

The Secretary
An Bord Pleanála
64 Marlborough Street,
Dublin 1

AN BORD PLEANÁLA	
LDG-	<u>048281 - 22</u>
ABP-	_____
28 JAN 2022 <i>ok</i> 27 th January 2022	
Fee: €	<u>220</u> Type: <u>cheque</u>
	<u>express</u>
Time: _____	By: <u>post</u>

Re: Referral of Declaration issued by Limerick City and County Council under Section 5 of the Planning and Development Act 2000 in regard to the use of an established retail use premises at 10 Wickham Street and 25 Upper Gerald Griffin Street, Limerick as a market. Planning Register Reference Number. EC69/21

Dear Sir/Madam,

We act for Eva Clarke of 20 Thomas Street, Limerick and refer on her behalf the Declaration issued by Limerick City and County Council on the 4th January 2022 under Section 5 of the Planning and Development Act, 2000 (as amended)¹. We enclose the required fee of €220 and attach as Appendix 1 a copy of the Declaration.

On the 8th November 2021 we submitted a request to Limerick City and County Council seeking a declaration as to:

1. Whether the current use of the premises at 10, Wickham Street, and 25 Upper Gerald Griffin Street, Limerick as a 'market' on Fridays, Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act.

2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change of use is exempted development under Article 10 of the Planning and Development Regulations, 2000 (as amended)² in so far as it is a change within Class 1 of Part 4 of Schedule 2.

A decision was issued by Limerick City and County Council on the 4th January 2022.

This declaration stated:

The current use of the premises at 10 Wickham Street & 25 Upper Gerald Griffin Street Limerick as a market on Fridays, Saturdays and Sundays does NOT come within the scope of Exempted Development under Section 3(2)(b) and Section 4(1)(h) of the Planning and Development Act (as amended).

¹ Hereafter referred to as 'the Planning Act'

² Hereafter referred to as "the Planning Regulations"

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On review of the planner's report, dated 7th December 2021, that was attached to the Declaration, we do not consider that the planning authority has correctly interpreted the legislation with regard to the meaning of 'development' in accordance with Section 3(2)(b) of the Planning Act. Similarly, the conclusion of the Planning Authority that the works required to facilitate the use of the premises as a 'market' do not come within the scope of the exemptions under Section 4(1)(h) lacks an assured justification of the same. We do not consider that adequate attention to the facts of the case and the corresponding legislation was given. Therefore, in accordance with the provisions of Section 5(3)(a), we now refer the question for decision by An Bord Pleanála. For the purposes of clarity, we have structured this referral into three sections including our response to the following (i) the Planning Authority's conclusion that the change of use to a market constitutes development under Section 3(2)(b) of the Planning Act, and (ii) the conclusion that the works involved do not constitute exempted development under Section 4(1)(h) of the Planning Act. Section (iii) includes further relevant points from our submission, some of which were not addressed in the Planner's report.

(i) Section 3(2)(b) of the Planning Act

The planner's report of 7th December 2021 accepts that, while there is no planning history for this site, the premises was previously used for the sale and hire of light industrial tools (e.g. power washers, compressors, etc.) by the HSS Hire Shop and therefore accepts that the established use for the premises is retail/shop. Article 5(1) of the Planning Regulations 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, 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 launderette or dry cleaners,
- (i) for the reception of goods to be washed, cleaned or repaired. [Emphasis added]

Thus, the planner, in their report on the 7th December 2021, agreed with our submission that the established use of the premises has been for the retail sale of goods to visiting members of the public. Notwithstanding this acknowledgement, the planner then concludes that as the premises is now being used by a number of different stall holders which are setting up daily for the market it must be considered development under Section 3(2)(b) of the Act.

Section 3(2)(b) of the Planning Act states:

Where land becomes used for any of the following purposes –

(i) *the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods...*

The use of the land shall be taken as having materially changed. [Emphasis added]

We consider that the use of Section 3(2)(b) is not appropriate in this context given that the established and subsequently accepted use of the site is retail therefore it has not, and indeed cannot, 'become used' for something which is already the established use as no change has occurred. Goods have always been sold on site, albeit the type of goods now varies.

The Board has set a precedent when using Section 3(2)(b) of the Planning Act to establish whether development has occurred. A referral (Meath County Council Planning Ref: LBS51933, An Bord Pleanála Planning Ref: ABP 305080-09) to the board in 2019 questioned 'whether a caravan park/mobile home park is or is not development'. The inspector's report dated 31st January 2020 concluded:

*That the lands to the rear of Alverno House have not been **in continuous use** as a caravan/mobile home park since the 1960's, as stated, and the lands have not been used for the continuous storage of caravans/mobile homes during this time. I consider, therefore, that the land to rear of Alverno House **has now become used** for the storage, rental and occupation of caravans/mobile homes as caravan/mobile home park and therefore the use of the land has materially changed, in accordance with Section 3(2)(b)(ii) of the Act. [Emphasis added]*

Whereas the land in the above case (Ref: ABP 305080-09) was considered development as the land had not been in continuous use for the storage, rental and occupation of mobile/homes, our client's premises cannot be considered development on the same grounds. As acknowledged by the planner the land was previously used for the sale of goods as the HSS Hire Shop and we submit that the use of the premises as a market is a continuation of the same use, i.e the use of the premises for the sale of goods.

We refute the planner's statement that the change of use to a market with 30 stalls cannot be considered a shop. The planner has not demonstrated clearly how the nature of the current retail activity deviates from the definition of a shop under Article 5(1) of the Planning Regulations. We strongly disagree with the planner's opinion that the number of stalls, in their existing layout and form, could be a factor that would affect this. The current function and layout of the market does not differ from the form and function of a department store which is an established retail use that operates in a similar manner. In a Section 5 declaration issued by Cork City Council (Planning ref: R622/20) the planner concluded that:

the established use of the unit is as a shop

where the subject property was formerly occupied by a Debenhams department store. We would argue that department stores such as Debenhams or Brown Thomas are also "marketplaces" with similar operational characteristics, i.e. the primary retail unit comprises a variety of smaller retailers with their own individual stalls and cash desks where transactions are carried out. The Nespresso stall in Brown Thomas is a prime example of an independent franchise operating in the retail premises but that is not part of the main retail group, as is the case for the vendors in the Wickham Way Market. Similarly, the nature of the retail activity of the previous Plant and Tool Hire would have involved the movement and placing of objects such as industrial power washers and compressors, both in the open yard and internally, for sale and for hire that would not be materially different to the movement and placing of tables internally and in the open yard for stalls displaying goods as is the case for the market.

Notwithstanding the planner's assertion that the use of the premises as a market with 30 no. stalls cannot be considered a 'shop' under Article 5(1) of the Planning Regulations, which we disagree with, we do not consider their assessment of Section 3(2)(b) of the Planning Act to be correct. As outlined above there is no material difference between the established retail use and the existing retail use of the land thus a material change of use cannot have occurred.

(ii) Section 4(1)(h) of the Planning Act

The planner has incorrectly interpreted Section 4(1)(h) of the Planning Act in the planning report dated 7th December 2021 and we have found that there is a significant lack of clarity between the reasoning in their report to refer to Section 4(1)(h) and the final declaration issued to our client. At this juncture it is important to note that Section 4(1)(h) of the Planning Act sets out development that can be considered exempted development for the purposes of the Planning Act:

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 neighbouring structures.

In our submission to the Council dated 8th November 2021 (see Appendix 2) we set out that the works required to facilitate the current use were exempted development under Section 4(1)(h) of the Act. These works included:

- *Alterations and improvements to the signage on the elevations to Wickham Street and Upper Gerald Griffin Street, to identify the premises as "Wickham Way" rather than the "HSS Hire Shop"*
- *Minor alterations and improvements to the counters, displays and storage units within the covered floorspace and open yard to reflect the change in the range of goods and services and the way in which the products are displayed and sold to the customer.*

In the planning report dated 7th December 2021 the planner states that:

There has been an intensification of the use property (sic) with the change of use from a retail unit to a market with up to 30 stalls, thus a material change of use of property under Section 4(1)(h) of the Planning and Development Act 2000

Emphasis is clearly placed on the perceived quantitative change to 'a market with up to 30 stalls', however, the planner's report does not establish how same, being works that affect only the interior of the structure, would

'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'.

Under Section 4(1)(h) of the Planning Act.

The Planning Authority have not clarified what works carried out as specified in our submission cannot be considered as exempted development under Section 4(1)(h) of the Planning Act as they affect the external appearance of the structure. Instead, the Planner makes the assertion that these works constitute an intensification of use and thus a material change of use under Section 4(1)(h). We would argue that Section 4 of the Planning Act, which sets out exempted development for the purposes of the Planning Act is not the correct mechanism in the legislation to use to establish whether a material change of use, and thus development, has occurred.

There is a significant lack of clarity with regard the Planning Authority's interpretation of the Planning Act and we strongly believe that the reasoning for the Planning Authority's decision is unfounded and based on a misguided use of the legislation with regard to Section 3(2)(b) and Section 4(1)(h) of the Planning Act.

(iii) Further Relevant Information

The planner's report dated 7th December 2021 claims that a change of use to a market with 30 stalls cannot be considered a shop under Article 5(1) of the Planning Regulations. However, the planner makes no distinction between the perceived difference between the meaning of a shop and a market with 30 stalls, with the exception of stating that there are now a number of stall holders using the premises and that this comprises an intensification of use. We do not agree with the planner that the change of use from a Plant and Tool Hire shop that operated for 55hrs 30 mins per week (Monday to Friday from 7:30 to 17:30 and on Saturday from 7:30 to 13:00) to a market operating for 19hrs 30 mins per week (Friday 12:00 to 12:30, Saturday 9:00 to 14:00 and Sunday 11:00 to 16:00) is an intensification of use. As there is no definition of a market within the legislation, we refer again to case law to establish whether the test of "materiality" in regard to a change or intensification of use has occurred (Barron J. in *Mahon v Dublin Corporation* and *Galway County Council v Lackagh Rock Ltd.*). These cases established that there are two criteria when determining this test:

- (a) whether the essential character of the use has changed; and
- (b) whether the change of use has had any effects on the environment of the site.

In our submission (see Appendix 2) we outlined that:

(a) the essential character of the established use of the premises is that it is used for many decades for the sale of products or retail services to customers in the Limerick area. Further to our original submission we would add that, as a plant and tool hire shop the open yard and indoor space would have been used for the placing of objects that were moved daily for sale/hire similar to the use and layout of tables for stalls that occurs within the market. It can therefore be concluded that there has been no change to the essential nature of the retail activity.

(b) it is a less intensive form of retailing as it involves a reduction in the vehicular traffic generated generally but in particular during peak hours, it is less likely to be a single purpose trip and is more compatible with sustainable modes of transport than the previous Plant and Tool Hire retail use. Further to our original submission we would note that in a planning application for the temporary change of use from an industrial unit to an indoor market (Dublin City Council Planning Ref: 3662/11) a similar methodology was established by the local authority. In the associated planner's report it was concluded that as the market was occurring outside of peak hours it would not have an undue adverse impact on the residential and visual amenity of the area. Based on this precedent we would argue that the planner's report did not fully consider the details of the case included in our submission.

The change of use in this instance cannot be considered "material" on the grounds of intensification once tested against the criteria set out in case law and established methodology of similar cases. We ask that the Board considers this referral on its merits, noting the content of the original submission made to Limerick City and County Council (Appendix 2) as well as the valid points made above.

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

Yours Sincerely,

Brian McCutcheon Brian McCutcheon

McCutcheon Halley Planning Consultants

Appendices

Appendix 1: Copy of Section 5 Declaration from Limerick City and County Council issued on 4th January 2022

Appendix 2: Copy of Section 5 Declaration Request by McCutcheon Halley originally sent to Limerick City and County Council

Appendix 1: Copy of Section 5 Declaration from Limerick City and County Council issued on 4th January 2022

PLANNING & DEVELOPMENT ACTS 2000 (as amended)

PLANNING & DEVELOPMENT REGULATIONS, 2001 (as amended)

SECTION 5 – DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

DECLARATION NO.

EC69/21

Name and Address of Applicant:

Eva Clarke, 20 Thomas Street, Limerick.

Agent:

Brian McCutcheon, McCutcheon Halley Planning
Consultants, 6 Joyce House, Barrack Square, Ballincollig,
Cork.

WHEREAS a question has arisen as to

1. Whether the current use of the premises at 10 Wickham Street & 25 Upper Gerald Griffin Street Limerick as a market on Fridays Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act ;and
2. In the event that the Planning Authority decides that, the development in form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations 2000 (as amended) in so far as it is a change within Class 1 of Part 4 of Schedule 2 is or is not Development or is or is not Exempted Development. The works as described on the plans submitted with the application on the 08th November 2021

AND WHEREAS the Planning Authority has concluded that the the current use of the premises at 10 Wickham Street & 25 Upper Gerald Griffin Street Limerick as a market on Fridays Saturdays and Sundays does NOT come within the scope of Exempted Development under Section 3(2)(b) and Section 4(1)(h) of the Planning and Development Acts 200 (as amended)

NOW THEREFORE the Planning Authority in exercise of the powers conferred on it by Section 5(2) (a) of the Planning and Development Act 2000 (as amended) hereby decides that the said development as described above is Development and is NOT Exempt Development.

Signed on behalf of the said Council


Date: 4/1/2022

NOTE: A Declaration on Development or Exemption issued by Limerick City & County Council may be referred to An Bord Pleanála on payment of €220 for review within 4 weeks after the issuing of the declaration.



Comhairle Cathrach
& Contae **Luimnigh**

Limerick City
& County Council

Seirbhísí Pleanála agus Comhshaoil,
Comhairle Cathrach agus Contae Luimnigh,
Tuar an Dail,
Luimneach

Planning and Environmental Services,
Limerick City and County Council,
Dooradoyle,
Limerick

PLANNING & ENVIRONMENTAL SERVICES

EC69/21/SMn/CL

07/Dec/2021

EIRCODE V94 WV78

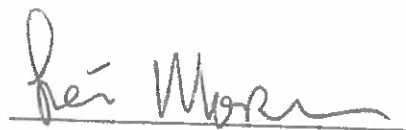
t: +353 (0) 61 556 000
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Donogh O' Donoghue
A/Senior Executive Planner

RE: **Declaration under Section 5**

Attached please find a report in connection with the above and I recommend that a Declaration be issued.

Signed:



Sean Moran
Development Inspector.

Report on application under Section 5 of the Planning and Development Act 2000 (as amended)

Reference no.	EC69/21
Name and Address of Applicant:	Eva Clarke, 20 Thomas Street, Limerick.
Agent:	Brian McCutcheon, McCutcheon Halley Planning Consultants, 6, Joyce House, Barrack Square, Ballincollig, Cork.
Location:	10 Wickham Street & 25 Upper Gerald Griffin Street Limerick

WHEREAS a question has arisen as to

1. Whether the current use of the premises at 10 Wickham Street & 25 Upper Gerald Griffin Street Limerick as a market on Fridays Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act ;and
2. In the event that the Planning Authority decides that, the development in form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations 2000 (as amended) in so far as it is a change within Class 1 of Part 4 of Schedule 2.

The premises is now used as a market place and is referred to as Wickham Way in the application. The applicant has not indicated the number of stalls in operation in the building.

There was previously use as a plant hire shop, with a shop at the 25 Gerald Griffin St. and a warehouse door on Wickham St. (see google map photos). It appears there is an open yard to rear of shop building. There is no planning history at this location; I would accept HSS Hire Shop previously used the premises for the sale and hire of light industrial tools (e.g. Power washers, compressors etc.) therefore I would accept the established use is retail/shop.

On inspection of premises on the 20th November 2021 there was 30 no. stalls in operation at the premises, which included 3 food trucks, and 1 coffee stall. It appears that the traders turn up on the morning of market and set up their stalls.

The applicant opinion is the matter is exempt and has included the following opinions, in summary

- That the change in the retail concept is not a material change as defined by Section 3 of the planning Act.
- That any alterations or improvements to the elevations and the internal layout were exempt under Section 4 (1)(h) of the Act.
- The proposed change of use is not material and is therefore not “development” as defined by Section 3 (1) of the Planning Act.
- The change of use could not be considered to have a material effect on the area as it would enhance ‘retail vitality’ in accordance with planning authority’s retail strategy for this part of city.
- Under Article 10 the applicant considers it is exempt and conclude the following

- (a) The manner in which goods and services are displayed and offered for sale at Wickham Way falls within the general description of shop in Article 5(1).
- (b) All activities on the premises either fall within the definition of a retail use within the description of a retail use or are subsidiary or incidental to retail use; and
- (c) As both the the existing and the former use of the premises fall within the description of "shop" in Article 5(1), the change of use is exempted under

With regard to Article 5 (1) which defines a shop as a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting 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,

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 for consumption off the premises, except under paragraph (d) above, or any use to which class 2 or 3

While accepting there was a shop on the premises I am not satisfied that the change of use to a market with 30 stalls can be still considered to be a shop.

I consider the use has been intensified and must be considered a material change of use from a shop to a market.

Also Under Section 3(2)(b) of the Act – where land becomes used for any of the following purposes (1) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods, the use of the land shall be taken as having materially changed.

As the premises is now being used by a number of different stall holders which are setting up daily for the market it must be considered development under Section 3(2)(b).

Also I am opinion that there has been an intensification of the use property with the change of use from a retail unit to a market with up to 30 stalls, thus a material change of use of property under Section 4(1)(h) of the Planning and Development Act 2000

I have considered this question and I have had regard particularly to –

- (a) Section 2, 3 & 4(1)(h) of the Planning and Development Act 2000 (as amended).
- (b) Article 5 of the Planning & Development Act 2000 (as amended)
- (c) Plans & particulars submitted with the application on 8th November 2021.

RECOMMENDATIONS:

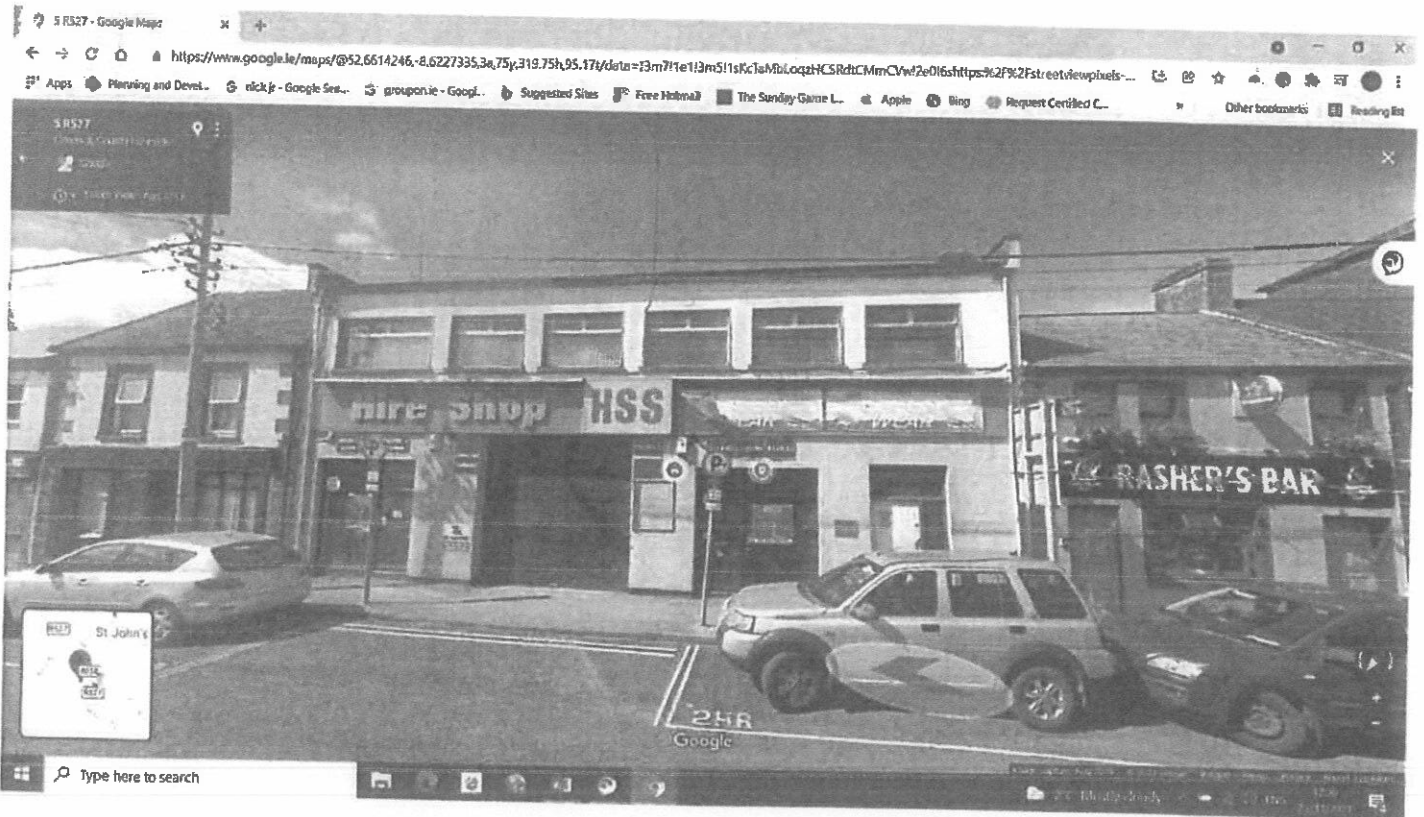
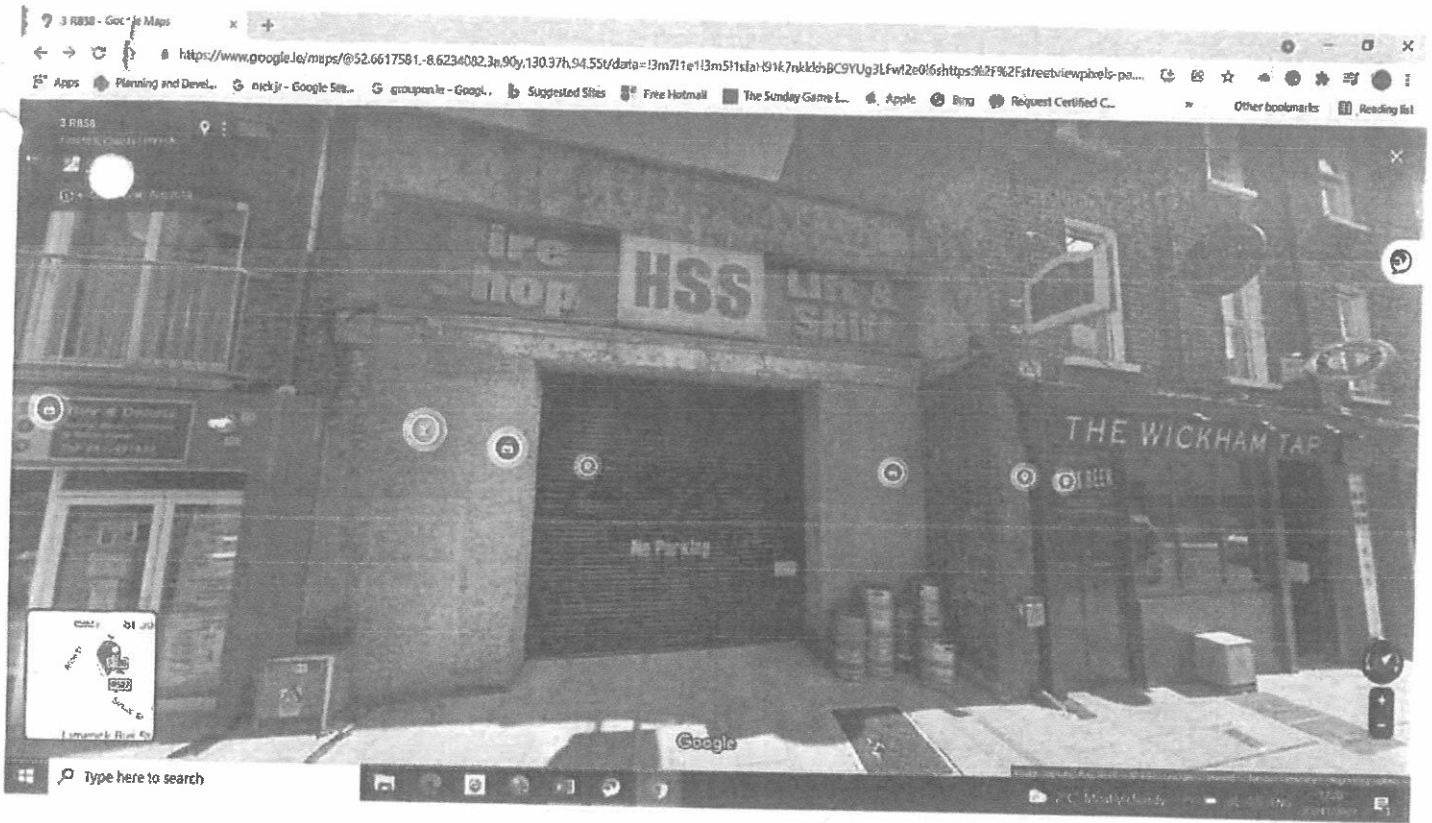
I therefore consider the said change of use to be development and not exempt development under Section 3(2)(b) and Section 4(1)(h) of the Planning and Development Act 2000 due to there being a material change of use by the intensification of single unit to a market with multiple units including for units for food.

Signed: _____



Seán Moran

Development Inspector.





LIMERICK CITY & COUNTY COUNCIL

APPROVED OFFICER'S ORDER

SECTION 5 – DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

File Ref No. EC69/21

No. D.C. 611/21

SUBJECT: Declaration under Section 5.
Planning and Development Act 2000 as amended
Planning and Development Regulations 2001 as amended

RE: Whether the current use of the premises at 10 Wickham Street & 25 Upper Gerald Griffin Street Limerick as a market on Fridays Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act ;and In the event that the Planning Authority decides that, the development in form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations 2000 (as amended) in so far as it is a change within Class 1 of Part 4 of Schedule 2.

ORDER: Whereas by Chief Executive's Order No. CE/2021/145 dated 07th September 2021, Dr. Pat Daly, Chief Executive, Limerick City & County Council did, pursuant to the powers conferred on him by Section 154 of the Local Government Act, 2001, delegate unto Donogh O' Donoghue, Senior Executive Planner the functions within the meaning of the Local Government Act, 2001 as set out therein.
Now therefore pursuant to the delegation of the functions aforesaid, I, Donogh O' Donoghue, Senior Executive Planner, having considered the report and recommendation of Mr. Sean Moran, Development Inspector dated 07/Dec/2021, hereby order that a Declaration under Section 5 of the Planning and Development Act 2000 as amended be issued to Eva Clarke, C/o Brian McCutcheon, McCutcheon Halley Planning Consultants, 6 Joyce House, Barrack Square, Ballincollig, Cork to state that the works as described above **is Development and is NOT Exempt Development.**

Signed



SENIOR EXECUTIVE PLANNER, PLANNING & ENVIRONMENTAL SERVICES

Date

22/12/21

Certified to be a true copy of Approved Officer's Order, Planning & Development Order No. D.C. _____ dated _____, pursuant to Section 151(7) of the Local Government Act 2001

Signed:



SENIOR EXECUTIVE PLANNER, PLANNING & ENVIRONMENTAL SERVICES

PLANNING & ENVIRONMENTAL SERVICES

11/11/2021

Brian McCutcheon
McCutcheon Halley
6 Joyce House
Barrack Square
Ballincollig
County Cork
P31 YX97

Ref: 1.) DC-328-21
2.) Section 5, Application Wickham way

Dear Sir,

I wish to acknowledge receipt of your letter dated 08/11/2021. The content of which is noted and will be brought to the attention of Development Inspector assigned to case DC-328-21.

I further wish to acknowledge receipt of a Section 5 application in the name of applicant Eva Clarke at development address 10 Wickham Street, and 25, Upper Gerald Griffin Street and the fee of €80.

Yours faithfully,



Eugene Crimmins
SO Planning & Environmental Services

Director of Service
Planning and Environmental Services
Limerick City and County Council
Dooradoyle
Limerick V94 WV78

08 November 2021

Re: Planning Reference No DC-328-21. Retail Use of Premises at "Wickham Way", 10, Wickham Street and 25, Upper Gerald Griffin Street Limerick

Dear Sir/Madam,

We act for Eva Clarke of 20, Thomas Street, Limerick and refer to the Warning Letter which was issued on 13/10/2021 under Planning Ref. No. DC-328-21 in regard to our client's premises at 10, Wickham Street, and 25, Upper Gerald Griffin Street, Limerick which is shown on the site location map which we have attached as Appendix 1. The Warning Letter queries whether an unauthorised development may have carried in so far as "a market is operating from the premises for which there is no record of a Planning Permission being granted".

As there is no reference in the Warning letter to the carrying out of works, we assume that the query in regard to alleged unauthorised development is confined to the planning status of the current use of the premises as a "market" on Fridays, Saturdays and Sundays. It has been established in case law that planning permission is not required for the continuation of a permitted or long-established use or for the making of a non-material change to an established use. We therefore propose to clarify the authorised nature of the existing use by making a formal request for a declaration under Section 5 of the Planning and Development Act, 2000 (as amended)¹. We attach a copy of the Section 5 application form and enclose a cheque for €80.

The question on which the Declaration is sought is in two parts:

1. Whether the current use of the premises at 10, Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a "market" on Fridays, Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act.
2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations, 2000 (as amended)² in so far as it is a change within Class 1 of Part 4 of Schedule 2.

¹ Hereafter referred to as "the Planning Act"

² Hereafter referred to as "the Planning Regulations"

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1. The Nature of the Change of Use

Prior to the rebranding of the premises as "Wickham Way" the buildings and the open yard on the site were used by HSS as a retail outlet for the sale and hire of a wide range of tools and hardware products. The premises are currently used for the sale of arts crafts and food products from a number of different stalls with shared storage and services in an arrangement which is colloquially referred to as a "market".

The only works required to facilitate the current use were:

- the alterations and improvements to the signage on the elevations to Wickham Street and Upper Gerald Griffin Street, which to identify the premises as "Wickham Way" rather than the "HSS Hire Shop"; and
- minor alterations and improvements to the counters, displays and storage units within the covered floorspace and open yard to reflect the change in the range of goods and services and the way in which the products are displayed and sold to the customers.

In our opinion the change in the retail concept is not a "material" change of use as defined by Section 3 of the Planning Act. We would also argue that any alterations or improvements to the elevations and internal layout were exempt under Section 4(1)(h) of the Act.

2. The Materiality of the Change of use

The test of "materiality" in regard to a change or intensification of use is addressed in the judgements of Barron J. in *Mahon v Dublin Corporation* and *Galway County Council v Lackagh Rock Ltd*. These cases established that there are two criteria:

- (a) whether the essential character of the use has changed; and
- (b) whether the change of use has had any effects on the environment of the site.

2.1 The Essential Character of the Use

In the case of *Mahon v Dublin Corporation* 1996 [WJSC-HC 4138], the Court found that the planning authority could not have envisaged, when permission was granted for a cluster of family dwelling houses, that some of the units would be rented out to tourists. The Court concluded that a house that is occupied by the same family for several years has a different essential character to a house that is rented out to rugby fans for an international weekend.

This principle does not apply to the current case. The essential character of the established use of the premises is that it is used for many decades for the sale of products or retail services to customers in the Limerick area. While there have been alterations and improvements to the internal layout and the range of the products and services offered, there has been no change in the essential nature of the retail activity.

2.2 The Effects on the Environment

The case of *Galway CC v Lackagh Rock Ltd*. 1985 [IR120 (HC)] related to a quarry that had been in operation since 1950 and the question raised was whether the current operations were different in nature and intensity to what had existed in 1964. The Court concluded:

"that there was no material change of use as there was no evidence to indicate that the planning authority would have taken any different matters into consideration in determining an application for planning permission made at the time that this case was before the courts compared with any such application for permission before the appointed day To test whether or not the uses are materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If these matters are materially different, then the nature of the use must be materially different."

The Court found that there is an onus on the planning authority to show that there are additional effects on the environment of the site arising from any change or intensification of use. The change of use would only be "material" if:

- (a) there was a significant increase in physical and measurable effects such as traffic, air or noise emissions or hours of operation, and
- (b) there was limited capacity in the receiving environment to cope with any additional effects.

In this case there has been a significant reduction in the hours of operation as HSS operated 55hrs 30mins per week (Monday to Friday from 07.30 to 17.30 and on Saturday from 07.30 to 13.00) while Wickham Way is only open for 19hrs 30 mins per week (Friday 12.00 to 21.30, Saturday 09.00 to 14.00 and Sunday 11.00 to 16.00). In our opinion the change in the hours of operation has resulted in a major reduction in the traffic effects which is due not only to the 65% reduction in the opening hours, but also the fact that it avoids most of the ten traffic peaks in the week.

Another beneficial effect of the change of use is the fact that a visit to Wickham Way is less likely to be a single purpose trip as customers are more likely to be visiting a number of shops in the area or combining shopping with entertainment or dining out. They would also be more likely to travel by public transport than someone who is picking up power tools or hardware and in so far as they are using private cars, they are less likely to be travelling alone.

In summary the current use by Wickham Way would not involve any change in the established retail character of the premises. It is also a less intensive form of retailing as it involves a reduction in the vehicular traffic generated during peak hours. Having regard to the case law referred to above, the proposed change of use is not material and is therefore not "development" as defined by Section 3(1) of the Planning Act.

2.3 Consistency with the Zoning Objectives for the City Centre

The premises are zoned in the draft City and County Plan as part of the City Centre where the objective is:

To protect, consolidate and facilitate the development of the City Centre commercial, retail, educational, leisure, residential, social and community uses and facilities.

Section 4.6 of the Draft City Plan sets out the retail strategy for the City Centre. Although the retail sector is essential to the vitality of Limerick City Centre, it has been in decline in recent decades, with established retailers migrating to the purpose built out of town shopping centres and increasingly to an online platform. The strategy is to improve the range and quality of shopping on offer and create an enhanced customer experience of visiting the City Centre. The core retail area comprises Thomas Street/Bedford Row, William Street/Sarsfield Street, O'Connell Street/Patrick Street, Cruises Street, Roches Street, Henry Street and Catherine Street. It is an objective of the Council to improve the range and quality of shopping by supporting a contemporary shopping offer with leisure food, drink and entertainment at the heart of the experience.

Paragraph 4.6.2 of the draft City and County Plan highlights the fact that:

...the closure of businesses in the City Centre has resulted in a lack of maintenance of some vacant buildings, with urban decay evident on parts of some streets.... It is vital to ensure that the City Centre is suitable to attract and retain retail and other businesses. A sense of place and high quality leisure market is required in the first instance, to allow the development of a more complementary mix of retail uses to follow, including boutique clothing, tech showrooms, local agri-food produce and creative arts and crafts shops.

Objective ECON O1 (c) of the Draft Plan therefore seeks to:

Enhance the vitality of the City Centre through a mixture of uses, reuse of vacant units, increased residential population and revitalisation....Development shall be designed so as to enhance the public realm and creation of a sense of place.

The previous use of this premises highlights the problems identified in the draft Plan in so far as the HSS Hire Shop has migrated from the City Centre to the Childers Road Enterprise Park. At the same time the current use is a good example of the solution promoted by the Draft Plan as the replacement of the former HSS store with the Wickham Way "market" has:

- ensured that a vacant retail property was brought quickly back into use;
- improved the range and quality of shopping by providing leisure, food and entertainment as part of the shopping experience;
- enhanced the public realm and sense of place by effectively extending the footfall along Thomas Street through the site as far as Upper Gerald Griffin Street.

In our opinion the change of use could not be considered to have a material effect on the area as it would be enhance 'retail vitality' in accordance with the planning authority's retail strategy for this part of the City.

3. Exempted Change of Use under Article 10

Without prejudice to the argument put forward in the previous section it should be noted that even if the change of use was considered to be "material" under Section 3 of the Planning Act, it may still be considered to be exempted under Articles 10 of the Planning Regulations. Article 10(1) states 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.*

We have already noted in regard to item (a) above that any works carried out to facilitate the change of use were exempt under Section 4(1)(h) of the Planning Act. In relation to items (b) and (c) we have been advised that the current use does not contravene any planning condition, or a use specified in any previous

permission relating to the site. Finally, the current use complies with item (d) as the retail use by HSS was a continuation of the long-established retail use of the property by Sean Cronin & Sons and Dan Twomey Ltd. extending back before commencement of the Planning Act.

Article 5(1) of the Planning Regulations 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
- (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.

Article 10 (2)(a) of the Regulations further states that:

"A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use."

We therefore conclude that:

- (a) the manner in which goods and services are displayed and offered for sale at Wickham Way falls within the general description of "shop" in Article 5(1);
- (b) all activities on the premises either fall within the definition of a retail use or are subsidiary or incidental to retail use; and
- (c) as both the existing and the former use of the premises fall within the description of "shop" in Article 5(1), the change of use is exempt under Article 10.

4. Legal Issues Raised by The Trustees of the Milk Market

The Warning Letter issued by Limerick City and County Council on 13/10/2021 under Section 152(1) of the Planning Act states that it had come to the attention of the Council that our client may be carrying out an unauthorised development namely "the operating of a market". The planning register indicates that the Council issued the Warning Letter in response to a representation received on 15/09/2021. We assume that the representation was from the Limerick Market Trustees as, shortly before that date, the Trustees had formally notified our client that:

"The Market Trustees operate a market and have done so under the Market Trustees legislation since 1852. Under that legislation the Limerick Market Trustees have the sole authority for running markets in Limerick other than the market run by the Limerick City & County Council under the Casual Trading Act. Indeed it is perfectly clear from the legislation that no other market should be set up in the City".

If the Warning Letter was indeed issued in response to the specific concerns which have been raised by the Market Trustees, the following legal issues will arise for the planning authority:

1. A legal distinction should be made between the role of Limerick City and County Council as a planning authority under the Planning Act and the role of certain elected members of the Council as trustees of the Milk Market under the Limerick Markets Acts 1852 to 1992. As these are two entirely separate pieces of legislation, it would not be appropriate for the Council, acting as planning authority, to take on the role of enforcing compliance with the Limerick Markets Acts on behalf of the Market Trustees.
2. The Council should consider seeking a formal legal opinion on the planning implications of the Limerick Markets Acts 1852 to 1992 given the assertion made by the Trustees that *"it is perfectly clear from the legislation that no other market should be set up in the City"*. This opinion should address not just the implications for our client's current use of her property but also the Council's right to implement the retail strategy for the City Centre which could be undermined by the anti-competitive position adopted by the Trustees.

The first issue should be addressed in the context of Section 7.8 of the Development Management Guidelines, 2007 which advises that:

"It is inappropriate, however, in development management, to deal with matters which are the subject of other controls unless there are particular circumstances e.g. the matters are relevant to proper planning and sustainable development and there is good reason to believe that they cannot be dealt with effectively by other means.

The existence of a planning condition, or its omission, will not free a developer from his or her responsibilities under other codes and it is entirely wrong to use the development management process to attempt to force a developer to apply for other some licence, approval, consent, etc."

This advice is based on Section 34(13) of the Planning Act which states that a person shall not be entitled solely by reason of a permission under this section to carry out any development. In our opinion, any decision to issue a Warning Letter under Section 152 or a Declaration under Section 5 should be confined to the jurisdiction of the planning authority under the Planning Act.

In regard to the interpretation of the Limerick Markets Acts 1852 to 1992 we challenge the position adopted by the Market Trustees that the Limerick Markets Act, 1852 imposes a blanket restriction that *"no markets other than the markets to be provided and established under this Act shall be held"* and that this applies to the current use of our client's private property. The quotation used by the Trustees is taken from Section 32 which provides that:

"32. The markets to be provided and established under this Act shall be held within the municipal boundaries of the said Borough, and subject to the provisions of this Act no market other than the markets to be provided and established under this Act shall be held within the said boundary and within an area of one mile therefrom". (emphasis added)

The clause on which the Trustees rely must therefore be interpreted in the context of the other provisions of the Act including the preamble thereto. Regard should also be had to the Supreme Court's interpretation of Section 32 of the 1852 Act in *Michael Bridgman v The Mayor Alderman and Burgesses of Limerick* [2001] IESC 51 which found that:

"In respect of the said Act the phrase "no market" alone is used and the statutory context makes abundantly clear that it was a market in agricultural produce that was contemplated. That being so, there is no reason to suppose that the legislature intended to prohibit any other form of market in the Borough of Limerick." (emphasis added)

It is important to note that the specific issue raised in the Bridgeman case was whether the 1852 Act prevented the establishment by the local authority of new casual trading areas within the public domain of the City. As a result, the Court did not explicitly address the implications of the 1852 Act for the operation of a market on private property. This is addressed in Section 44 of the 1852 Act which clarifies that the prohibition of new markets under Section 32 of the Act does not apply to private property:

44. After the said market places shall be open for public use every person (except an auctioneer selling by auction in any place other than the public street, or a licensed hawker, or a person hawking or selling eggs or fruits, or a person bringing by water carriage any corn, grain, pulses, or seeds) who shall sell or expose for sale in any place within the limits of this Act other than in some one of the said markets places or of such private legal markets, or in his own dwellinghouse shop, warehouse, yard or store, any cattle or livestock, or any corn or anything whatever in respect of which rents or tolls are by this Act authorised to be taken shall for every such offence be liable to a penalty not exceeding 40 shillings to be recovered in the same manner as penalties are recoverable under the Markets and Fairs Clauses Act, 1847 (emphasis added).

This indicates there is no legal basis for the complaint made by the Trustees that the retail use of our client's private property contravenes the provisions of Section 32 of the Limerick Markets Act, 1852.

We acknowledge the right of the planning authority under Section 152 of the Planning Act to issue a Warning Letter on receipt of a written complaint and before a detailed investigation of the case has been carried out. However, Section 152(1) of the Act also requires the planning authority to make a preliminary assessment as to whether the representation received is vexatious, frivolous or without substance or foundation. In our opinion the position adopted by the Market Trustees could be considered to be frivolous and vexatious in so far as it:

- (a) incorrectly applies Section 32 of the Limerick Markets Act 1852 to a private retail premises;
- (b) ignores the relevant case law;
- (c) invites the planning authority to exceed its jurisdiction by acting as enforcement agency for the Market Trustees;
- (d) seeks to use planning enforcement to inhibit commercial competition.

5. Rationale for the Section 5 Request

In view of the legal position adopted by the Market Trustees we believe that it would be appropriate that the planning status of our client's site be formally affirmed within the scope of the Planning Acts and Regulations, having due regard to:

- (a) the proper planning and sustainable development of the city centre;
- (b) the retail strategy set out in the City Development Plan;
- (c) the policy on retail competition in the Retail Planning Guidelines; and
- (d) the long-established retail use of the property.

We therefore formally request that the following Declaration be issued by the planning authority under Section 5 of the Planning and Development Act:

WHEREAS questions have arisen as to:

1. Whether the current use of the premises at 10, Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a "market" on Fridays Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act; and
2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations, 2000 (as amended) in so far as it is a change within Class 1 of Part 4 of Schedule 2.

AND WHEREAS Eva Clarke of 20, Thomas Street, Limerick requested a declaration on these questions from Limerick City and County Council;

AND WHEREAS Limerick City and County Council, 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 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) Article 5 of the Planning and Development Regulations, 2001 as amended;
- (e) Article 10 of the Planning and Development Regulations, 2001 as amended;
- (f) the planning history of the site;

AND WHEREAS Limerick City and County Council has concluded that:

- (a) the alterations and improvements to the external signage on the street elevations and to the layout of the internal floorspace and yards would constitute "works" that are "development" under Section 3 of the Planning and Development Act, as amended;
- (b) the alterations and improvements to the signage on the elevations to 10, Wickham Street and 25, Upper Gerald Griffin Street which identify the premises as "Wickham Way" rather than the "HSS Hire Shop", come within the scope of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, being works 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 and are, therefore, exempted development;
- (c) the alterations and improvements to the internal layout of the covered floorspace and open yard, which have been made to reflect the change in the range of goods and services and the way in which they are displayed and sold to the customers, come within the scope of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, being works which affect only the interior of the structure and are, therefore, exempted development;

(c) the change in the range of goods and in the way they are displayed and sold to customers, would not give rise to increased traffic movements or any other activity that would have material consequences in terms of the proper planning and sustainable development of the area; would not, therefore constitute a material change of the established retail use of the premises; and so would not be 'development' as defined under Section 3 of the Planning Act;

(d) apart from the fact that it is not 'development', the change of use from use as the "HSS Hire Shop" to use as the "Wickham Way Market" is a change of use within Class 1 (Use as a Shop as defined by Article 5(1)) in Part 4 of Schedule 2 of the Planning and Development Regulations, 2001 and complies with the restrictions on exempted changes of use under Article 10(1).

NOW THEREFORE Limerick City and County Council, in exercise of the powers conferred on it by section 5 (2)(a) of the 2000 Act, hereby decides that operation of the "market" known as Wickham Way on the site of the former HSS Hire Shop at 10 Wickham Street and 24 Upper Gerald Griffin Street, Limerick is either not development or is exempted development.

Yours sincerely,

Brian McCutcheon

Brian McCutcheon
McCutcheon Halley

Appendix 1 Site Location Map



F7



LIMERICK CITY & COUNTY COUNCIL
PLANNING AND ENVIRONMENTAL SERVICES
SECTION 5 APPLICATION

DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

Applicant's Name: Eva Clarke

Applicant's Address: 20 Thomas Street

Limerick

Telephone No. _____

Name of Agent (if any): Brian McCutcheon

Address: McCutcheon Halley Planning Consultants

6, Joyce House, Barrack Square

Ballincollig Cork

Telephone No. 087 997 1164

Address for Correspondence:

McCutcheon Halley Planning Consultants

6, Joyce House, Barrack Square

Ballincollig Cork

Appendix 2 Site layout Plan



SITE LAYOUT MAP
SCALE — 1/500
DATE — MARCH 1998

Location of Proposed development:

10 Wickham Street & 25 Upper Gerald Griffin Street

Limerick

Description of Proposed development:

Use of former HSS Hire Shop as a "market" for sale of Food, Arts and
Crafts on Fridays, Saturdays and Sundays

**Is this a Protected Structure or within the curtilage of a Protected Structure.
YES/NO**

Applicant's interest in site: Owner

List of plans, drawings, etc. submitted with this application:

Site Location Map

Site Layout Plan

Have any previous extensions/structures been erected at this location NO

If Yes please provide floor areas of all existing structures:

Signature of Applicant (or Agent)

Brian McCutcheon



NOTES: Application must be accompanied by:

- (a) Fee of €80
- (b) Site location map
- (c) Site layout plan
- (d) Dimensioned plans and elevations of the structure and any existing structures.
- (e) Where the declaration is in respect of a farm building, a layout identifying the use of each existing building together with floor area of each building.

Application to be forwarded to:

Limerick City & County Council,
Planning and Environmental Services,
City & County Council Offices,
Doonadoyle Road,
Limerick.

OFFICE USE ONLY

Ref. No. _____ Date Received _____

Fee Received _____ Date Due _____

EC/69/21

F7



Limerick City & County Council
11 NOV 2021
Planning and Environmental Services

LIMERICK CITY & COUNTY COUNCIL
PLANNING AND ENVIRONMENTAL SERVICES
SECTION 5 APPLICATION

DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

Applicant's Name: Eva Clarke

Applicant's Address: 20 Thomas Street

Limerick

Telephone No. _____

Name of Agent (if any): Brian McCutcheon

Address: McCutcheon Halley Planning Consultants

6, Joyce House, Barrack Square

Ballincollig Cork

Telephone No. 087 997 1164

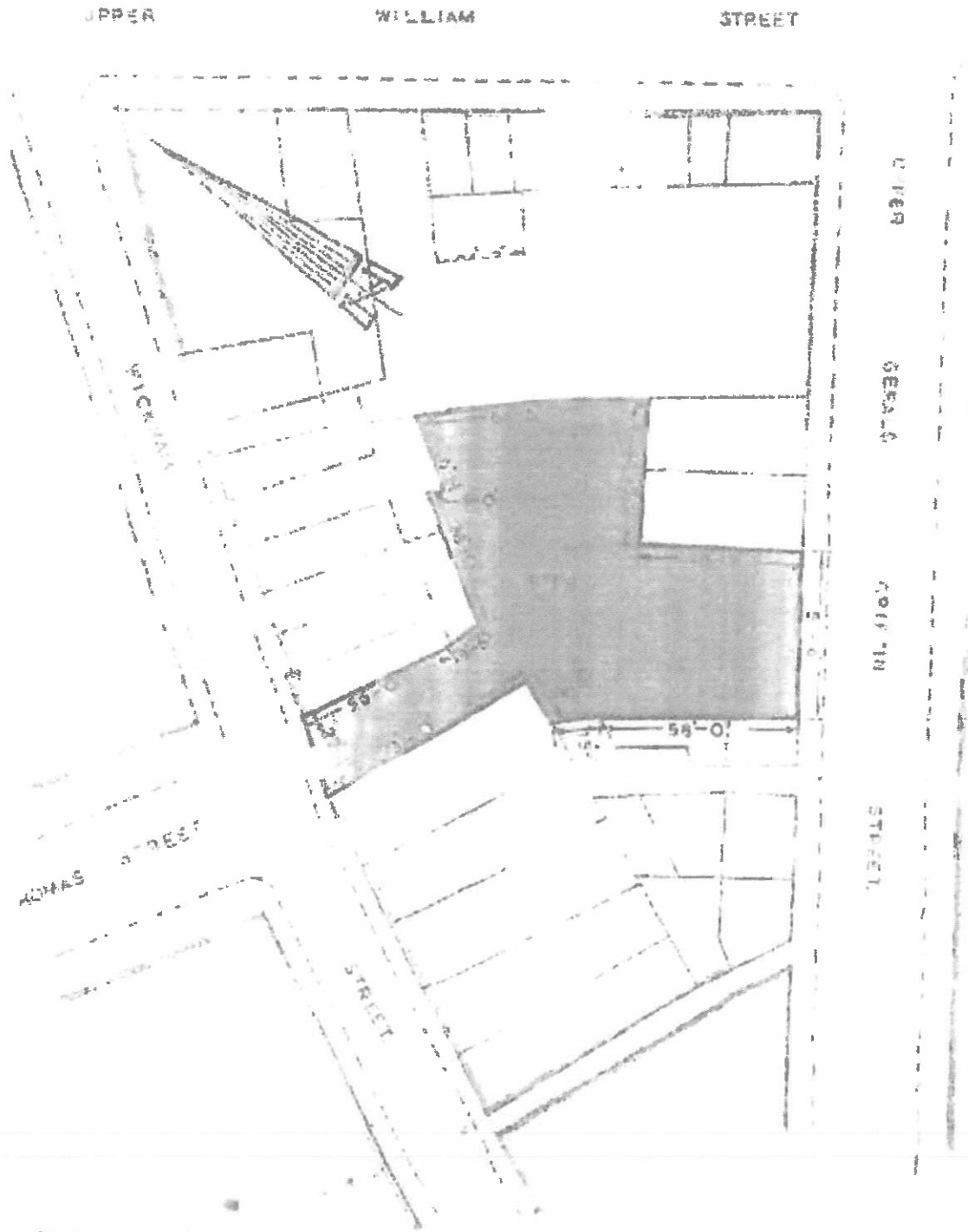
Address for Correspondence:

McCutcheon Halley Planning Consultants

6, Joyce House, Barrack Square

Ballincollig Cork

Appendix 2 Site layout Plan



SITE LAYOUT MAP
SCALE — 1/500
DATE — MARCH 1978

Location of Proposed development:

10 Wickham Street & 25 Upper Gerald Griffin Street

Limerick

Description of Proposed development:

Use of former HSS Hire Shop as a "market" for sale of Food, Arts and
Crafts on Fridays, Saturdays and Sundays

Is this a Protected Structure or within the curtilage of a Protected Structure.
YES/NO

Applicant's interest in site: Owner

List of plans, drawings, etc. submitted with this application:

Site Location Map

Site Layout Plan

Have any previous extensions/structures been erected at this location NO

If Yes please provide floor areas of all existing structures:

Signature of Applicant (or Agent)

Brin McCutcheon

NOTES: Application must be accompanied by:

- (a) Fee of €80
- (b) Site location map
- (c) Site layout plan
- (d) Dimensioned plans and elevations of the structure and any existing structures.
- (e) Where the declaration is in respect of a farm building, a layout identifying the use of each existing building together with floor area of each building.

Application to be forwarded to:

Limerick City & County Council,
Planning and Environmental Services,
City & County Council Offices,
Dooradoyle Road,
Limerick.

OFFICE USE ONLY

Ref. No. _____ Date Received _____

Fee Received _____ Date Due _____

Appendix 1 Site Location Map



Ulster Bank Ireland Limited www.communis.com 9508 11/09

Ulster Bank

Patrick St - Cork
88 Patrick Street Cork Co Cork

Pay *Donneridge City & County Council* or order

eighty euro only

 271115

IRELAND Cheque No.

Branch Sort Code

Account No.

002382 985480 15348014 06

98-54-80 €

Date *8th November 2021*

euro euro euro

€ 80 = 00

B MCCUTCHEON &
MRS C MCCUTCHEON

Brian McCutcheon



COMHAIRLE
CATHRACH & CONTAE
Luimnigh
Limerick
CITY & COUNTY
COUNCIL

LIMERICK CITY & COUNTY COUNCIL
CASH OFFICE
CIVIC OFFICES
DOORADOYLE
CO LIMERICK

11/11/2021 10:49:59

Receipt No./
Uimhir Admhála : LA25(0)/25140567
***** REPRINT *****

MCCUTCHEON HALLEY CHARTERED PLAN
6 JOYCE HOUSE
BARRACK SQUARE
BALLINCOLLIG
CO. CORK
DC-328-21

EXEMPTION CERTIFICATES	80.00
GOODS	80.00
VAT Exempt/Non-vatable	

Total/Iomlán 80.00 EUR

Tendered/Tairgthe
Cheque 80.00
U.B.
002382

Change/Sóinseáil 0.00

ued By/
he ag : Linda Reidy
Ó : CASH OFFICE HQ
No./Clárúimhir CBL: 3267368TH

Leahy, Carmel

From: plandev
Sent: Friday 7 January 2022 14:03
To: enforcements
Subject: FW: S5 Declaration Documents EC69/21

From: Muireann Carroll <mcarroll@mhplanning.ie>
Sent: Friday, January 7, 2022 1:55 PM
To: plandev <planning@limerick.ie>
Subject: S5 Declaration Documents EC69/21

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To whom it may concern,

On behalf of our Client, Eva Clarke, we request a copy of all documents relating to the below S5 Declaration:

Reference no. : EC69/21
Applicant: Eva Clarke
Address: 20 Thomas Street, Limerick

Your help is greatly appreciated.

Kind regards,

Muireann

Muireann Carroll
Graduate Planner
McCutcheon Halley
CHARTERED PLANNING
CONSULTANTS

Cork
6 Joyce House, Barrack Square
Ballincollig, Co. Cork
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www.mhplanning.ie

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Appendix 2: Copy of Section 5 Declaration Request by McCutcheon Halley originally sent to Limerick City and County Council

Director of Service
Planning and Environmental Services
Limerick City and County Council
Dooradoyle
Limerick V94 WV78

08 November 2021

Re: Planning Reference No DC-328-21. Retail Use of Premises at “Wickham Way”, 10, Wickham Street and 25, Upper Gerald Griffin Street Limerick

Dear Sir/Madam,

We act for Eva Clarke of 20, Thomas Street, Limerick and refer to the Warning Letter which was issued on 13/10/2021 under Planning Ref. No. DC-328-21 in regard to our client’s premises at 10, Wickham Street, and 25, Upper Gerald Griffin Street, Limerick which is shown on the site location map which we have attached as Appendix 1. The Warning Letter queries whether an unauthorised development may have carried in so far as “a market is operating from the premises for which there is no record of a Planning Permission being granted”.

As there is no reference in the Warning letter to the carrying out of works, we assume that the query in regard to alleged unauthorised development is confined to the planning status of the current use of the premises as a “market” on Fridays, Saturdays and Sundays. It has been established in case law that planning permission is not required for the continuation of a permitted or long-established use or for the making of a non-material change to an established use. We therefore propose to clarify the authorised nature of the existing use by making a formal request for a declaration under Section 5 of the Planning and Development Act, 2000 (as amended)¹. We attach a copy of the Section 5 application form and enclose a cheque for €80.

The question on which the Declaration is sought is in two parts:

1. Whether the current use of the premises at 10, Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a “market” on Fridays, Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act.
2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations, 2000 (as amended)² in so far as it is a change within Class 1 of Part 4 of Schedule 2.

¹ Hereafter referred to as “the Planning Act”

² Hereafter referred to as “the Planning Regulations”

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1. The Nature of the Change of Use

Prior to the rebranding of the premises as "Wickham Way" the buildings and the open yard on the site were used by HSS as a retail outlet for the sale and hire of a wide range of tools and hardware products. The premises are currently used for the sale of arts crafts and food products from a number of different stalls with shared storage and services in an arrangement which is colloquially referred to as a "market".

The only works required to facilitate the current use were:

- the alterations and improvements to the signage on the elevations to Wickham Street and Upper Gerald Griffin Street, which to identify the premises as "Wickham Way" rather than the "HSS Hire Shop"; and
- minor alterations and improvements to the counters, displays and storage units within the covered floorspace and open yard to reflect the change in the range of goods and services and the way in which the products are displayed and sold to the customers.

In our opinion the change in the retail concept is not a "material" change of use as defined by Section 3 of the Planning Act. We would also argue that any alterations or improvements to the elevations and internal layout were exempt under Section 4(1)(h) of the Act.

2. The Materiality of the Change of use

The test of "materiality" in regard to a change or intensification of use is addressed in the judgements of Barron J. in *Mahon v Dublin Corporation* and *Galway County Council v Lackagh Rock Ltd*. These cases established that there are two criteria:

- (a) whether the essential character of the use has changed; and
- (b) whether the change of use has had any effects on the environment of the site.

2.1 The Essential Character of the Use

In the case of *Mahon v Dublin Corporation* 1996 [WJSC-HC 4138], the Court found that the planning authority could not have envisaged, when permission was granted for a cluster of family dwelling houses, that some of the units would be rented out to tourists. The Court concluded that a house that is occupied by the same family for several years has a different essential character to a house that is rented out to rugby fans for an international weekend.

This principle does not apply to the current case. The essential character of the established use of the premises is that it is used for many decades for the sale of products or retail services to customers in the Limerick area. While there have been alterations and improvements to the internal layout and the range of the products and services offered, there has been no change in the essential nature of the retail activity.

2.2 The Effects on the Environment

The case of *Galway CC v Lackagh Rock Ltd*. 1985 [IR120 (HC)] related to a quarry that had been in operation since 1950 and the question raised was whether the current operations were different in nature and intensity to what had existed in 1964. The Court concluded:

“that there was no material change of use as there was no evidence to indicate that the planning authority would have taken any different matters into consideration in determining an application for planning permission made at the time that this case was before the courts compared with any such application for permission before the appointed day To test whether or not the uses are materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If these matters are materially different, then the nature of the use must be materially different.”

The Court found that there is an onus on the planning authority to show that there are additional effects on the environment of the site arising from any change or intensification of use. The change of use would only be “material” if:

- (a) there was a significant increase in physical and measurable effects such as traffic, air or noise emissions or hours of operation, and
- (b) there was limited capacity in the receiving environment to cope with any additional effects.

In this case there has been a significant reduction in the hours of operation as HSS operated 55hrs 30mins per week (Monday to Friday from 07.30 to 17.30 and on Saturday from 07.30 to 13.00) while Wickham Way is only open for 19hrs 30 mins per week (Friday 12.00 to 21.30, Saturday 09.00 to 14.00 and Sunday 11.00 to 16.00). In our opinion the change in the hours of operation has resulted in a major reduction in the traffic effects which is due not only to the 65% reduction in the opening hours, but also the fact that it avoids most of the ten traffic peaks in the week.

Another beneficial effect of the change of use is the fact that a visit to Wickham Way is less likely to be a single purpose trip as customers are more likely to be visiting a number of shops in the area or combining shopping with entertainment or dining out. They would also be more likely to travel by public transport than someone who is picking up power tools or hardware and in so far as they are using private cars, they are less likely to be travelling alone.

In summary the current use by Wickham Way would not involve any change in the established retail character of the premises. It is also a less intensive form of retailing as it involves a reduction in the vehicular traffic generated during peak hours. Having regard to the case law referred to above, the proposed change of use is not material and is therefore not “development” as defined by Section 3(1) of the Planning Act.

2.3 Consistency with the Zoning Objectives for the City Centre

The premises are zoned in the draft City and County Plan as part of the City Centre where the objective is:

To protect, consolidate and facilitate the development of the City Centre commercial, retail, educational, leisure, residential, social and community uses and facilities.

Section 4.6 of the Draft City Plan sets out the retail strategy for the City Centre. Although the retail sector is essential to the vitality of Limerick City Centre, it has been in decline in recent decades, with established retailers migrating to the purpose built out of town shopping centres and increasingly to an online platform. The strategy is to improve the range and quality of shopping on offer and create an enhanced customer experience of visiting the City Centre. The core retail area comprises Thomas Street/Bedford Row, William Street/Sarsfield Street, O’Connell Street/Patrick Street, Cruises Street, Roches Street, Henry Street and Catherine Street. It is an objective of the Council to improve the range and quality of shopping by supporting a contemporary shopping offer with leisure food, drink and entertainment at the heart of the experience.

Paragraph 4.6.2 of the draft City and County Plan highlights the fact that:

...the closure of businesses in the City Centre has resulted in a lack of maintenance of some vacant buildings, with urban decay evident on parts of some streets.... It is vital to ensure that the City Centre is suitable to attract and retain retail and other businesses. A sense of place and high quality leisure market is required in the first instance, to allow the development of a more complementary mix of retail uses to follow, including boutique clothing, tech showrooms, local agri-food produce and creative arts and crafts shops.

Objective ECON O1 (c) of the Draft Plan therefore seeks to:

Enhance the vitality of the City Centre through a mixture of uses, reuse of vacant units, increased residential population and revitalisation....Development shall be designed so as to enhance the public realm and creation of a sense of place.

The previous use of this premises highlights the problems identified in the draft Plan in so far as the HSS Hire Shop has migrated from the City Centre to the Childers Road Enterprise Park. At the same time the current use is a good example of the solution promoted by the Draft Plan as the replacement of the former HSS store with the Wickham Way "market" has:

- ensured that a vacant retail property was brought quickly back into use;
- improved the range and quality of shopping by providing leisure, food and entertainment as part of the shopping experience;
- enhanced the public realm and sense of place by effectively extending the footfall along Thomas Street through the site as far as Upper Gerald Griffin Street.

In our opinion the change of use could not be considered to have a material effect on the area as it would be enhance 'retail vitality' in accordance with the planning authority's retail strategy for this part of the City.

3. Exempted Change of Use under Article 10

Without prejudice to the argument put forward in the previous section it should be noted that even if the change of use was considered to be "material" under Section 3 of the Planning Act, it may still be considered to be exempted under Articles 10 of the Planning Regulations. Article 10(1) states 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.

We have already noted in regard to item (a) above that any works carried out to facilitate the change of use were exempt under Section 4(1)(h) of the Planning Act. In relation to items (b) and (c) we have been advised that the current use does not contravene any planning condition, or a use specified in any previous

permission relating to the site. Finally, the current use complies with item (d) as the retail use by HSS was a continuation of the long-established retail use of the property by Sean Cronin & Sons and Dan Twomey Ltd. extending back before commencement of the Planning Act.

Article 5(1) of the Planning Regulations 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*
- (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.*

Article 10 (2)(a) of the Regulations further states that:

“A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.”

We therefore conclude that:

- (a) the manner in which goods and services are displayed and offered for sale at Wickham Way falls within the general description of “shop” in Article 5(1);
- (b) all activities on the premises either fall within the definition of a retail use or are subsidiary or incidental to retail use; and
- (c) as both the existing and the former use of the premises fall within the description of “shop” in Article 5(1), the change of use is exempt under Article 10.

4. Legal Issues Raised by The Trustees of the Milk Market

The Warning Letter issued by Limerick City and County Council on 13/10/2021 under Section 152(1) of the Planning Act states that it had come to the attention of the Council that our client may be carrying out an unauthorised development namely “the operating of a market”. The planning register indicates that the Council issued the Warning Letter in response to a representation received on 15/09/2021. We assume that the representation was from the Limerick Market Trustees as, shortly before that date, the Trustees had formally notified our client that:

"The Market Trustees operate a market and have done so under the Market Trustees legislation since 1852. Under that legislation the Limerick Market Trustees have the sole authority for running markets in Limerick other than the market run by the Limerick City & County Council under the Casual Trading Act. Indeed it is perfectly clear from the legislation that no other market should be set up in the City".

If the Warning Letter was indeed issued in response to the specific concerns which have been raised by the Market Trustees, the following legal issues will arise for the planning authority:

1. A legal distinction should be made between the role of Limerick City and County Council as a planning authority under the Planning Act and the role of certain elected members of the Council as trustees of the Milk Market under the Limerick Markets Acts 1852 to 1992. As these are two entirely separate pieces of legislation, it would not be appropriate for the Council, acting as planning authority, to take on the role of enforcing compliance with the Limerick Markets Acts on behalf of the Market Trustees.
2. The Council should consider seeking a formal legal opinion on the planning implications of the Limerick Markets Acts 1852 to 1992 given the assertion made by the Trustees that *"it is perfectly clear from the legislation that no other market should be set up in the City"*. This opinion should address not just the implications for our client's current use of her property but also the Council's right to implement the retail strategy for the City Centre which could be undermined by the anti-competitive position adopted by the Trustees.

The first issue should be addressed in the context of Section 7.8 of the Development Management Guidelines, 2007 which advises that:

"It is inappropriate, however, in development management, to deal with matters which are the subject of other controls unless there are particular circumstances e.g. the matters are relevant to proper planning and sustainable development and there is good reason to believe that they cannot be dealt with effectively by other means.

The existence of a planning condition, or its omission, will not free a developer from his or her responsibilities under other codes and it is entirely wrong to use the development management process to attempt to force a developer to apply for other some licence, approval, consent, etc."

This advice is based on Section 34(13) of the Planning Act which states that a person shall not be entitled solely by reason of a permission under this section to carry out any development. In our opinion, any decision to issue a Warning Letter under Section 152 or a Declaration under Section 5 should be confined to the jurisdiction of the planning authority under the Planning Act.

In regard to the interpretation of the Limerick Markets Acts 1852 to 1992 we challenge the position adopted by the Market Trustees that the Limerick Markets Act, 1852 imposes a blanket restriction that *"no markets other than the markets to be provided and established under this Act shall be held"* and that this applies to the current use of our client's private property. The quotation used by the Trustees is taken from Section 32 which provides that:

*"32. The markets to be provided and established under this Act shall be held within the municipal boundaries of the said Borough, and **subject to the provisions of this Act** no market other than the markets to be provided and established under this Act shall be held within the said boundary and within an area of one mile therefrom". (emphasis added)*

The clause on which the Trustees rely must therefore be interpreted in the context of the other provisions of the Act including the preamble thereto. Regard should also be had to the Supreme Court's interpretation of Section 32 of the 1852 Act in *Michael Bridgman v The Mayor Alderman and Burgesses of Limerick* [2001] IESC 51 which found that:

"In respect of the said Act the phrase "no market" alone is used and the statutory context makes abundantly clear that it was a market in agricultural produce that was contemplated. That being so, there is no reason to suppose that the legislature intended to prohibit any other form of market in the Borough of Limerick." (emphasis added)

It is important to note that the specific issue raised in the Bridgeman case was whether the 1852 Act prevented the establishment by the local authority of new casual trading areas within the public domain of the City. As a result, the Court did not explicitly address the implications of the 1852 Act for the operation of a market on private property. This is addressed in Section 44 of the 1852 Act which clarifies that the prohibition of new markets under Section 32 of the Act does not apply to private property:

44. After the said market places shall be open for public use every person (except an auctioneer selling by auction in any place other than the public street, or a licensed hawker, or a person hawking or selling eggs or fruits, or a person bringing by water carriage any corn, grain, pulses, or seeds) who shall sell or expose for sale in any place within the limits of this Act other than in some one of the said markets places or of such private legal markets, or in his own dwellinghouse shop, warehouse, yard or store, any cattle or livestock, or any corn or anything whatever in respect of which rents or tolls are by this Act authorised to be taken shall for every such offence be liable to a penalty not exceeding 40 shillings to be recovered in the same manner as penalties are recoverable under the Markets and Fairs Clauses Act, 1847 (emphasis added).

This indicates there is no legal basis for the complaint made by the Trustees that the retail use of our client's private property contravenes the provisions of Section 32 of the Limerick Markets Act, 1852.

We acknowledge the right of the planning authority under Section 152 of the Planning Act to issue a Warning Letter on receipt of a written complaint and before a detailed investigation of the case has been carried out. However, Section 152(1) of the Act also requires the planning authority to make a preliminary assessment as to whether the representation received is vexatious, frivolous or without substance or foundation. In our opinion the position adopted by the Market Trustees could be considered to be frivolous and vexatious in so far as it:

- (a) incorrectly applies Section 32 of the Limerick Markets Act 1852 to a private retail premises;
- (b) ignores the relevant case law;
- (c) invites the planning authority to exceed its jurisdiction by acting as enforcement agency for the Market Trustees;
- (d) seeks to use planning enforcement to inhibit commercial competition.

5. Rationale for the Section 5 Request

In view of the legal position adopted by the Market Trustees we believe that it would be appropriate that the planning status of our client's site be formally affirmed within the scope of the Planning Acts and Regulations, having due regard to:

- (a) the proper planning and sustainable development of the city centre;
- (b) the retail strategy set out in the City Development Plan;
- (c) the policy on retail competition in the Retail Planning Guidelines; and
- (d) the long-established retail use of the property.

We therefore formally request that the following Declaration be issued by the planning authority under Section 5 of the Planning and Development Act:

WHEREAS questions have arisen as to:

- 1. Whether the current use of the premises at 10, Wickham Street, and 25, Upper Gerald Griffin Street, Limerick as a “market” on Fridays Saturdays and Sundays is, or is not, a material change of the established retail use of the premises and is or is not development under Section 3 of the Planning Act; and*
- 2. In the event that the Planning Authority decides that development in the form of a material change of use has occurred, whether that change use is exempted development under Article 10 of the Planning and Development Regulations, 2000 (as amended) in so far as it is a change within Class 1 of Part 4 of Schedule 2.*

AND WHEREAS Eva Clarke of 20, Thomas Street, Limerick requested a declaration on these questions from Limerick City and County Council;

AND WHEREAS Limerick City and County Council, 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 4(1)(h) of the Planning and Development Act, 2000, as amended,*
- (d) Article 5 of the Planning and Development Regulations, 2001 as amended;*
- (e) Article 10 of the Planning and Development Regulations, 2001 as amended;*
- (f) the planning history of the site;*

AND WHEREAS Limerick City and County Council has concluded that:

(a) the alterations and improvements to the external signage on the street elevations and to the layout of the internal floorspace and yards would constitute “works” that are “development” under Section 3 of the Planning and Development Act, as amended;

(b) the alterations and improvements to the signage on the elevations to 10, Wickham Street and 25, Upper Gerald Griffin Street which identify the premises as “Wickham Way” rather than the “HSS Hire Shop”, come within the scope of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, being works 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 and are, therefore, exempted development;

(c) the alterations and improvements to the internal layout of the covered floorspace and open yard, which have been made to reflect the change in the range of goods and services and the way in which they are displayed and sold to the customers, come within the scope of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, being works which affect only the interior of the structure and are, therefore, exempted development;

(c) the change in the range of goods and in the way they are displayed and sold to customers, would not give rise to increased traffic movements or any other activity that would have material consequences in terms of the proper planning and sustainable development of the area; would not, therefore constitute a material change of the established retail use of the premises; and so would not be 'development' as defined under Section 3 of the Planning Act;

(d) apart from the fact that it is not 'development', the change of use from use as the "HSS Hire Shop" to use as the "Wickham Way Market" is a change of use within Class 1 (Use as a Shop as defined by Article 5(1)) in Part 4 of Schedule 2 of the Planning and Development Regulations, 2001 and complies with the restrictions on exempted changes of use under Article 10(1).

NOW THEREFORE Limerick City and County Council, in exercise of the powers conferred on it by section 5 (2)(a) of the 2000 Act, hereby decides that operation of the "market" known as Wickham Way on the site of the former HSS Hire Shop at 10 Wickham Street and 24 Upper Gerald Griffin Street, Limerick is either not development or is exempted development.

Yours sincerely,

Brian McCutcheon

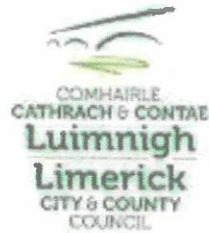
Brian McCutcheon
McCutcheon Halley

Appendix 2 Site layout Plan



SITE LAYOUT MAP
SCALE — 1/500
DATE — MARCH 1978.

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LIMERICK CITY & COUNTY COUNCIL
PLANNING AND ENVIRONMENTAL SERVICES
SECTION 5 APPLICATION

DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

Applicant's Name: Eva Clarke

Applicant's Address: 20 Thomas Street

Limerick

Telephone No. _____

Name of Agent (if any): Brian McCutcheon

Address: McCutcheon Halley Planning Consultants

6, Joyce House, Barrack Square

Ballincollig Cork

Telephone No. 087 997 1164

Address for Correspondence:

McCutcheon Halley Planning Consultants

6, Joyce House, Barrack Square

Ballincollig Cork

Location of Proposed development:

10 Wickham Street & 25 Upper Gerald Griffin Street

Limerick

Description of Proposed development:

Use of former HSS Hire Shop as a "market" for sale of Food, Arts and
Crafts on Fridays, Saturdays and Sundays

**Is this a Protected Structure or within the curtilage of a Protected Structure.
YES/NO**

Applicant's interest in site: Owner

List of plans, drawings, etc. submitted with this application:

Site Location Map

Site Layout Plan

Have any previous extensions/structures been erected at this location NO

If Yes please provide floor areas of all existing structures:

Signature of Applicant (or Agent)

Brin McCutcheon

