



An
Bord
Pleanála

Inspector's Report RL28.RL3810

Question

Whether the use of 11 St. Patrick's Street, Cork for the sale of convenience goods (as defined in the Retail Planning Guidelines 2012) is or is not development and is or is not exempted development?

Location

11 St. Patrick's Street, Cork

Declaration

Planning Authority

Cork City Council

Planning Authority Reg. Ref.

449/17

Applicant for Declaration

Mestonway Ltd

Planning Authority Decision

Development that is not exempted development

Referral

Referred by

Mestonway Ltd

Owner/ Occupier

The Royal London Mutual Insurance Society Ltd

Observer(s)

None

Date of Site Inspection

24th January 2018

Inspector

Hugh D. Morrison

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1.0 Site Location and Description

- 1.1. The site is located towards the northern end and on the eastern side of St. Patrick's Street in Cork city centre.
- 1.2. The building on the site is of three storey form and it has a stated floorspace of 223.61 sqm. This building is attached on its northern side to a row of three and four storey buildings, all of which are in use as shops, at least at ground floor level and one of which is a department store. The building adjoins a gated yard on its southern side, beyond which there is a part three and a part four storey building, which is in use as a department store.

2.0 The Question

- 2.1. Whether the use of No. 11 St. Patrick's Street, Cork, Co. Cork for the sale of convenience goods (as defined in the Retail Planning Guidelines 2012) is or is not development and is or is not exempted development.
- 2.2. Under the heading of Types of Retail Goods in Annex 1 of the Retail Planning Guidelines 2012 entitled "Glossary of Terms" convenience goods are defined as being "food, alcoholic and non-alcoholic beverages, tobacco, and non-durable household goods".

3.0 Planning Authority Declaration

3.1. Declaration

The question was expanded by means of the phrase in italics to read as follows:

Whether the use of No. 11 St. Patrick's Street, Cork, Co. Cork for the sale of convenience goods (as defined in the Retail Planning Guidelines 2012) *and as currently operating as a Starbucks coffee shop* is or is not development and is or is not exempted development.

The Planning Authority decided that the said use is development, which is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

Further information was sought with respect to the envisaged use of the premises. However, as the referrer simply seeks to ensure that their operation is fully compliant with the permitted use of the premises as a shop, the Planning Authority took the view that the referral concerns the continuing use of the premises as a Starbucks coffee shop. Furthermore, as the operation primarily entails the sale of sandwiches and other food (including beverages) for consumption on and off the premises, the conclusion was reached that a shop use does not persist, as the said sale is the main use rather than a subsidiary one.

3.2.2. Other Technical Reports

Not applicable.

4.0 Planning History

88/14214: Construction of retail unit, including extension onto portion of Merchant Street and fire exit passageway: Permitted.

95/19448: Installation of an Early Learning Centre sign above the shop window: Permitted.

RL3425: Whether the use of premises as a coffee shop at 11 St. Patrick's Street, Cork, is or is not development and is or is not exempted development. The Board's decision was that this use was development, which is not exempted development. In reaching this decision the Board had regard to legislative provisions and the following factors:

- The previous use of the premises as a shop.
- The information submitted on behalf of the site occupier/operator regarding the scale, nature and layout of the coffee shop, and
- The nature and range of goods sold on the premises and the layout and services provided to visiting members of the public, in particular, the extent of seating provided.

The Board came to the following conclusions:

- The use of the subject premises as a coffee shop does not constitute a “shop”, as defined in Article 5(1) of the Planning and Development Regulations, 2001, as amended, because the scale, nature and layout of the coffee shop is more akin to a restaurant use which is expressly excluded from the definition of “shop” under Article 5(1) of the said Regulations, and
- The change of use of the subject premises, from use as a shop to use as a coffee shop raises issues that are material in terms of the proper planning and sustainable development of the area and is, therefore, material and is, therefore, “development” within the meaning of Section 3 of the Planning and Development Act, 2000, as amended.

RL3515: Whether the use of a former retail unit as a coffee shop on the ground floor of 11 St. Patrick’s Street, Cork, is or is not development and is or is not exempted development. The Board’s decision was that this use was development, which is not exempted development. In reaching this decision the Board had regard to legislative provisions and the following factors:

- The previous use of the premises as a shop, and
- The information submitted on behalf of the site occupier/operator regarding the scale, nature and layout of the coffee shop, including the internal layout thereof, and regarding the nature and range of goods sold on the premises.

The Board’s decision did not reflect the inspector’s recommendation and so the following explanation was given in this respect:

...the Board had regard to the statutory definition of “shop” as set out in the Planning and Development Regulations, 2001, as amended, and considered that the use that is the subject matter of the referral involves primarily the sale of sandwiches and other food (including beverages) for consumption off the premises, and that such sale is the main retail use, and is not a subsidiary use, and that therefore the use as a “coffee shop” is not within the scope of the definition of a “shop”, as set out in the Regulations.

The Board was also satisfied that the change of use from the former retail use to the use as a “coffee shop”, as proposed, raises external matters that are material in

planning terms, and that therefore the change of use in this instance constitutes development.

In this context, the Board did not consider that the removal of all customer seating and toilet facilities was sufficient to alter the situation, as compared to the Board's previous decision in respect of the subject premises...since that decision referred both to the scale, nature and layout of the "coffee shop" AND the nature and range of goods sold on the premises.

5.0 Policy Context

5.1. Development Plan

The subject building is located on St. Patrick's Street, which under the Cork City Development Plan 2015 – 2021 (CDP) lies within the city centre retail area, wherein the zoning objective is "To provide for the protection, upgrading and expansion of retailing, in particular higher order comparison retailing, as well as a range of other supporting uses in the city centre retail area."

St. Patrick's Street is composed of primary retail frontages. Accordingly, Objective 13.4 of the CDP, which is entitled "Protection of prime and secondary retail frontage", is of relevance. It states the following: "To restrict retail offices, general offices, hot food takeaways, general convenience stores, public houses, night clubs, mobile phone shops, bookmakers/betting shops and restaurant uses from locating at ground floor level on prime retail frontages, and restrict retail offices, general offices, hot food takeaways, bookmakers/betting shops at ground floor level on secondary retail frontages (as defined in Map 2, Volume 2)."

5.2. Natural Heritage Designations

Not applicable.

6.0 The Referral

6.1. Referrer's Case

- Exception is taken to the Planning Authority's expansion of the question, as it resulted in a failure to address the question that was asked.
- The logic of the Planning Authority's view, that the sale of food and drink only constitutes use as a shop where such sale is subsidiary to a primary retail use, is such that, for example, supermarkets, butchers, and bakers would not be shops.
- The Planning Authority has referred to the definition of shop under item (d) of Article 5(1) to the exclusion of item (a). In this respect, the only relevant exclusion is that of the sale of hot food where it is not subsidiary to the main retail use, circumstances that do not apply in this case.
- Aforementioned item (d) should be read as an alternative to item (a) rather than a restriction upon this item.
- The referrer suggests that there is a drafting error in aforementioned item (d), as it should state "hot food" rather than simply "food", thereby corresponding with the aforementioned relevant exclusion stated at the end of the definition of shop.
- The sale of heated sandwiches from the subject premises accounts for less than 2% of overall sales.
- The Planning Authority's reference to issues pertaining to a coffee shop that are material in terms of the proper planning and sustainable development of the area are not relevant to this referral, which seeks only to establish the range of goods that can be sold consistent with the premises use as a shop, particularly with respect to convenience goods as cited under the Retail Planning Guidelines 2012.

6.2. Planning Authority Response

None received.

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

None received.

6.4. **Further Responses**

Not applicable.

7.0 **Statutory Provisions**

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

Section 2(1) states the following:

*In this Act, except where the context otherwise requires –
“planning authority” means a local authority,*

Section 5(1) states the following:

If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

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 fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

Section 127(1) states the following:

An appeal or referral shall –

(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,

Section 2(1) states the following:

“land” includes any structure and any land covered with water (whether inland or coastal);

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined, and –

(a) where the context so admits, includes the land on, in or under which the structure is situate...

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

“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.

7.2. Planning and Development Regulations, 2001

Article 5(1) states the following:

“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 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 (1909-1910) Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,

(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 laundrette 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 or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies;

Article 10(1) states the following:

Development which consist 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.

Under Part 4 of Schedule 2 to Article 10 of the aforementioned Regulations, the following Exempted Development – Classes of Use are cited:

Class 1: Use as a shop.

7.3. **Other**

Not applicable.

8.0 **Assessment**

8.1. **The question**

- 8.1.1. The question asked by the referrer is “Whether the use of 11 St. Patrick’s Street, Cork for the sale of convenience goods (as defined in the Retail Planning Guidelines 2012) is or is not development and is or is not exempted development?”
- 8.1.2. The Planning Authority amplified this question by the inclusion of the phrase “and as currently operating as a Starbucks coffee shop”. Accordingly, the question that it answered was “Whether the use of 11 St. Patrick’s Street, Cork for the sale of convenience goods (as defined in the Retail Planning Guidelines 2012) and as currently operating as a Starbucks coffee shop is or is not development and is or is not exempted development?”
- 8.1.3. The referrer takes exception to this amplification of its question, which it is contended had the effect of leading the Planning Authority to answer a question that it was not asked. Instead the referrer seeks only to establish the range of goods that can be sold consistent with the premises use as a shop. In this respect, the definition of convenience goods cited in the Retail Planning Guidelines 2012 is referred to, i.e. “food, alcoholic and non-alcoholic beverages, tobacco, and non-durable household goods”.
- 8.1.4. The Planning Authority requested further information of the referrer. Thus, the referrer was asked to clarify if the current unauthorised use of the premises was

going to cease and, if so, what any future use of these premises would comprise. The referrer responded by stating that the range of goods sold had been amended since the last referral, RL3515, and that the purpose of the current referral was to establish what range of goods could be sold to ensure that the planning status of the premises as a “shop” was not infringed. Based on the referrer’s response, the Planning Authority concluded that the use under examination was the current use of the premises and so it proceeded to amplify the referrer’s question accordingly.

8.1.5. In reviewing the two above cited questions, I note that the former is of a general nature while the latter amplification is of a specific nature. I note, too, that under Section 5(1) of the Planning and Development Act, 2000 – 2017, the legal provision to ask a question as to what is or is not development or is or is not exempted development relates to “any particular case”. I understand this provision to presuppose specificity and so, on this basis, I consider that the original question, in the current case, is insufficiently specific to qualify as a valid question under this legal provision. Accordingly, the Planning Authority’s amplification is necessary to ensure that the question is a specific one, i.e. the use of the premises as a Starbucks coffee shop, and, thus, a valid one under the said legal provision.

8.1.6. I conclude that the originally posed question is invalid and that, while the Planning Authority seeks to amplify it, this question needs to be refocused to reflect the referrer’s description of the use submitted under further information. Thus, I consider that the question should be rephrased as follows: “Whether the use of 11 St. Patrick’s Street, Cork, as currently operating as a Starbucks coffee shop, is or is not development and is or is not exempted development?”

8.2. **Is or is not development**

8.2.1. The authorised use of the subject premises as a shop is accepted by the referrer and the Planning Authority. The issue arising is whether the current use of these premises comes within the definition of a shop set out under Article 5(1) of the

Planning and Development Regulations, 2001 – 2017. The referrer contends that this use is capable of being operated within the ambit of this definition, while the Planning Authority contests the same.

- 8.2.2. The aforementioned issue has been previously addressed for the subject premises under two earlier referrals, i.e. RL3425 and RL3515.
- 8.2.3. In the case of the former referral, the Board concluded that the use of the premises as a coffee shop is development, which is not exempted development. In reaching this decision, regard was had to several factors including the scale, nature, and layout of the coffee shop and the nature and range of goods sold on the premises and the layout and services provided to visiting members of the public, in particular, the extent of seating provided. The inspector's report elucidates that, at that time, the premises were laid out to provide seating for c. 30 patrons and a customer toilet was provided. Kitchen facilities for the preparation of food did not feature, as food for sale was prepared elsewhere and conveyed to the premises.
- 8.2.4. In the case of the latter referral, the Board again concluded that the use of the premises as a coffee shop is development, which is not exempted development. In the intervening period between the first and second referral, the seating and the customer toilet were removed from the premises. The reporting inspector deemed that the aforementioned removals had led to a situation wherein the use had ceased to be akin to that of a café and so he concluded that development had not occurred. The Board, however, disagreed. In setting aside the inspector's recommendation, it provided the following explanation for its decision:

The Board had regard to the statutory definition of "shop" as set out in the Planning and Development Regulations, 2001, as amended, and considered that the use that is the subject matter of the referral involves primarily the sale of sandwiches and other food (including beverages) for consumption off the premises, and that such sale is the main retail use, and is not a subsidiary use, and that therefore the use as a "coffee shop" is not within the scope of the definition of a "shop", as set out in the Regulations. The Board was also satisfied that the change of use from the former retail use to the use as a "coffee shop", as proposed, raises external matters that are material in planning terms, and that therefore the change of use in this instance constitutes

development. In this context, the Board did not consider that the removal of all customer seating and toilet facilities was sufficient to alter the situation, as compared to the Board's previous in respect of the subject premises, under Board referral decision RL3425, dated 2nd March 2016, since that decision referred both to the scale, nature, and layout of the "coffee shop" AND the nature and range of goods sold on the premises.

- 8.2.5. During my site visit, I observed that the premises continue to be laid out without customer seating and toilets. Instead the publically accessible floorspace is available for patrons to queue within, before placing their orders, and to wait within, while orders are being prepared. There is also a station where patrons can attend to their drinks, i.e., typically, add milk and sugar. On either side of this space there are display shelves for goods that are available for purchase, e.g. mugs, cafeterias, and bags of coffee. The public counter is accompanied by cabinets and baskets within which, variously, sandwiches, cakes and confectionary, and cold drinks are displayed and crisps and further bags of coffee are displayed.
- 8.2.6. The referrer has not provided a breakdown of sales from the subject premises beyond stating that the sale of heated sandwiches accounts for less than 2% of overall sales. In the absence of any information to the contrary and in accordance with the nature of "coffee shops", I assume that the predominant component of sales is that of hot drinks for consumption off the premises.
- 8.2.7. Turning to the definition of "shop" under Article 5(1) of the Planning and Development Regulations, 2001 – 2017, nine items are listed as being "purposes", which either individually or in combination constitute use as a shop. This definition elucidates Class 1 of Part 4 of Schedule 2 to Article 10 of these Regulations, which addresses changes of use. This Class therefore encompasses the said nine items and so changes of use between these items are deemed to be exempted development.
- 8.2.8. The referrer draws attention to items (a) and (d) of Article 5(1), which state "for the retail sale of goods" and "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 outlet..." It contends that the Planning Authority has focused inappropriately on item (d) to the exclusion of item (a), thereby disregarding the fact

that these items are not alternatives but accumulative. Instead the only exclusion from either of these items is to be found in the qualifying statement at the end of the definition of “shop”, the relevant portion of which is “But does not include any use... for the sale of hot food...for consumption off the premises except paragraph (d)...” (Paragraph (d) refers to item (d) in my assessment). The referrer also draws attention to the wording of item (d) and the qualifying statement and suggests that the former should refer to “hot food” so as to dovetail with the latter.

- 8.2.9. I concur with the referrer’s identification of item (d) and the qualifying paragraph as the relevant portions of the definition of “shop” to this referral. I am not persuaded that the omission of the word “hot” from this item is significant as “food” encompasses both hot and cold food and, *prima facie*, the critical distinction within the definition is between hot and cold food.
- 8.2.10. The Planning Authority concluded that the predominant use of the subject premises is for the sale of sandwiches and other food (including beverages) for consumption on and off the premises and that this use is not subsidiary to any other retail use.
- 8.2.11. Essentially, I concur with the Planning Authority’s conclusion. However, I would express matters somewhat different. Thus, on the basis of the information before me, the subject premises is currently being operated as a coffee shop wherein the sale of hot drinks and to a lesser extent hot food for consumption off the premises are in combination the predominant rather than the subsidiary use. While other cold drinks and cold food and non-food goods are also being sold, I have seen nothing to indicate that the sale of these things are the predominant use. Accordingly, the condition built in to item (d), that the sale of sandwiches or other food for consumption off the premises be subsidiary to the main retail use, does not apply.
- 8.2.12. The referrer critiques the aforementioned conclusion on the basis that if the same logic was to be applied to, e.g. supermarkets, butchers, and bakers, then they would not come within the definition of “shop”. By way of response, *prima facie*, these examples come within the definition of “shop” on the basis of item (a), i.e. “for the retail sale of goods”. I consider that the qualifying statement is of assistance in this respect, as it makes clear that it is any use for the sale of hot food for consumption off the premises that is excluded from the definition of “shop”, unless it is subsidiary to the main retail use of the premises. This statement is applicable to item (a), just as

it is explicitly applicable to item (d). Typically, supermarkets, butchers, and bakers, if they do sell hot food, do so on a subsidiary basis to the sale of cold food and so the qualifying statement is not applicable to them.

8.2.13. In the light of the above discussion, I conclude that the use of the subject premises does not come within the definition of shop, under Article 5(1), and so this use lies outside of Class 1 of Part 4 of Schedule 2 to Article 10. Given that the authorised use of these premises is that of a shop, a change of use has thus arisen. Whether this change of use constitutes development hinges on whether it is a material one.

8.2.14. The legal case of *Monaghan v Brogan* established that the test for materiality pertains to whether the change of use in question would raise material planning considerations if the change of use were to be the subject of a planning application. If this test is applied to the change of use currently in question, then I anticipate that the following material planning considerations would be raised:

- Whether the use would be compatible with the land use policy of the Cork City Development Plan 2015 – 2021 as set out e.g. in Objective 13.4,
- Whether the use would generate odours that would require ventilating,
- Whether servicing the use would generate vehicle movements and the type, number, and timing of such movements and their accommodation within the regulatory regime for St. Patrick Street in a manner that would make for good traffic management and the promotion of road safety,
- Whether the use would heighten the risk of littering and, if so, mitigation of the same, and
- Whether the use would operate in the evening/at night and any associated need to control opening times.

In these circumstances, I conclude that a material change of use has occurred.

8.2.15. I conclude that the use of the subject premises has entailed a material change of use from the authorised use of these premises as a shop and so development has occurred under Section 3(1) of the Planning and Development Act, 2000 – 2017.

8.3. Is or is not exempted development

- 8.3.1. In the light of the foregoing section of my assessment the use of the subject premises does not lie within the scope of Class 1 of Part 4 of Schedule 2 to Article 10 of the Planning and Development Regulations, 2001 – 2017. Furthermore, this use does not lie within the scope of any of the other said Classes. Accordingly, it is a *sui generis* one.
- 8.3.2. The aforementioned Article 10 addresses changes of use that are deemed to be exempted development. None of these changes of use pertain to the use of the subject premises. No other provisions either within the relevant Regulations or Act bestow exempted development status on the change of use that has occurred.
- 8.3.3. I conclude that the development, which has occurred, is not exempted development.

8.4. Restrictions on exempted development

- 8.4.1. As the development, which has occurred, is not exempted development the question has to any restrictions on 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 11 St. Patrick's Street, Cork, as currently operating as a Starbucks coffee shop, is or is not development and is or is not exempted development:

AND WHEREAS Mestonway Ltd requested a declaration on this question from Cork City Council and the Council issued a declaration on the 31st day of August, 2017, stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 27th 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, as amended,
- (c) Section 5(1) of the Planning and Development Act, 2000, as amended,
- (d) Article 5(1) and Article 10(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Part 4 of Schedule 2 to article 10 of the Planning and Development Regulations, 2001, as amended,
- (f) The planning history of the site,
- (g) The previous use of the subject premises as a shop,
- (h) The information submitted by the referrer as to the current use of the subject premises as a coffee shop, and
- (i) The report of the inspector.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The use of the subject premises as a “coffee shop” does not constitute use as a “shop” under Article 5(1) of the Planning and Development Regulations, 2001, as amended, because the sale of hot drinks and to a lesser extent hot food for consumption off the premises are in combination the predominant rather than the subsidiary use of the premises and so this use does not come within the scope of Paragraph (d) of the said Article.

- (b) The use of the subject premises as a “coffee shop” does not come within the scope of Paragraph (a), due to the qualifying statement at the end of the definition of “shop” in Article 5(1) of the Planning and Development Regulations, 2001, as amended, and Paragraphs (b), (c), and (e) – (i) are not applicable to this use.
- (c) The use of the subject premises as a “coffee shop” has resulted in a change of use of these premises from their authorised use as a shop and this change of use is a material one as it raises material planning considerations relating to land use policy, odours, traffic, litter, and hours of operation. It thus constitutes development under Section 3(1) of the Planning and Development Act, 2000, as amended.
- (d) Neither the Planning and Development Act, 2000, as amended, nor the Planning and Development Regulations, 2001, as amended, deem the said change of use, which is development, to be exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the Planning and Development Act, 2000, as amended, hereby decides that the use of a former shop at 11 St. Patrick’s Street, Cork as a Starbucks coffee shop is development and is not exempted development.

Hugh D. Morrison
Planning Inspector

6th February 2018