

The Secretary  
An Bord Pleanála  
64 Marlborough Street,  
Dublin 1

21 May 2019

**AN BORD PLEANÁLA**  
LDG- 01 61 37-19  
ABP- \_\_\_\_\_  
**22 MAY 2019**  
Fee: € 220 Type: CHQ  
Time: \_\_\_\_\_ By: Exp Post

**Re: Referral under Section 5(3)(b) of the Planning and Development Act 2000, (as amended) regarding internal alterations to the Maxol Filling Station at Glasheen Road, Wilton, Cork.**

Dear Sir/Madam,

We act on behalf of the Maxol Group of 3 Custom House Plaza, IFSC, Dublin 1, D01 VY76 and submit on their behalf this referral for a request for a Declaration under Section 5 of the Planning and Development Act 2000, as amended (herein referred to as "the Act").

Section 5(3)(b) of the Act states:

*Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).*

A valid request for a Section 5 Declaration together with the appropriate fee was issued to Cork City Council on the 18<sup>th</sup> April 2019 (see stamped receipt attached). The question on which the Declaration was sought is whether the alterations to the internal layout of the permitted forecourt shop which are shown on the drawings attached as Appendix 1 are, or are not, development and are, or are not, exempted development.

The 4-week deadline for decision (i.e. 15<sup>th</sup> May 2019) as set out in Section 5(3)(a) has now elapsed and therefore, in accordance with the provisions of Section 5(3)(b), we now refer the question for decision to the Board. We enclose a copy of the request that was submitted to Cork City Council as well as the statutory fee of €220.

Should you require any further information please do not hesitate to contact the undersigned.

Yours Sincerely,



Brian McCutcheon  
McCutcheon Halley Planning Consultants

[www.mhplanning.ie](http://www.mhplanning.ie)

McCutcheon Halley is a limited partnership registered under the Limited Partnerships Act, 1997, registration no. LP512. Registered in Ireland No. 326490. Registered office: 6 Joyce House, Barrack Square, Ballincollig, Co. Cork. Directors: Brian McCutcheon, BA(Econ) DipTP DipGIS MIPi (Chairman), Tom Halley, BA(Mod), MRUP BSc ARCH(Hons) CerL Civil Eng. MIPi.

Also in DUBLIN  
Kreston House, Arran Court  
Arran Quay, Dublin 7  
D07 K271  
T. +353 (0) 1 804 4477  
E. [info@mhplanning.ie](mailto:info@mhplanning.ie)

CORK  
6 Joyce House, Barrack Square  
Ballincollig, Co. Cork  
P31 YX97  
T. +353 (0)21 420 8710  
E. [info@mhplanning.ie](mailto:info@mhplanning.ie)





**McCutcheon Halley**  
 CHARTERED PLANNING CONSULTANTS

**Comhairle Cathrach Chorcaí**  
**Cork City Council**  
 18 APR 2019  
 Strategic Planning & Economic  
 Development Directorate

Mr. Fearghal Reidy  
 Director of services  
 Planning Department  
 Cork City Council  
 City Hall  
 Cork

18 April 2019

**AN BORD PLEANÁLA**  
 22 MAY 2019  
 LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_  
 LDG- \_\_\_\_\_  
 ABP- \_\_\_\_\_

**Re: Internal Alterations to the Maxol Filling Station at Glasheen Road Glasheen Road, Wilton**

Dear Mr. Reidy,

We act for The Maxol Group, 3 Custom House Plaza, IFSC Dublin 1, D01VY76, and submit on their behalf this request for a Declaration under Section 5 of the Planning and Development Acts, 2000 – 2018<sup>1</sup>. We enclose the required fee of €80.00.

The question on which the Declaration is sought is whether the alterations to the internal layout of the permitted forecourt shop which are shown on the drawings attached as Appendix 1 are, or are not, development and are, or are not, exempted development.

**1. Exempted Status of the Works**

It is accepted that the physical alterations to the permitted are development as they involve the removal and relocation of internal partitions. However these works are also exempted development as they fall within the scope of Section 4(1)(h) of the Planning Act which provides for:

*"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";*

The proposed works, which are shown on the attached site layout plan (Dwg. 01-102) and floor plan (Dwg. No. 01-11) are required to improve the internal layout of the premises so that it can compete with the range of goods and services offered by other forecourt shops in the area. As the works are confined to the interior they do not materially affect the external appearance of the structure.

We attach as Appendix 2 to this request a legal opinion by Douglas Hyde, Barrister at Law which sets out the case law in regard to Section 4(1)(h) of the Planning Act. This indicates that the works proposed to the interior of the premises are in themselves exempted development.

<sup>1</sup> Hereafter referred to as "the Planning Act"

[www.mhplanning.ie](http://www.mhplanning.ie)

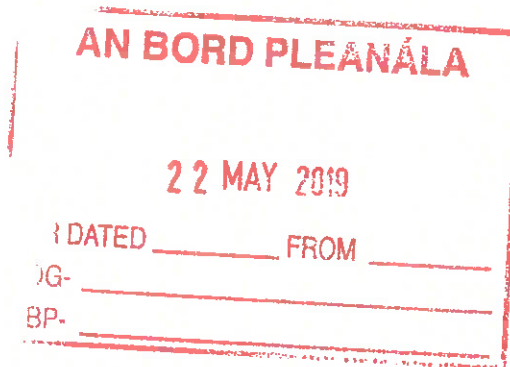
McCutcheon Halley is a limited partnership registered under the Limited Partnerships Act, 1907, registration no. LP512. Registered in Ireland No. 326490. Registered office: 6 Joyce House, Barrack Square, Ballincollig, Co. Cork. Directors: Brian McCutcheon, BA(Icon) DipTP DipGIS MPl (Chairman), Tom Halley, BA(Mod), MRUP BSc ARCH(Hons) Cert. Civil Eng. MPl.

Also in DUBLIN  
 Kreston House, Arran Court  
 Arran Quay, Dublin 7  
 D07 K271  
 T. +353 (0) 1 804 4477  
 E. info@mhplanning.ie

CORK  
 6 Joyce House, Barrack Square  
 Ballincollig, Co. Cork  
 P31 YX97  
 T. +353 (0)21 420 8710  
 E. info@mhplanning.ie



Mr. Fearghal Reidy  
Director of services  
Planning Department  
Cork City Council  
City Hall  
Cork



18 April 2019

**Re: Internal Alterations to the Maxol Filling Station at Glasheen Road Glasheen Road, Wilton**

Dear Mr. Reidy,

We act for The Maxol Group, 3 Custom House Plaza, IFSC Dublin 1, D01VY76, and submit on their behalf this request for a Declaration under Section 5 of the Planning and Development Acts, 2000 – 2018<sup>1</sup>. We enclose the required fee of €80.00.

The question on which the Declaration is sought is whether the alterations to the internal layout of the permitted forecourt shop which are shown on the drawings attached as Appendix 1 are, or are not, development and are, or are not, exempted development.

### 1. Exempted Status of the Works

It is accepted that the physical alterations to the permitted are development as they involve the removal and relocation of internal partitions. However these works are also exempted development as they fall within the scope of Section 4(1)(h) of the Planning Act which provides for:

*“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”;*

The proposed works, which are shown on the attached site layout plan (Dwg. 01-102) and floor plan (Dwg. No. 01-11) are required to improve the internal layout of the premises so that it can compete with the range of goods and services offered by other forecourt shops in the area. As the works are confined to the interior they do not materially affect the external appearance of the structure.

We attach as Appendix 2 to this request a legal opinion by Douglas Hyde, Barrister at Law which sets out the case law in regard to Section 4(1)(h) of the Planning Act. This indicates that the works proposed to the interior of the premises are in themselves exempted development.

<sup>1</sup> Hereafter referred to as “the Planning Act”

[www.mhplanning.ie](http://www.mhplanning.ie)



## 2. Exempted Status of the Proposed Use

### 2.1 Criteria for Exempted Use of the Premises

As the works are deemed to be exempted development under Section 4(1)(h) of the Planning Act, the primary issue to be addressed in this request is whether the works carried under Section 4(1)(h) would facilitate a **material** change or intensification of the permitted use of the premises.

This involves consideration of two criteria:

- (a) The **quantum** of net retail floorspace which was permitted in the previous decisions of the Planning Authority and An Bord Pleanála and therefore considered to be appropriate for this premises from a land use planning viewpoint. It is reasonable to assume that a material change, or intensification, of use would only occur if the net retail floorspace materially exceeded the quantum that was deemed to be acceptable by An Bord Pleanála during the consideration of the previous appeals on the site.
- (b) The **proposed use** of the permitted quantum of net retail floorspace. In our opinion this should be assessed on the basis of the definition of net retail floorspace in the Retail Planning Guidelines, 2012; the definition of "shop" in the Planning and Development Regulations 2001 (as amended)<sup>2</sup> and the precedents established by recent decisions of the Planning Authority as to how the definitions should be applied to established forecourt shops.

### 2.2 The Appropriate Quantum of Net Retail Floorspace for this Site

It has been established in case law that, once compliance has been achieved and the development has been implemented and operated in accordance with the agreed floor plan, the developer is entitled, under Section 4(1)(h) of the Planning Act, to make further changes to the internal layout of the premises provided any material change or intensification of use falls within the scope of the exemptions under Article 10(1) of the Planning Regulations. There is no obligation on the developer to maintain the agreed floor plan and distribution of uses in perpetuity simply because it formed part of the compliance submissions.

The materiality of any change or intensification of use arising from a change in the agreed floor plan should therefore be assessed based on:

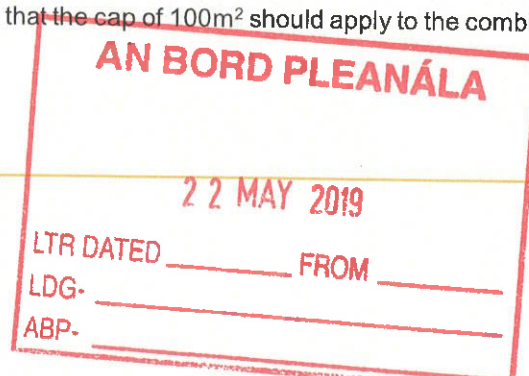
- (a) whether the quantum of the net retail floorspace is within the range envisaged in the previous permission(s); and
- (b) whether the use of the net retail floorspace falls within the definition of "shop" in Article 5(1) of the Planning Regulations.

The appropriate quantum of net retail floorspace for this site has been assessed by Cork City Council and by An Bord Pleanála in the decisions made under 07/32534 (PL28.230442) and 09/34163 (PL 28.237319).

#### 07/32534 (PL28.230442)

This case refers to a third-party appeal against Cork City Council's decision to grant permission for the demolition of the existing building/canopy and the construction of a new two-storey forecourt building of 367m<sup>2</sup> including 100m<sup>2</sup> retail shop area and 48m<sup>2</sup> delicatessen. The Board upheld the decision to grant subject to 16 conditions. The permitted amount of net retail floor space was confirmed by the Board as 148m<sup>2</sup>. The Board did not accept the argument made in the third party appeals that the cap of 100m<sup>2</sup> should apply to the combined

<sup>2</sup> Hereafter referred to as "the Planning Regulations"







area of the shop and food hall. The Board applied the sequential test and was satisfied that 148m<sup>2</sup> was an appropriate quantum of net retail floorspace for a forecourt shop in this area of Cork City.

**09/34163 (PL 28.237319)**

Cork City Council's decided to grant planning permission for the extension and refurbishment of the existing service station. The proposed net retail floorspace was described by the Board's Inspector as a total of 164m<sup>2</sup> which comprised of a shop of 114m<sup>2</sup>, a delicatessen area of 34m<sup>2</sup> and a café of 16m<sup>2</sup>.

The Inspector considered that the level of retail as permitted in PL 28.230442 should not be exceeded. The Inspector therefore recommended a reduction in the net retail floor space to 148 m<sup>2</sup> on the basis that this amount was "acceptable in terms of general land use policy". The Inspector's draft of Condition 2 required that

**2. The proposed development shall be amended as follows:**

**(a) Building footprint shall be reduced such that the proposed retail floor space shall not exceed 148 square metres.**

**(b) Minimum setback of 5m of the entire forecourt building from the southern boundary shall be maintained.**

*Revised drawings showing compliance with these requirements shall be submitted for written agreement prior to the commencement of development.*

The Inspector's draft of Condition 2 was amended by the Board Direction to require that

**2. The proposed development shall be amended as follows:**

**(a) The retail/deli building shall be reduced in area by 10m<sup>2</sup> by reducing the length of the building by approximately one metre.**

**(b) There shall be no seating for the public in the deli/coffee area/retail area.**

**(c) The proposed car-wash shall be relocated further from the eastern boundary by 2m.**

**(d) A pedestrian route from Glasheen Road to the retail unit shall be demarcated on the ground by road markings.**

*Revised drawings showing compliance with these requirements shall be submitted to the planning authority for written agreement prior to the commencement of development.*

The reason given by the Board for the imposition of Conditions 2(a) and 2(b) was "to reduce the intensity of the development in order to avoid overflow parking onto nearby roads". The applicant submitted proposals in compliance with Condition 2 which showed a reduction in the net retail floorspace to 144 m<sup>2</sup>. This was approved by the Planning Authority on 19<sup>th</sup> April 2011 as compliant with Conditions 2(a) and 2(b). A copy of the approved layout is attached as Appendix 3.

It is reasonable to argue, therefore, that no material change intensification of use would arise if it can be shown that the quantum of net retail floorspace as defined in the Retail Planning Guidelines does not exceed 144m<sup>2</sup> and that the use of this floorspace falls within the definition of "shop" in the Planning Regulations.



## 2.4 The Nature of the Permitted Use

The use permitted under 09/34163 (PL 28.237319) was described in the public notices as the extension and refurbishment of the existing service station to provide new freezer room, cold room, food prep area, deli counter, sit down coffee area, store solid fuel store, relocated external ATM unit with refurbished shop, office, toilet facilities and staff canteen. Condition 3 of the permission granted by An Bord Pleanála requires that:

*"The use of the office and storage area shall be ancillary to the main use of the building as a filling station forecourt shop. The storage area shall only be used for the storage of goods sold in the forecourt shop. The permitted forecourt shop shall be operated as a "shop" as defined in article 5 (1) of the Planning and Development Regulations 2001, as amended. The shop shall not be used as an off licence".*

Article 5(1) of the Planning and Development Regulations, 2001 (as amended) states that:

*'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,*
- (e) for hairdressing,*
- (f) for the display of goods for sale,*
- (g) for the hiring out of domestic or personal goods or articles,*
- (h) as a launderette or dry cleaners,*
- (i) for the reception of goods to be washed, cleaned or repaired,*

*but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food 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) of the 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—*

- (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.

Apart from Condition 3 the only other restriction on the use of the net retail floorspace is Condition 2(b) which states that "there shall be no seating for the public in the deli/coffee area/retail area".

This means that once the development was carried out and completed in accordance with the plans and particulars approved by the Board and with the compliance submissions agreed with the Planning Authority, the developer was entitled to make further changes to the internal layout provided the works were exempt under Section 4(1)(h) of the Planning Act and the use of the premises remained within the definition of a "shop" under Article 5(1) of the Planning Regulations

## 2.5 Interpretation of the Retail Planning Guidelines, 2005 and 2012

Paragraph 97 of the Retail Planning Guidelines 2015 (2005 RPG), which deals with petrol filling stations, states that

*"Notwithstanding the sequential approach, a shop of up to 100 square metres of net retail sales area may be allowed when associated with a petrol filling station. Where retail space in excess of 100 square metres of net retail sales area associated with petrol filling facilities is sought the sequential approach to retail development will apply, i.e. the retail element of the development should be assessed by the planning authority in the same way as would an application for retail development (without petrol filling facilities) in the same location."*

"Net retail sales area" was defined in the 2005 RPG as:

*"the area of a shop or store which is devoted to the sales of retail goods (including the area devoted to checkouts)"*.

It is clear from the planning history that An Bord Pleanála applied the sequential test to this site and decided that the floorspace cap of 100m<sup>2</sup> should not apply in this case. Permission was granted under 07/32534 (PL28.230442) for a development which had a net retail floorspace of 148m<sup>2</sup>. This is confirmed by the following extract from the Inspector's report:

*As regards the 100-metre threshold for shops associated with filling stations, I concur with the planning authority's viewpoint that the proposal exceeds that figure (i.e. given the definition of convenience retailing in the guidelines it is reasonable to include the food hall as part of the convenience retailing element).*

The 2005 RPG also applied when permission was granted under 09/34163 (PL 28.237319) for refurbishment and extension of the premises. It was initially proposed to increase the net retail floorspace from 148m<sup>2</sup> to 164m<sup>2</sup> but compliance with the planning conditions imposed by the Board resulted in the net retail floorspace being reduced to 144m<sup>2</sup>.

Since the permission granted under 09/34163 (PL 28.237319) was implemented, the Retail Planning Guidelines were revised in 2012. This resulted in the definition of net retail floorspace being amended to comprise:

*"the area within the shop or store which is visible to the public and to which the public has access including fitting rooms, checkouts, the area in front of checkouts, serving counters and the area behind used by serving staff, areas occupied by retail concessionaires, customer service areas, and internal*





*lobbies in which goods are displayed, but excluding storage areas, circulation space to which the public does not have access to, cafes, and customer toilets”.*

The revised definition of retail floorspace has allowed established filling stations to reorder their internal layouts so that the restriction on the net retail sales area only applies to the shop element of the store. Areas used for cafes, delicatessen, food preparation and circulation within the store are treated as gross rather than net and may be provided in addition to the permitted net retail floorspace. In most cases the sequential test was not applied when permission was granted for the forecourt building and the net retail sales area is restricted by the governing permission to 100m<sup>2</sup>.

We attach as Appendix 3 precedents showing how the definition of net retail floorspace has been interpreted by Cork City Council in recent planning decisions relating to forecourt shops.

The designation of the gross and net floor areas which we have shown on the floor plan attached as Appendix 1 is consistent with the approach adopted by Cork City Council in the cases listed in Appendix 3.

## 2.6 Conclusion in Regard to the Exempted Status of the Proposed Use

The Retail Planning Guidelines clarify that the impact of a retail use is based on the net rather than the gross retail floorspace. It has been established by the previous planning permissions that the subject site has a capacity for 144 m<sup>2</sup> of net retail floorspace.

The development permitted under 09/34163 (PL 28.237319) was carried out and completed in accordance with the plans and particulars approved by the Board and with the compliance submissions agreed with the Planning Authority.

Once the permitted use has commenced, the developer is entitled to make further changes to the internal layout provided the works are exempt under Section 4(1)(h) of the Planning Act; the allocation of the permitted net retail floorspace complies with the Retail Planning Guidelines; and the use of the premises remains within the definition of a “shop” under Article 5(1) of the Planning Regulations.

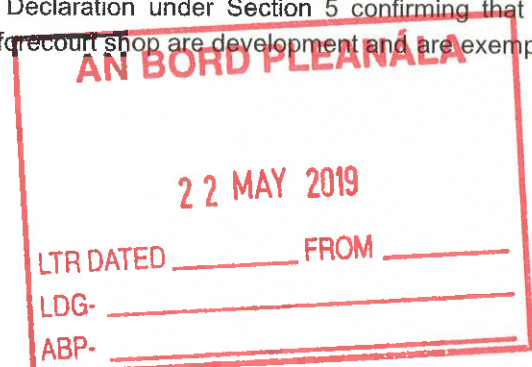
The revised internal layout, as shown on the floorplan attached as Appendix 1, would result in a net retail floorspace of 128 m<sup>2</sup> as defined by the current Retail Planning Guidelines. As the permission granted under 09/34163 (PL 28.237319) allows for a net retail floorspace of 144m<sup>2</sup>, the current proposal could not be considered to be an intensification of the permitted retail use of the premises.

We therefore request the Planning Authority to issue a Declaration under Section 5 confirming that the proposed alterations to the internal layout of the permitted forecourt shop are development and are exempted development.

Yours sincerely,

*Brian McCutcheon*

Brian McCutcheon  
McCutcheon Halley



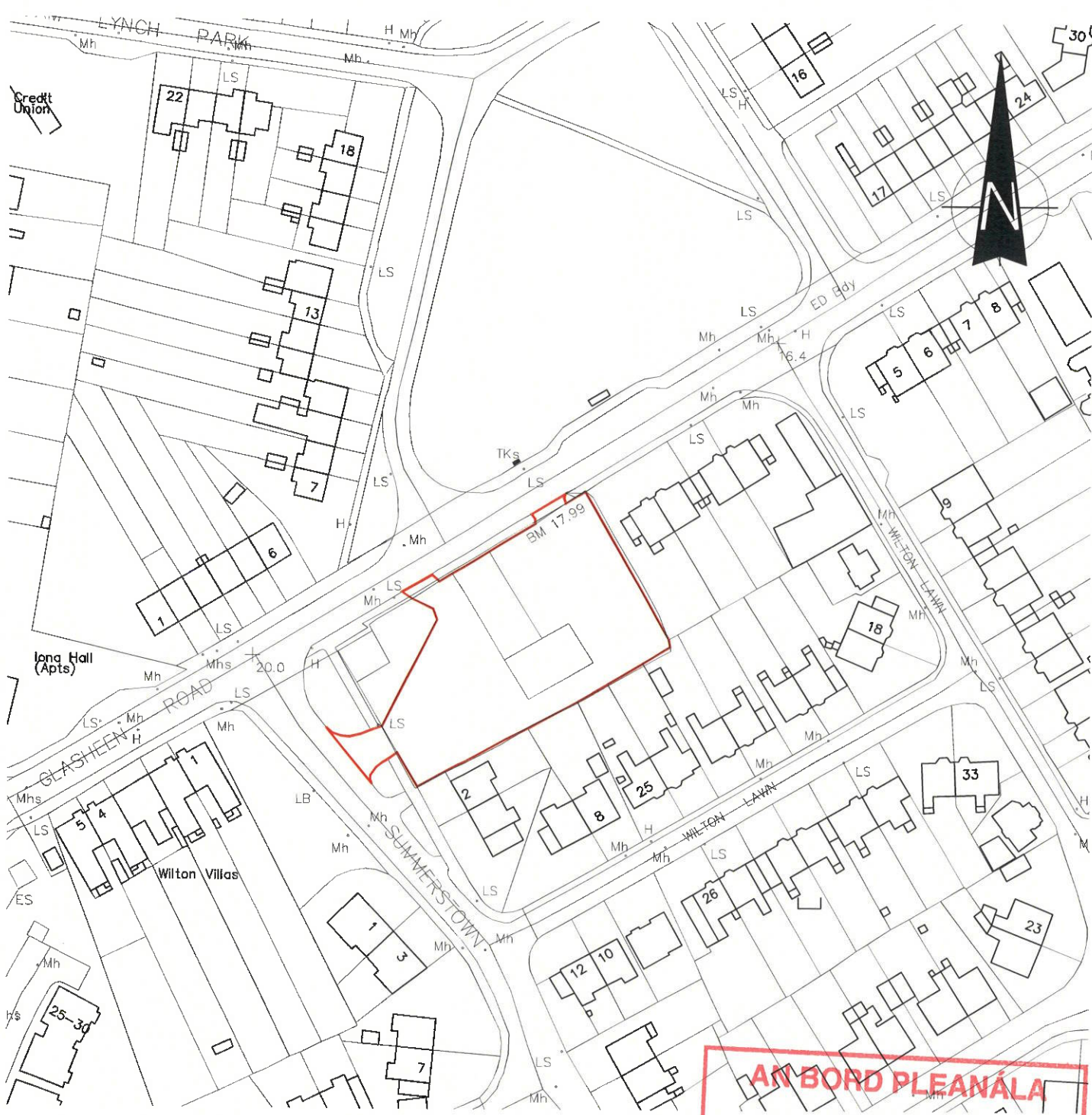
Appendix 1: Drawings showing the alterations to the permitted floor plans

Appendix 2: Legal opinion in regard to Section 4(1)(h)

Appendix 3: Precedents in regard to the definition of net retail floorspace for forecourt shops







**Location Map**  
**Scale 1 : 1 2 5 0**

**AN BORD PLEANÁLA**

**22 MAY 2019**

LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_

LDG- \_\_\_\_\_

ABP- \_\_\_\_\_

Rev	Description	Date	Rev. By

**Project Title**  
 Re-development to existing premises at  
 Glasheen Road,  
 Wilton Cork  
 Cork T12 FYN4  
 Ireland

**Drawing Title**  
 Location Map

Stage	Project No.	Dwg. No.	Revision
2	3404	01-01	

Scale	Date	Drawn by	Checked By
1:1250	Dec 17	JC	JJM

Unit 1, 33 Dunganon Road, Coisilind, Co Tyrone TEL: 02887 747900 FAX: 02887 747901  
 e-mail: cm@clarman.com



**Douglas Hyde  
Barrister-at-Law**

Glenavy, 134 Georgian Village, Castleknock, Dublin 15. [REDACTED]; [REDACTED]. Phone: [REDACTED]

**COUNSEL OPINION**

**Querist: Maxol Ltd, 3 Custom House Plaza, IFSC, Dublin.**

**Agent: McCutcheon Halley, Chartered Town Planners, per Brian McCutcheon.**

**Re: Alterations at forecourt building, Wilton Service Station, Glasheen Road, Wilton, Cork.**

**Request for an Opinion**

1. Maxol Ltd. proposes to reconfigure the internal layout of the forecourt building of its Wilton Service Station by removing partition walls and relocating an ATM with consequential changes. The reconfigured internal layout will reduce the total net retail area from 154 to 128.8 square metres. Maxol also intends to remove the rear extension to the forecourt building.

2. Agent has asked for an Opinion as to whether the proposed internal layout reconfiguration is exempted development under section 4(1)(h) of the Planning and Development Act 2010, as amended, ("the PDA") and under the Planning and Development Regulations 2011, as amended, ("the PDR").

**Planning history**

3. In July 2010, Cork City Council ("CCC") decided to grant permission subject to conditions for the extension and refurbishment of the forecourt building at Wilton Service Station. The proposed combined area of shop, deli and café use was 164 square metres (register ref. 09/34163).

4. In December 2010, on appeal, An Bord Pleanála ("ABP") granted permission subject to conditions, including condition 2(a) which required the relevant floor area to be reduced by 10 square metres to 154 square metres. (ABP reference number 237319)

5. In 2011, the Planning Authority approved a submission for compliance with the conditions of the ABP's grant of permission. Maxol then implemented the permission and complied with ABP's conditions, reducing the relevant floor area to 154 square metres and providing no seating in the deli/coffee area/retail area.

**AN BORD PLEANÁLA**

**22 MAY 2019**

LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_

LDG- \_\_\_\_\_

ABP- \_\_\_\_\_



6. Six years later, in November 2017, CCC sent a Warning Letter to Maxol Ltd. regarding unauthorised extension and internal alterations including increase in retail area. Arising from the Warning Letter, a retention application was made. In September 2018, ABP refused permission for the retention of the extension and alterations to the forecourt building.

#### Current proposal

7. In November and December 2018, Agent wrote to CCC, the planning authority regarding new proposals for the forecourt building. Maxol Ltd. intends to remove the extension and to reconfigure the internal layout of the permitted structure with a net floor space allocated to shop, deli and café uses well within the total area of 154 square metres permitted by An Bord Pleanála under ABP Ref. PL 28. 23719.

8. Agent said that while the internal layout proposed now differs from that shown on the compliance drawing submitted in 2011, it still complies with Condition 2 of ABP's grant of permission. The only reference to the internal layout in ABP's Condition 2 is the requirement that there "*shall be no seating in the deli/coffee area/retail area*". No such seating is now proposed.

Agent said a compliance submission was approved by the City Council in 2011 and was implemented then by Maxol. Agent said once the permitted development was implemented, Maxol was entitled to make further changes to the internal layout in accordance with section 4(1)(h) of the Planning and Development Act 2000, as amended.

9. In January 2019, the planning authority wrote to Agent saying, *inter alia*, that the points raised in Agent's letter of December 2018 "*are not considered to materially relate to Condition No 2 (a)*". It is stated that the details submitted in the drawing attached to agent's letter of 18<sup>th</sup> December 2018 are considered non-compliant with the grant of permission issued by An Bord Pleanála and the compliance submission as agreed in respect of Condition No. 2 by the Planning Authority.

#### Consideration of issues

10. Arising from the Planning Authority's January 2019 letter, Agent has asked for an Opinion as to whether the current proposals to reconfigure the internal layout of the forecourt building are exempted development under s. 4(1)(h) PDA. The current proposals are development, the question is: do the proposals constitute exempted development.

#### Development

11. Planning permission is required for any development of land, not being exempted development. "Development" means *'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'*. Thus are two categories of "development", first, the carrying out of *works* and, secondly, the making of any *material change of use*. In the instant case, the relevance, if any, of material change of use is considered in paragraph 23 of this Opinion.

AN BORD PLEANALA  
22 MAY 2019  
LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_  
LDS  
ABP





“Works” according to section 2(1) of the 2000 Act ‘includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...’ and “land”, according to section 2(1), includes any structure (emphasis added).

“Structure” means, *inter alia*, ‘any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined’.

## 12. Exempted development

Certain categories of development are “exempted development”, that is, development for which planning permission is not required. There is exemption, first, under primary legislation, under s.4, PDA and, secondly, under secondary legislation, that is, by Regulations, namely the Planning and Development Regulations, 2011, as amended (PDR).

## 13. Section 4(1)(h) provides that the following shall be exempted development –

*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;*  
(emphasis added)

## Alteration

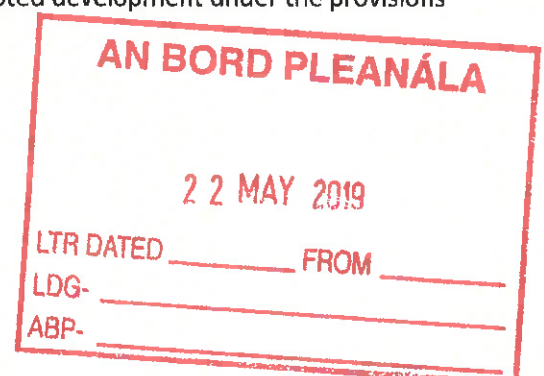
14. There is no definition of “alteration” in the PDA. Section 2 of the Act does state that “alteration” includes

*(a) plastering or painting or the removal of plaster or stucco, or*

*(b) the replacement of a door, window or roof, that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures.*

## 15. In the instant case, the questions to be answered are:

- first, whether Maxol’s proposals for a re-configuration of the internal layout of the forecourt building are “alterations” within the meaning of section 4(1)(h) PDA, and, if they are alterations,
- secondly, whether the proposed alterations are exempted development under the provisions of section 4(1)(h).







16. The PDA does not include a definition of “alteration”. The Collins English Dictionary defines alteration as “an adjustment, change, or modification”. In Cronin (Readymix) Ltd. v. An Bord Pleanála [2017] 2 I.R. 658, at 673, the Supreme Court noted that

*[t]here is no single definition of “alteration” for the purposes of the 2000 Act. Thus, for at least some purposes an “alteration” may involve something that changes the external appearance in a way that is inconsistent with the character of the structure in question, or with the character of neighbouring structures.*

17. In Dublin Corporation v. Lowe [2004] IESC 106 the Supreme Court considered the inclusion of the words “other alteration” in section 4(1)(g), now 4(1)(h):

*Clearly s.4(1)(g), by referring to “other alteration”, implies [sic] that there can be alterations which do not materially affect the external appearance of the structure or render such appearance inconsistent with the character of the structure or of neighbouring structures. In that context, therefore, “alteration” cannot be confined to something which materially affects the appearance of the structure. [emphasis added]*

18. In the instant case, the currently proposed works comprise the internal layout reconfiguration of the forecourt building by removing partition walls and relocating an ATM. It is clear from the two Supreme Court judgments above (Cronin Readymix Ltd v. ABP and Dublin Corporation v. Lowe), that the internal layout reconfiguration do constitute an alteration within the meaning of s. 4(1)(h) PDA.

19. The next issue is whether Maxol’s proposals come within the ambit of the exemption under section 4(1)(h) of the 2000 Act, that is,

*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;*

20. In Cronin (Readymix) Ltd v. An Bord Pleanála & ors [2017] IESC 36, the Supreme Court determined that –

*an alteration may involve something that changes the external appearance in a way that is inconsistent with the character of the structure in question, or with the character of neighbouring structures. However, for the purposes of the exemption an “alteration” must not have that effect.*

and

<b>AN BORD PLEANÁLA</b>	
22 MAY 2019	
LTR DATED _____	FROM _____
LDG- _____	
ABP- _____	



*It seems to me that an "improvement", for the purposes of an exemption, must be something that relates to the internal use and function of the structure, resulting in either no externally noticeable difference or an insignificant difference.*

21. In the instant case,

- the only difference between the works permitted (and implemented) under the permission granted by ABP and Maxol's current proposals relate to the interior layout of the forecourt building and Agent confirms that this will result in an insignificant external difference (with slightly larger signage),
- the footprint of the building will be identical to that for which permission was granted by ABP,
- the net retail floor space will be less than that permitted in the ABP permission, being approx.. 129 as compared to 154 square metres,

22. **OPINION:** Having regard to Superior Court's judgments, (including *Cronin Readymix v. ABP*), and to the wording of section 4(1)(h), I am satisfied that the works currently proposed by Maxol Ltd, namely, internal layout reconfiguration at the forecourt building, Wilton Service Station, are "alterations" which come within the ambit of exempted development under the provisions of section 4(1)(g) in respect of the works proposed to be carried out'.

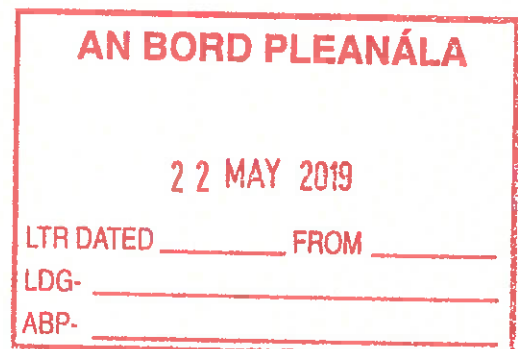
23. As an additional point, I have considered the relevance, if any, of the second category of "development" as defined in the PDA, namely, "material change of use". It is proposed to use the reconfigured internal layout, which is exempted development under s, 4(1)(h), for the same uses for which planning permission was granted in 2010 by An Bord Pleanála. Thus it is clear the requirements of Articles 5(1) or 10 (1), PDR are met. This confirms the exempted development status of the current proposals by Maxol Ltd for their forecourt building at Wilton Service Station.

Nothing further occurs.

Douglas Hyde

Barrister-at Law

8<sup>th</sup> April 2019





## Definition of the Net Retail Floorspace in Forecourt Shops

### Precedents Established by Cork City Council

Cork City Council Ref.18/38027 – Texaco Service Station, Model Farm Road, Cork

On 21/08/2018, MFR Service Station Limited applied for the change of use from permitted retail use to retail use including the sale of alcohol for consumption off the premises (i.e. off-licence use), where the floor area for the off-licence use is 12 sqm and is restricted within the overall unit and is ancillary to primary retail use.

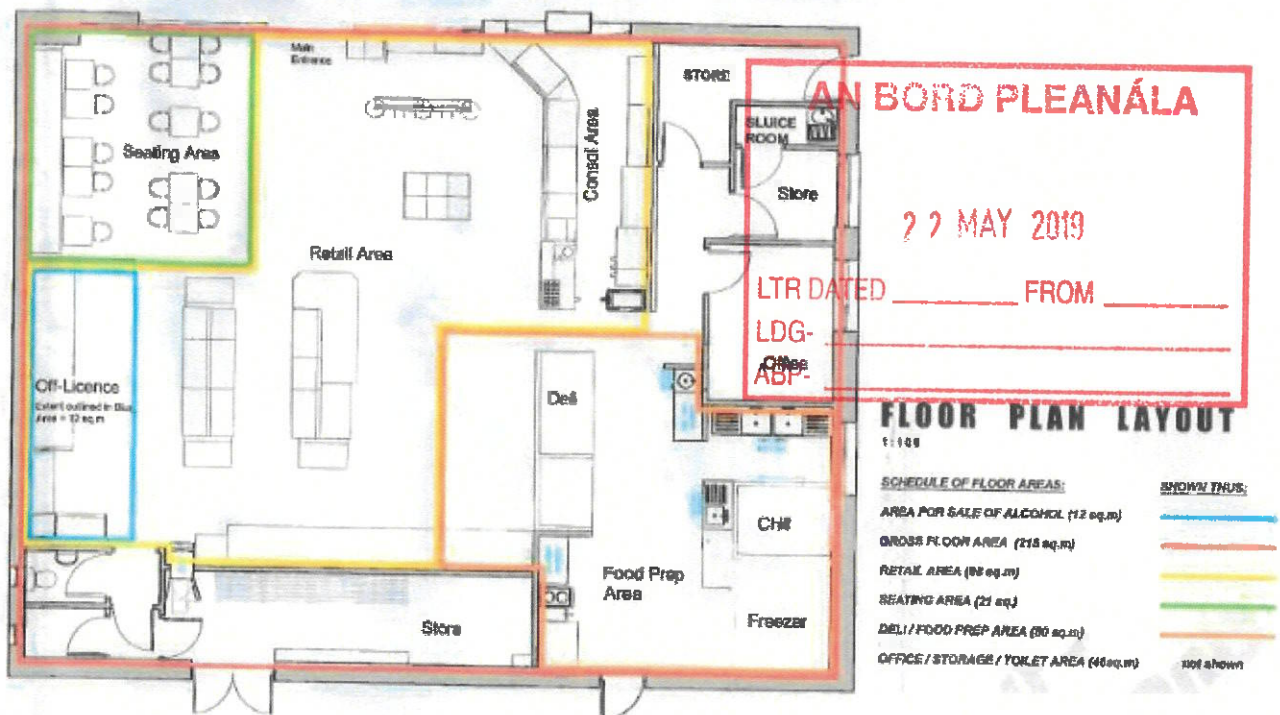


Figure 1: Permitted floorplan

The existing gross floor area of the service station was 215sqm and the application sought an area of 12sqm for use as an off-license, which represents an expansion of uses within the shop. Figure 1 above outlines that this off-license area is included in the overall retail area of 98sqm (i.e. 45% of the total floorspace), which considered in isolation, is below the 100sqm cap on retail floorspace within service stations as outlined in the Retail Planning Guidelines.

The breakdown of floorspace given on the proposed layout plan defines various areas within the shop which are excluded from this calculation of net retail floorspace, including the deli area and the customer space in front of the deli which totals 50sqm (i.e. 23% of the total floorspace).

This interpretation was not disputed by the Assistant Planner and the Senior Executive Planner in their reports, and permission was granted subject to 3 no. conditions.

\*Note the City Council cannot locate the original planning application documents, ref. 99/23730.














Cork City Council Ref. 16/36942 - Applegreen Filling Station, North Ring Road, Ballyvolane

On 24/06/2016, Petrogas Group Ltd. applied for permission for:

- a single storey extension (115.2sq.m) to the existing service station building to accommodate net retail area of 99.8sq.m (including off-licence area of 4.1sq.m), ATM and storage;
- Reconfiguration of the internal floor area within the existing building (156sq.m) to accommodate 2 no. food offers, seating and toilets;
- Alterations to front elevation of existing building and new door ope to south side provision of 7 no. signs on front elevation and side elevation erection of timber fencing to rear of service building proposed new 6.5m totem sign pat demolition of existing canopy and replacement of company logo on existing canopy natural stone finish to be applied to front boundary wall. Installation of new hatch in shop building which will operate nightly between 11pm and 7am for fuel and retail only; and
- All associated site works including landscaping and lined car

	Food Offer 1 - 23.4m <sup>2</sup>
	Food Offer 2 - 18.4m <sup>2</sup>
	Back of House - 78.0m <sup>2</sup>
	Circulation - 16.5m <sup>2</sup>
	Net Retail Area - 99.8m <sup>2</sup> incl. ancillary Off-Licence of 4.1m <sup>2</sup>
	Useable Floor Area (Seating) - 35.1m <sup>2</sup>
	Total Internal Floor Area - 271.2m <sup>2</sup>
	Licensable Off-Licence Area for Legal Purposes
	Denotes New Work

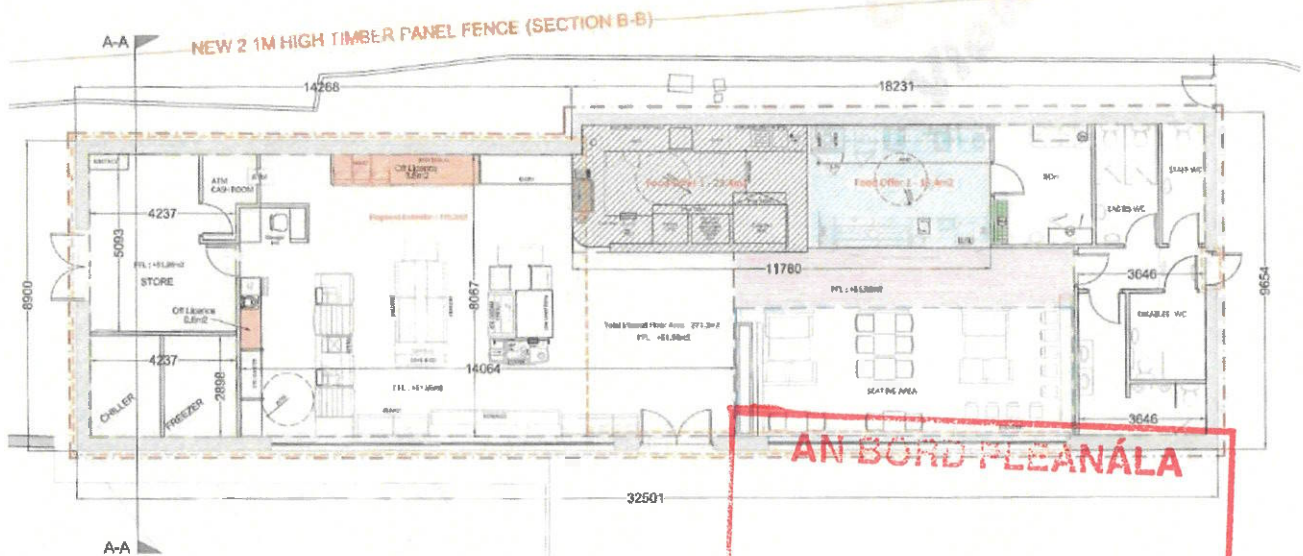


Figure 2: Permitted Floorplan

parking.

The food offers, including counter space and preparation areas were excluded from the calculation of the retail floor area. The Council agreed with this interpretation and granted permission on 18/08/2016 subject to 19 no. conditions including condition 2 which requires the use of the forecourt building to be restricted to retail (99.8sqm), food offer 1 (23.4sqm), food offer 2 (18.4sqm) and associated seating area, as specified on the permitted floorplans.





Cork City Council Ref. 15/36588 - Esso Service Station, Ballyhooly Road, Ballyvolane

On 22/10/2015 Sirio Property Company Limited applied for permission for the redevelopment of the existing Esso service station to include:

- demolition of existing forecourt buildings, canopy, fuel tanks and all associated structures;
- demolition of adjoining car sales associated sheds, boundary walls & structures;
- provision of new two-storey forecourt building with 100sqm retail shop, 98.84sqm café deli seating area & 19.86 sqm food prep area, 89.86 sqm fast food seating area & 86.72sqm food prep area including drive thru facility, offices, stores & toilet facilities;
- sale of specially prepared hot & cold food for consumption both on and off the premises from the café deli and drive thru facilities;
- new forecourt layout including fuel pumps with canopy over, remote fast-fill fuel/LPG pumps, underground & overground fuel tanks, 2 no. jet washes, carwash water pump room and bin compound;
- provision of new tyre bay/solid fuel store building with 117sqm tyre bay including reception office & toilet facilities and 113.49sqm solid fuel store;
- relocation of existing site entrance & exit crossovers;
- revised road layout along site frontage;
- new pedestrian entrance from North Ring Road; and
- ancillary signage, both illuminated and non-illuminated, and all associated site works.

The proposed layout below was provided to the Council outlining the breakdown of floorspace within the building footprint, which is 679.21sqm in total. Notably the café/deli/food prep area (blue) was excluded from the retail floorspace (green) calculation.

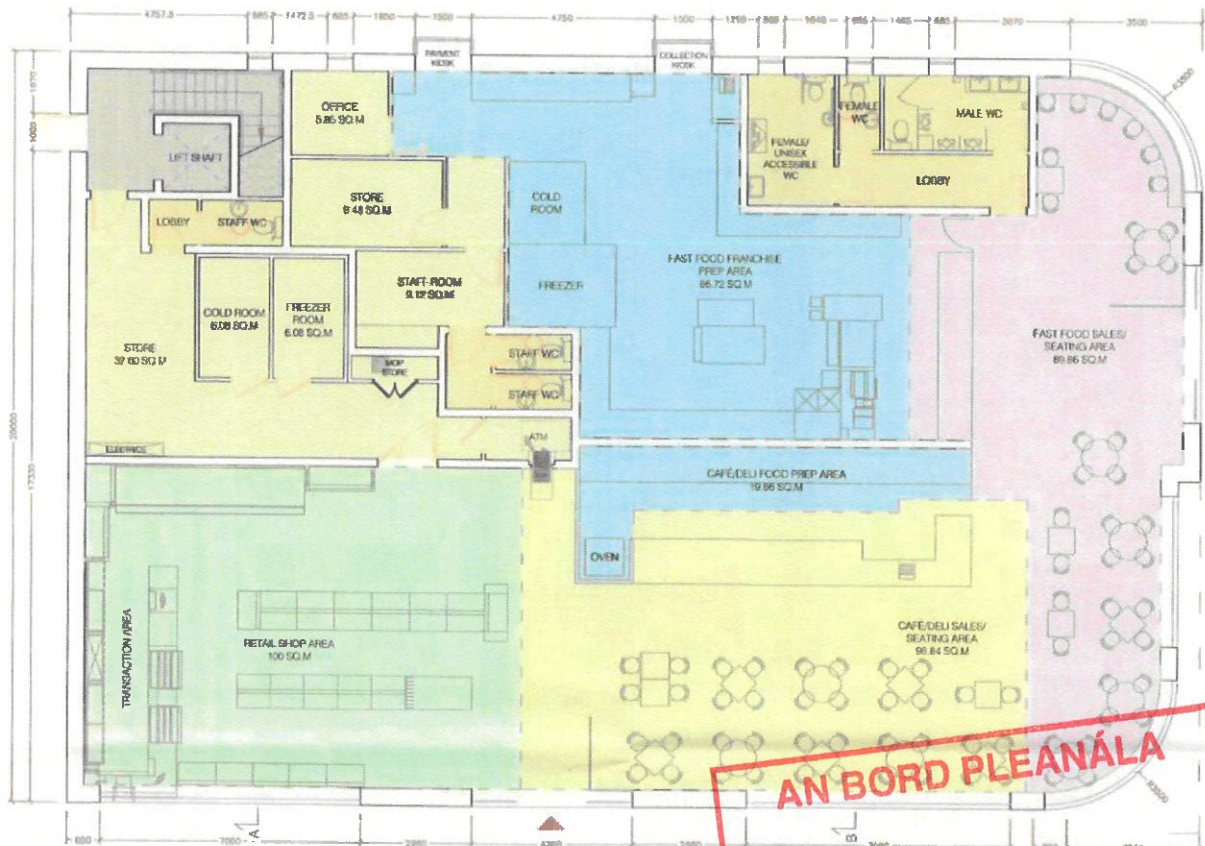


Figure 3: Permitted Floorplan

**AN BORD PLEANÁLA**  
 22 MAY 2019  
 LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_  
 LDG. \_\_\_\_\_  
 ABP. \_\_\_\_\_



In the assessment of this application with regard to its compliance with the Retail Planning Guidelines, it is noted that these guidelines clearly excludes cafes, and as the café/deli are separate from the retail area, same can be considered to be a separate use. Therefore, the development is compliant with the retail guidance.

Permission was granted on the 16<sup>th</sup> December 2015 subject to 12 no. conditions, including Condition 2 which limits the proposed use of the building to 100sqm retail, 98.84sqm café/deli and 89.86sqm fast food restaurant, as per the permitted drawings.

**Cork City Council Ref. 12/35462 - O'Reilly's Filling Station, Watercourse Road, Blackpool**

On 11/12/2012 Aidan & Seamus O' Reilly applied for permission for the extension to the existing forecourt shop comprising an increase to the overall floor area, alterations to the elevations and all associated site works.

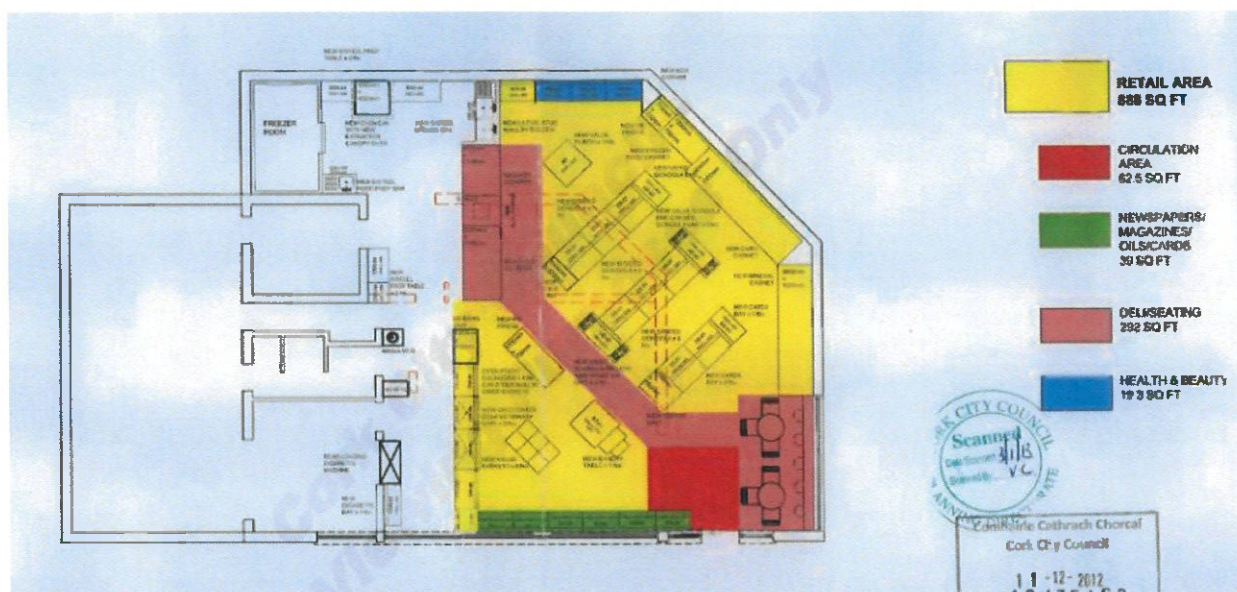


Figure 4: Permitted Floorplan

The total floor area of the building was proposed as 257sqm comprising 136.3sqm ancillary/back of house space, with the remainder (i.e. 120.7sqm) divided as follows 82.5sqm retail, 27sqm deli, 5.8sqm circulation space, 1.8sqm health and beauty, and 3.6sqm newspapers/magazines.

The Area Planner agreed with this approach and it was stated in the report that *"the net retail area falls within the limit for petrol station retail shops as set out in the Retail Planning Guidelines and the City Development Plan, as such I have no objection to the proposed development"*.

Permission was granted on 13/02/2013 subject to 6 no. conditions.

