is or is not exempted development

8.2.1. Car showroom to retail/ café: As stated above a previous Section 5 declaration (Reg. Ref. 0357/15) determined that a change of use of the premises for the sale and display of motor vehicles to use as a shop was exempt, the entire floor space was included in the application. The most recent Section 5 declaration determined the safe of hot food to takeaway was ancillary to the retail use. The referrer argues the retail element on site is ancillary to the café use and therefore is not exempt development and disagrees with the Section 5, determination of the Planning Authority as they consider the café/ coffee takeaway the primary use on the site and therefore consider the original determination for exempted development under Reg Ref 0357/15 never took place in the first instance. This has led to the referrer raising the question over the change of use from car showroom to café.

8.2.2. I note from site inspection that the majority of the unit was used for the sale and display of coffee paraphernalia with a counter area at the entrance for the sale of takeaway coffee and food. Whilst there was a table for customers to drink their coffee, I do not consider it dominates the use on the site. The drawings submitted with a recent refusal by the Board, PL29S.248876, detail the existing use as a shop and the Inspectors Report referred to the use of the unit primarily as a café rather than ancillary to a shop unit, therefore the Board did not accept the determination that the outdoor seating area could be associated with a retail use and that the takeaway coffee use as a primary use could not be considered within the definition of “shop” under Article 2. (d) of the Regulations:

“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(...)”

8.2.3. Based on the majority of the amount of floor space utilised for the display and sale of goods, the current use on the site is, in my opinion, primarily retail with an associated coffee takeaway element. The report of the area planner, for this Section 5 declaration, considered that the sale of food off site was deemed as coming within the terms of Article 5 (1) as per previous Board decision PL54.RL2941 which was an established Centra Shop to be retained and the change of use for the purposes of café/ takeaway was deemed as ancillary by the Board. I consider the use on the site is similar in nature to the previous determination by the Board (PL54.RL2941), where the takeaway element supports the retail.

8.2.4. Therefore, having regard to Schedule 2, Part 1, Class 14 of the Planning and Development Regulations 2001 (as amended) Development consisting of a change of use-

- g) *from use for the sale of hot food for consumption off the premises, or for the sale or leasing or display for sale or leasing of motor vehicles, to use as a shop,*

I consider the retail use for coffee paraphernalia on the site **IS EXEMPT**. In addition to this, having regard to Part 2, Article 5 (1) of the Planning and Development Regulations 2001 (as amended) and that definition of shop which includes

- 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,*

I consider the takeaway/cafe element on the site **IS EXEMPT**.

8.2.5. Business Use to Wholesale Business: The grounds of appeal argue there is a wholesale operation on the site as advertised on their website www.3fe.com. I note the section on the web page promotes the sale of coffee machines for wholesale business i.e. hotels and business premises which are also displayed within the subject site. I note the site is not used for storage and these machines may be purchased directly by members of the public. As stated above, the definition of business and wholesale warehousing differ significantly where the use of a site for business is for services for visiting members of the public, whereas wholesale warehousing is for the storage where the display of goods is incidental to the wholesale nature of the business. Class 2 of the Planning and Development

Regulations (as amended) 2001 includes business use whereas wholesale warehouse is within Class 5.

8.2.6. Having regard to the use on the site and the class of development within the Planning and Development Regulations 2001, as amended, I do not consider the site is currently used as wholesale storage, this aside, for the purposes of this determination I consider both uses are within separate use classes and there are no specific exemptions to change between, therefore I consider the change of use from business to business wholesale **IS NOT EXEMPT**.

8.2.7. Outdoor Seating Area and New gates: The seating is located at either side of the courtyard at the entrance of the premises and was recently refused permission as it was deemed to be ancillary to the use of the premise as a coffee shop, which was not permitted on the site. I consider the use of this courtyard for outdoor seating, materially alters the use of the space and although the space was not covered, as stated in the Inspectors Report for PL29S.248876, I do not consider it is within the remit of that definition of “shop” Part 2, Article 5 (1) of the Planning and Development Regulations 2001 (as amended) which includes

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.*

8.2.8. Therefore, having regard to the use of the site as primarily retail and the determination above for a takeaway element as per Part 2, Article 5 (1) of the Regulations, I consider the outdoor seating area and gate **IS NOT EXEMPT**.

8.3. **Restrictions on exempted development**

8.3.1. Outdoor seating area: Planning permission PL29/5/61365 (Reg Ref 3043/82) was granted on the site for two flats above 150 and 151 Upper Leeson Street, included a condition for two car parking space to be reserved for the occupants of the two flats. Article (9) (1) of the Regulations states that development to which article 6 relates shall not be exempted development for the purposes of the Act if it contravened a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

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 change of use from car showroom to café and ancillary retail, business to business wholesale, outdoor seating and new gates is or is not development or is or is not exempted development:

AND WHEREAS David Mac Nicholas requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 23rd day of August, 2017 stating that the matter was development and the sale of hot and cold food for consumption off the premises was exempted development and the change of use from business to business wholesale area and outdoor seating area and new gate was not exempt development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 19th day of September, 2017:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) Article 5 (1), article 6(1) and article 9 (1) and article 10 of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 (class 14) and 4 (class 2 & 3) of Schedule 2 to the Planning

and Development Regulations, 2001, as amended,

(f) the planning history of the site,

(g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The change of use from car showroom to 3FE Coffee Ltd comprising of retail outlet and ancillary coffee/food takeaway **IS DEVELOPMENT** within the meaning given to it under Section 3(1) of the Planning and Development Act 2000 (as amended) and **IS EXEMPTED DEVELOPMENT** as it comes within the within the definition of “Shop” as Article 5(1) in the Planning Development Act 2000 (as amended) and therefore assessed in the context of Schedule 2: Part 1, Class 14 (a) of the Planning and Development Regulations 2001 (as amended).
- (b) The change of use from business to business wholesale area **IS DEVELOPMENT** within the meaning given to it under Section 3(1) of the Planning and Development Act 2000 (as amended) and having regard to Schedule 2 Part 4, Class 2 and Class 3 of the Planning and Development Regulations 2001 (as amended) **IS NOT EXEMPT DEVELOPMENT.**
- (c) The outdoor seating area and new gates **IS DEVELOPMENT** within the meaning given to it under Section 3(1) of the Planning and Development Act 2000 (as amended) and **IS NOT EXEMPT** as it does not come within the meaning of “shop” Shop” as Article 5(1) in the Planning Development Act 2000 (as amended).

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 change of use from car showroom to retail and ancillary cafe, is development and is exempted development and the change of use business to business wholesale and outdoor seating and new gates, is development and is not

exempted development.

Karen Hamilton
Planning Inspector

15th of January 2018

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