



The Secretary
An Bord Pleanála
64 Marlborough Street, Dublin 1

AN BORD PLEANÁLA
LDG- 064428 -23
ABP-
20 JUN 2023
Fee: € 220 Type: chg
Time: By: Reglost

Monday, 19th June 2023
[By Post]

Dear Sir / Madam

RE: SECTION 5 REFERRAL IN RELATION TO WORKS AT LIDL, JOHNSWELL ROAD, KILKENNY, CO. KILKENNY, R95 A329 - KILKENNY COUNTY COUNCIL (SECTION 5) PLANNING REFERENCE DEC 739

1.0 INTRODUCTION

1.1 The Referral & Questions Posed

The Planning Partnership, McHale Retail Park, Castlebar, Co. Mayo, F23 TD25, acting on behalf of Lidl Ireland GmbH, Lidl Regional Distribution Centre, Littleconnell, Newbridge, Co. Kildare, W12 KT98, hereby refer to An Bord Pleanála the Declaration of Kilkenny County Council, dated 26th May 2023 (see Appendix A), under the provisions of Section 5 (3) (a) of the *Planning and Development Acts 2000-2023*.

The nature of the specific questions to be determined is detailed below along with our planning opinion regarding the status of same (see also Appendix C), including a review of the local Planning Authority Declaration and the appropriate fee of €220.

The purpose of the declaration application (and this referral) was (and is) to confirm our understanding that **no planning permission** is required in respect of the works in question. Specifically, the Referrer sought the Council's determination, and now seeks the Board's determination, as to whether;

1. The removal of 3 no. (high / eaves level) refrigeration units to Eastern elevation;
2. The installation of 1 no. Dry Cooler unit within the Loading Bay Area;
3. The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;
4. The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;
5. The installation of 4 no. (low / ground level) Air Conditioning units to the Northern Elevation;
6. The removal and relocation of 4 no. (low / ground level) Air Conditioning units to within the Loading Bay Area;
7. The provision of a fifth (low / ground level) Air Conditioning unit to within the Loading Bay Area;
8. The installation of 2 no. (low / ground level) Air Conditioning units to the Eastern Elevation;
9. The provision of a screen / enclosure surrounding proposed Air Conditioning units and existing Dry Cooler Refrigeration Unit within the Loading Bay area; and,
10. Landscaping and all associated and ancillary works and development.

Is or is not development or is or is not exempted development under Section 4 (1) (h) of the *Planning & Development Acts, 2000-2023* (in respect of works) and is or is not development (in respect of use, i.e. not a material change of use).

The Applicant / Referrer now seeks the Board's determination as to whether these works **are exempted development** under Section 4 (1) (h) of the *Planning and Development Acts 2000-2023*.

1.2 Declaration by the Local Planning Authority

As noted above, the local Planning Authority issued a Declaration on the 26th of May 2023 stating:

"AND WHEREAS the Planning Authority in considering this referral, had regard to
 (i) the information submitted with the application documents,
 (ii) S.4 (1)(h) of the Planning and Development Act 2000, as amended
 (iii) Restrictions on exemption by virtue of Part 2 Article 9(1)(a)(i) of the Planning and Development Regulations 2001, as amended
 (iv) Condition 1 of both grants of planning permissions ref. P. 10/12, and 10/515, and

AND WHEREAS:-

- it is considered that **the addition and relocation of plant and machinery as listed, by virtue of their nature and location, do affect the external appearance of the structure** in that proposed plant and machinery listed, both attached to the building and freestanding adjacent to the building and **visible from the adjacent public space without adequate screening, individually and in combination, presents as haphazard and incongruous as regards visual impact and accordingly materially affect the development's character, rendering the developments inconsistent with the high-quality finish of the remainder of the building.**
- it is considered that the adding and removal of plant and machinery, including screening (which is substandard) as listed **contravenes Conditions 1 of Planning Permission ref. 10/12 as amended by ref. 10/515**

NOW THEREFORE the Planning Authority, in exercise of the powers conferred on it by Section 5(2)(a) of the 2000 Act, as amended, hereby decides that:

The proposed works, plans and particulars for which were submitted to the Planning Authority on 28th April 2023, relating to, the works as set out above at Lidl, Johnswell Road, Kilkenny, **constitutes development which is not exempt and therefore, requires planning permission.**" [Our Emphasis]

We also refer to the accompanying Planners Report prepared by the local Planning Authority (Appendix B), extracts of which are noted as follows:

"It is considered that the works, by virtue of their nature and location, do affect the external appearance of the structure in that plant and machinery should be properly screened so as not to visibly affect the external appearance of the structure when viewed from neighbouring public spaces. The site abuts a public park and the haphazard addition of plant and machinery, both attached to the building and freestanding adjacent to the building and visible from the public park without adequate screening, individually and in combination, has an incongruous visual impact rendering the development inconsistent with the high-quality finish of the remainder of the Lidl building.

The act only provides for a questions to whether or not a development is exempt and does not allow for the question to extend to a question whether something is exempt under only one section but not another. The request for exemption only deals with Section 4 (1)(h) of the Act, which takes precedence over the planning regulations and hence this declaration does not consider other matters that may render the developments not exempt under the regulations.

However, irrespective of section 4(1)(h), other matters that need to be considered that are secondary are those that arise by virtue of Part 2 Article 9(1)(a)(i) of the Planning & Development Regulations, 2001-2021 'Restrictions on exemption', states the

following: Development to which article 6 relates shall not be exempted development for the purposes of the Act: (a) if the carrying out of such development would- (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act...

*Hence, although the question refers specifically to Section 4(1)h, the declaration deals with the matter of exemption specified under Section 5 generally within the scope of the Act and not only Section 4(1)(h). **Having assessed Part 2 Article 9 (detailed above), it is considered that the subject development is considered development and that such development also contravenes Condition 1 of Planning Permission ref. P10/12 as amended by 10/515, and therefore does not constitute exempt development** having regard to the 'Restrictions on exemption' as set out in Part 2 Article 9(l)(a)(i) of the Planning & Development Regulations, 2001, as amended.*

The nature and location of the works, relative to the location of the development in proximity to existing residential developments, and potential impacts on same formed part of the consideration of applications P.10/12 and P.10/515, and the conditions attached relate to the proposals considered as part of those applications. The works which form the subject to this Section 5 Declaration are considered to contravene and be inconsistent with the permission granted.

It is considered that the works, relating to works as per the documents submitted, regarding alterations to the Lidl store and site, at the Johnswell Roads, Kilkenny materially affects the character of the building when viewed from the adjacent public spaces and are therefore inconsistent with the character of the building and contravenes the conditions attached to the permitted development as per grant of permissions ref. P.10/12 and P.10/515; that the works constitute development and which is not exempted development and therefore, planning permission is required.

Arising from the above, we note in summary a number of key highlights:

- No consideration was given to the works in question on an item by item and overall / cumulative basis (as requested);
- No clarity provided on what has been deemed as the 'baseline' / 'before' situation;
- No explicit consideration of the full 'after' effect of all of the works, including those not yet carried out (e.g. Item nos. 4, 6, 7, 9 and 10);
- Visual impact appears to be conflated / used as a proxy for materiality of change and character / consistency of appearance;
- Significant weight has been applied to the 'standard Condition no. 1' governing the planning permissions on the site; and,
- Significant weight has also been placed on 'restrictions on exemptions' i.e. under Article 9 of the Planning & Development Regulations, 2001-2023.

These issues are highlighted in the following grounds of referral in greater detail, and form important aspects of the overall grounds.

2.0 GROUNDS OF REFERRAL

We note that the underlying merits of the Referrer's case are set out in detail in the original Section 5 Declaration Cover Letter (see Appendix C) which are not restated herein to avoid duplication, though the Board are requested to consider same in full as part of this Referral, not least as the local Planning Authority have not considered each element (from no. 1 to no. 10) of the application.

2.1 Explanation of Declaration Decision

A fundamental concern in relation to the decision by Kilkenny County Council is the absence of sufficient information in relation to the basis of their decision.

We note the requirements of the *Development Management Guidelines, 2007* in this regard also which state:

"9.4 Preparing recommendations on declarations

In making its decision on a declaration, the planning authority is restricted to considering what is, or is not, development, or is, or is not, exempted development, within the provisions of the Planning Act and Regulations. A planning report should be prepared clearly setting out the matters which have been considered in making the decision and giving the main reasons on which the decision is based.

The planning report should be typed/in electronic form, logically set out and clearly signed by the person who prepared it. The Report:

- *should contain details of the question that is being asked, together with a brief description of the location and of the site;*
- *should contain a summary of the planning history (if any) relating to the question and site;*
- *should examine the issue in relation the definition of development and exempted development as set out in the Planning Act and Regulations;*
- *should address the adequacy of further information where such information has been obtained.*

The Report should structure the above considerations in a way that is clear to the applicant and to the wider public and that enables informed judgements to be made as to the merits of a referral to the Board. The decision of the planning authority on the question at issue should be clearly stated." [Our emphasis]

Whilst the Declaration and supporting Planners Report both provide a degree of information as to the rationale for the decision, we note a number of aspects of concern, such as:

1. The absence of a case by case assessment of each of the items of the application;
2. The absence of a defined 'baseline' / 'before' from which the materiality of the 'change' is measured against an 'after' situation;
3. The (inappropriate) reliance on 'Condition no. 1' of the extant permissions; and,
4. The absence of sufficient consideration of the *character* of the structure(s), as is the relevant test.

Accordingly, the Board are requested to consider each of the 10 no. questions (individually and cumulatively) effectively *de novo* which we trust will result in the Board concurring with our view. As noted above, a detailed rationale and explanation of the questions was provided in the Application (and is enclosed under Appendix C).

2.2 Reliance on Article 9 of the Planning & Development Regulations

As demonstrated in the Declaration and the Planners Assessment, weighted significance has been given by the local Planning Authority to the issue of Article 9 of the Regulations and the related restrictions therein.

These restrictions for instance include where development would *contravene a condition attached to a permission*, which the local Planning Authority seek to rely on in its Declaration. The issue of the contravention of a condition is elaborated on in Section 2.3 below.

Separate to the issue of planning conditions however is the issue of the jurisdiction of Article 9 in the first instance. The local Planning Authority rely heavily on same in its Declaration.

However, we note that Article 9 is not in fact reckonable in the context of Section 4(1)(h) of the Planning & Development Acts exemptions, as has been categorically established over many years in numerous referral decisions by An Bord Pleanála, and as was highlighted in the original Declaration.

As a result, reliance on Section 4 of the *Planning and Development Acts* provides immunity from restrictions or limitations as may be applied under the *Regulations*.

An Bord Pleanála (in Ref: PL29S.RL.2120) confirmed same, stating: "...the restrictions on exemption contained in Article 9 of the Planning and Development Regulations, 2001 ... do not restrict any exempted development under section 4(1) of the Planning and Development Act, 2000".

Therefore, the Board are obliged to disregard Article 9 in its entirety. In doing so, this necessitates a significantly different perspective to that of the local Planning Authority in its approach to the determination of the Declaration, and the omission of any reliance on Article 9.

2.3 Contravention of a Condition

Separate to the issue of Article 9, which the above confirms is inapplicable in the subject case, we note the issue of the purported contravention of a condition or conditions has been heavily relied on in the Declaration by the local Planning Authority.

The Planning Authority decision refers to 'contraven[ing] Condition 1 of Planning Permission ref. P10/12 as amended by 10/515'. Condition no. 1 of the two permissions state, respectively:

"The development shall be carried out in accordance with the plans and particulars submitted on the 14th January 2010, as revised by further information received on the 22nd April 2010, except as amended by the conditions attached hereto. REASON: To ensure that the development strictly accords with the permission and to ensure that effective control is maintained.

The development shall be carried out in accordance with the plans and particulars submitted on the 27th August 2010 except as amended by the conditions attached hereto. REASON: To ensure that the development strictly accords with the permission and to ensure that effective control is maintained."

The above conditions are wholly standard conditions attached to most planning permissions issued throughout the country. Their function is essentially to clarify the extent of works and development which have received permission.

They do not, in and of themselves, limit or interfere with any future / ongoing development on the site.

In this regard, we reiterate that, in our opinion, these Conditions simply clarify what has received planning permission, and once the planning permission is implemented in accordance with the relevant 'plans and particulars' the condition is spent / discharged, i.e. it does not contain any ongoing / operational limits on development on the site, as would a condition restricting further signage for instance, as would also be a common condition.

We respectfully submit that the Planning Authority have misinterpreted the effect / significance of Condition no. 1 of the parent permission. For instance, applying the Planning Authority's interpretation would effectively restrict *any* exempted development from being carried out on virtually any planning permission.

We note also in another An Bord Pleanála Referral (ABP Ref: RL 06D.RL2601), relating *inter alia* to the construction of a substation under *Class 29 of the Regulations*, the Board determined that a landscaping condition would not be contravened, overruling the Inspector, and the local Planning Authority in their initial Declaration, whom considered that a material contravention of the condition would arise.

The local Planning Authority initially determined that: "*The ESB substation is not exempted development having regard to Article 9(1)(a)(i) of the Planning and Development Regulations 2008 and condition no. 1 attached to PLo6D.206884*". The Board Inspector noted as follows:

"A hard and soft landscaping scheme was to be submitted and agreed in writing with the planning authority... The installation of an ESB substation, amongst other things cannot be described as hard and soft landscaping... These are facilities and services associated with the main use on the site, i.e. a discount foodstore and underground carpark, and are not associated with the landscaping of the site, to which Condition No. 1 refers to. In my opinion, the provision of an ESB substation in this region of the site contravenes Condition No. 1 of PLo6D.206884 and therefore does not comply with Article 9(1)(a)(i) of the Regulations, and therefore is not exempted development."

The Board however determined that: "*The ESB substation comes within the scope of Class 29 of Part 1 of Schedule 2 of the said regulations, and is not delimited by way of an existing planning condition...*" [Our Emphasis]

Based on the wording of the Declaration decision in the subject case, it would appear that the issue of Condition no. 1 / Article 9(1)(a)(i) was a major obstacle to the confirmation of the works as exempted development. The Board are thus requested to confirm that there is no issue of *contravention* of conditions, in addition to the general non applicability of Article 9 in any event.

2.4 The 'Baseline' / 'Before' Scenario

Of particular concern in relation to the Declaration also is the absence of a clear baseline consideration, in terms of a reference against which the subsequent or proposed works are measured. For instance, of the 10 no. items, some relate to the *removal* of items that may have been of concern.

Accordingly, we note that the pre-existing / baseline context of the site includes the presence of wall mounted refrigeration units (Item no. 1) which is of particular relevance in that it establishes the presence and principle of plant type equipment on the building, hence informing the *character* of the building and the overall site / structure(s).

The baseline scenario is not therefore, as the local Planning Authority appear to assume, an untouched façade without appendages or external equipment. The Store has always been a hive of activity where the façade and curtilage of the Store and associated equipment thereon has always been reflective of the operational needs of the Referrer (e.g. Item no. 1).

Table 1 below sets out in sequential terms the context for each of the 10 no. items, for the purposes of clarity. Plates 1 & 2 below for instance illustrates the 'baseline' character of the premises.

Table 1: Sequence of Works

No.	Baseline / Before	Currently Existing	To be Removed	To be Provided
1	<i>The removal of 3 no. (high / eaves level) refrigeration units to Eastern elevation;</i>			
2		<i>The installation of 1 no. Dry Cooler unit within the Loading Bay Area;</i>		
3		<i>The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;</i>		
4			<i>The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;</i>	
5		<i>The installation of 4 no. (low / ground level) Air Conditioning units to the Northern Elevation;</i>		
6			<i>The removal and relocation of 4 no. (low / ground level) Air Conditioning units to within the Loading Bay Area;</i>	
7				<i>The provision of a fifth (low / ground level) Air Conditioning unit to within the Loading Bay Area;</i>
8		<i>The installation of 2 no. (low / ground level) Air Conditioning units to the Eastern Elevation;</i>		
9				<i>The provision of a screen / enclosure surrounding proposed Air Conditioning units and existing Dry Cooler Refrigeration Unit within the Loading Bay area; and,</i>
10				<i>Landscaping and all associated and ancillary works and development.</i>

Plate 1: Eastern Façade Refrigeration Units (now removed)



Source: ICAN Acoustics

Plate 2: Eastern Façade Refrigeration Units (now removed)



Source: ICAN Acoustics

2.5 The 'After' Scenario

Of similar importance is the issue of the 'After' scenario, where the Declaration does not appear to address the overall end goal of the (10 no.) series of works outlined.

The Declaration appears to rely on the present / existing scenario, rather than the 'after' scenario (nor indeed considering the change from the 'before' scenario also, as noted above).

In this regard the positive improvements / enhancements offered by the Applicant appear not to have received full consideration.

In our opinion, the Declaration, and Referral should make its determinations based on a comparison between the 'before' and 'after' scenarios to enable a clear understanding of the status of the works.

For instance, the 'before' scenario is that of:

- A Foodstore with existing refrigeration units mounted at high level on the Eastern Façade with no visual screening or softening.

The 'after' scenario is that of:

- A Foodstore with low level refrigeration and air conditioning units in a predominantly clustered and screened position, out of view and supplemented with soft landscaping works.

The Declaration however does not appear to consider this outcome, rather appears to assess the works as they exist on the ground at present, which was not the question posed by the Section 5 Declaration Application.

2.6 Non-Consideration of Individual (10 no.) Items

The above referred absence of a clear 'before' and 'after' comparison is also frustrated by the absence of an individual assessment of each item, for the purposes of clarity, and to enable the overall assessment of the cumulative and end result of the works.

Certain items for instance relate to the removal of works (nos. 1, 4 and 6), which of themselves should be uncontroversial however the Declaration does not provide a position on same.

Other items relate to improvement / mitigation measures which directly address the very reasons given by the local Planning Authority in their Declaration.

For instance, the Declaration refers to *proposed plant and machinery ... visible from the adjacent public space without adequate screening* however the objective of Item no 9 for instance is specifically to prevent such a scenario, further assisted by Item no. 10 (and enabled by no. 4).

In this regard it is not apparent that the local Planning Authority considered whether Item no. 9 would alleviate their concerns.

2.7 The Issue of Character

Whilst the Declaration states the local Planning Authority's opinion that the works materially affect the development's character, we note that limited expansion of the issue of *character* is provided.

The emphasis of the Declaration appears to relate to visibility / visual impact, and not the change in *character* arising between the 'before' and 'after' scenarios.

As noted as part of the Application, a material change in appearance or visibility is entirely acceptable under the exemption in question, with the relevant test being that of a change of *character*.

As was set out in detail at Application stage (see Appendix C), we consider that no change in *character* would arise as the *character* of the structure(s) already included elements of plant and equipment and furthermore a Foodstore *character* would typically be expected to have a presence of equipment and similar features on and around the structure(s).

Plates 1 and 2 above further illustrate same, highlighting the baseline character of the structure.

2.8 The Issue of Consistency

Allied to the issue of *character* is that of *consistency* in that this is the ultimate test as set out in the exemption in question, i.e. whether the works in question (i.e. nos. 1-10 individually and cumulatively) would *render the appearance inconsistent with the character of the structure or of neighbouring structures*.

As noted above, the issue of the 'before' and 'after' context is of vital importance in this regard as is arriving at a clear understanding of the *character* of the structure(s).

Thereafter, the issue of *consistency* arises, insofar as whether the works in question (i.e. nos. 1-10 individually and cumulatively) would be *consistent* with that *character* and not whether the works would result in a *change of appearance* or *be visible* or lead to *visual impact* or be *haphazard and incongruous*.

In our opinion therefore, we submit that the 'after' scenario is *consistent* with the 'before' scenario, as the same pattern of activity and the same type of view will be present, i.e. a viewer will still be observing the 'back of house' area of a Supermarket where various elements of equipment / housekeeping, etc. is expected to be found, and have always been present, across a spectrum from refrigeration units to the storage of wheelie bins, etc. The 'after' will remain *consistent* with the 'before' in this regard.

3.0 CONCLUSION

We trust that the Board will find this referral in order and we look forward to receipt of an acknowledgement at your earliest convenience.

Please revert to us should you require further clarification in relation to any aspect of this referral and we look forward to an early and favourable decision.

Yours faithfully,



Fintan Morrin

Associate

The Planning Partnership

Encl.

Appendix A

Kilkenny County Council Section 5 Declaration (*Reg. Ref: DEC 739*)

**Comhairle Chontae Chill Chainnigh
Kilkenny County Council**



**Declaration and Referral on Development and Exempted Development under Section 5 of the
Planning & Development Act 2000, as amended**

Kilkenny County Council Reference Dec 739

WHEREAS a question has arisen “as to whether:

1. The removal of 3 no. (high/eaves level) refrigeration units to Eastern elevation;
2. The installation of 1 no. Dry Cooler unit within the Loading bay area;
3. The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;
4. The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay area;
5. The installation of 4 no. (low/ground level) Air Conditioning units to the Northern Elevation;
6. The removal and relocation of 4 no. (low/ground level) Air conditioning units to within the Loading Bay Area;
7. The provision of a fifth (low/ground level) Air conditioning unit to within the Loading Bay Area;
8. The installation of 2 no. (low/ground level) air conditioning units to the Eastern elevation;
9. The provision of a screen/enclosure surrounding proposed air conditioning units and existing dry cooler refrigeration unit within the loading bay area; and
10. Landscaping and all associated and ancillary works and development.

Is or is not development or is, or is not exempted development and is or is not development”, at Johnswell Road, Kilkenny.

AND WHEREAS the said question was referred to Lidl Ireland GmbH C/- The Planning Partnership.

AND WHEREAS the Planning Authority in considering this referral, had regard to

- (i) the information submitted with the application documents,
- (ii) S.4 (1)(h) of the Planning and Development Act 2000, as amended
- (iii) Restrictions on exemption by virtue of Part 2 Article 9(1)(a)(i) of the Planning and Development Regulations 2001, as amended
- (iv) Condition 1 of both grants of planning permissions ref. P. 10/12, and 10/515, and

AND WHEREAS :-

- it is considered that the addition and relocation of plant and machinery as listed, by virtue of their nature and location, do affect the external appearance of the structure in that proposed plant and machinery listed, both attached to the building and freestanding adjacent to the building and

visible from the adjacent public space without adequate screening, individually and in combination, presents as haphazard and incongruous as regards visual impact and accordingly materially affect the development's character, rendering the developments inconsistent with the high-quality finish of the remainder of the building.

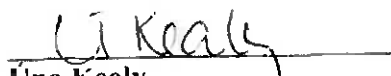
- it is considered that the adding and removal of plant and machinery, including screening (which is substandard) as listed contravenes Conditions 1 of Planning Permission ref. 10/12 as amended by ref. 10/515

NOW THEREFORE the Planning Authority, in exercise of the powers conferred on it by Section 5(2) (a) of the 2000 Act, as amended, hereby decides that:

The proposed works, plans and particulars for which were submitted to the Planning Authority on 28th April 2023, relating to, the works as set out above at Lidl, Johnswell Road, Kilkenny, constitutes development which is not exempt and therefore, requires planning permission.

MATTERS CONSIDERED

In making its decision, the Planning Authority has regard to those matters to which, by virtue of the Planning and Development Act 2000, as amended and Planning & Development Regulations 2001, as amended made thereunder, it was required to have regard.


Una Kealy
Administrative Officer
Footnote:

Date: 26/05/2023

Section 5 (3)(a) of the Planning & Development Act 2000, as amended states '*Where a declaration is issued under this section, any person with a declaration under subsection 2 (a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration*'.

An Bord Pleanála, 64 Marlborough Street, Dublin 1, Tel. 01 8588100 or LoCall 1890 275175.

Appendix B

Section 5 Declaration Planners Assessment (*Reg. Ref: DEC 739*)

**Comhairle Chontae Chill Chainnigh
Kilkenny County Council
Planning Report**



**Planning & Development Acts 2000, as amended
Planning & Development Regulations 2001, as amended**

**Section 5 Declaration
Reference No. Dec 739**

**Applicant: Lidl Ireland GmbH C/- The Planning Partnership, McHale Retail Park,
Castlebar Co. Mayo F23 TD25.**

Subject: 'The Applicant seeks the Council's determination as to whether;

- 1. The removal of 3 no. (high/eaves level) refrigeration units to Eastern elevation;**
- 2. The installation of 1 no. Dry Cooler unit within the Loading bay area;**
- 3. The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;**
- 4. The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay area;**
- 5. The installation of 4 no. (low/ground level) Air Conditioning units to the Northern Elevation;**
- 6. The removal and relocation of 4 no. (low/ground level) Air conditioning units to within the Loading Bay Area;**
- 7. The provision of a fifth (low/ground level) Air conditioning unit to within the Loading Bay Area;**
- 8. The installation of 2 no. (low/ground level) air conditioning units to the Eastern elevation;**
- 9. The provision of a screen/enclosure surrounding proposed air conditioning units and existing dry cooler refrigeration unit within the loading bay area; and**
- 10. Landscaping and all associated and ancillary works and development.**

Is or is not development or is, or is not exempted development under Section 4 (1) (h) of the Planning & Development Acts, 2000-2022 (in respect of works) and is or is not development (in respect of use, i.e. not a material change of use), at Lidl, Johnswell Road, Kilkenny

Due Date: 26th May 2023

Introduction:

This Section 5 Declaration application was submitted by Lidl Ireland GmbH C/- The Planning Partnership, under Section 5 of the Planning and Development Act 2000, as amended, seeking a declaration as to whether:

1. The removal of 3 no. (high/eaves level) refrigeration units to Eastern elevation;
2. The installation of 1 no. Dry Cooler unit within the Loading bay area;
3. The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;
4. The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay area;
5. The installation of 4 no. (low/ground level) Air Conditioning units to the Northern Elevation;
6. The removal and relocation of 4 no. (low/ground level) Air conditioning units to within the Loading Bay Area;
7. The provision of a fifth (low/ground level) Air conditioning unit to within the Loading Bay Area;
8. The installation of 2 no. (low/ground level) air conditioning units to the Eastern elevation;
9. The provision of a screen/enclosure surrounding proposed air conditioning units and existing dry cooler refrigeration unit within the loading bay area; and
10. Landscaping and all associated and ancillary works and development.

Is or is not development or is, or is not exempted development under Section 4 (1) (h) of the Planning & Development Acts, 2000-2022 (in respect of works) and is or is not development (in respect of use, i.e. not a material change of use).

Location/Site description:

The site is located on the Johnswell Road, to the north-east of Kilkenny City centre. There is an existing retail store on site, with associated parking.

The site is zoned for General Business with the objective to provide for general development.

Planning History:

23/60159 – Current application, decision due 18th June 2023 for retention of: 1) Existing Dry Cooler Refrigeration Unit located within the Loading Bay area; and, 2) Existing (2 no.) Air Conditioning units located on the Eastern elevation of the store. Permission for development is sought for: 3) Installation of (5 no.) Air Conditioning units to be located within the Loading Bay area; 4) Provision of a screen / enclosure surrounding proposed Air Conditioning units and existing Dry Cooler Refrigeration Unit within the Loading Bay area; and, 5) Landscaping and all associated and ancillary works and development

10/515 – Permission granted for amendments to planning permission P.10/12 which was granted for the erection of a Licensed Discount Foodstore of 1,647 sq. m. (gross floor area) and 1,274 sq. m. (net retail area). Permission is now sought for an 80sqm extension to the permitted building, resulting in a Licensed Discount Foodstore of 1,727 sq. m. (gross floor area) and 1,354 sq. m. (net retail area) and a revised site layout

Condition 1: The development shall be carried out in accordance with the plans and particulars submitted on the 14th January 2010, as revised by further information received on the 22nd April 2010, except as amended by the conditions attached hereto.

Reason: To ensure that the development strictly accords with the permission and to ensure that effective control is maintained.

12 – Permission granted for development on site to consist of the erection of 1 No. Licensed Discount Foodstore of 1,647m² (gross floor area) and 1,270m² (net retail area), comprising of a single storey single pitched roof structure, enclosed dock leveller, 2 No. building mounted back-lit signs, the erection of 1 No. back-lit freestanding double-sided sign, the erection of 2 No. freestanding finger post signs, boundary treatments, with connection to all existing services and to include all associated site development works, including new vehicular entrance off the existing Johnswell Road and 110 car parking spaces.

Condition 1: The development shall be carried out in accordance with the plans and particulars submitted on the 27th August 2010 except as amended by the conditions attached hereto.

Reason: To ensure that the development strictly accords with the permission and to ensure that effective control is maintained.

Description of the proposed works

This current Declaration seeks to determine as to whether:

1. The removal of 3 no. (high/eaves level) refrigeration units to Eastern elevation;
2. The installation of 1 no. Dry Cooler unit within the Loading bay area;
3. The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;
4. The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay area;
5. The installation of 4 no. (low/ground level) Air Conditioning units to the Northern Elevation;
6. The removal and relocation of 4 no. (low/ground level) Air conditioning units to within the Loading Bay Area;
7. The provision of a fifth (low/ground level) Air conditioning unit to within the Loading Bay Area;
8. The installation of 2 no. (low/ground level) air conditioning units to the Eastern elevation;
9. The provision of a screen/enclosure surrounding proposed air conditioning units and existing dry cooler refrigeration unit within the loading bay area; and
10. Landscaping and all associated and ancillary works and development.

Is or is not development or is, or is not exempted development under Section 4 (1) (h) of the Planning & Development Acts, 2000-2022 (in respect of works) and is or is not development (in respect of use, i.e. not a material change of use).

Legislative Framework

Section 2 of the Planning & Development Act 2000 (as amended) states:

“Works” includes any act or operation of construction, excavation, demolition, extension or alteration, repair or renewal.

Section 3 (1) of the Planning and Development Act, 2000 (as amended), states:

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

Assessment

The documentation submitted with the application includes a drawing relating to the subject works, and a 17-page submission including photographs relating to the subject works, and to set out the applicant’s position in relation exemptions for the works.

All documentation submitted with this application has been considered in this determination.

Pt.1 S.4 (1)(h) of the Planning and Development Act 2000-2019 states:

4.—(1) *The following shall be exempted developments for the purposes of this Act—*

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or

which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

It is considered that the works, by virtue of their nature and location, do affect the external appearance of the structure in that plant and machinery should be properly screened so as not to visibly affect the external appearance of the structure when viewed from neighbouring public spaces. The site abuts a public park and the haphazard addition of plant and machinery, both attached to the building and freestanding adjacent to the building and visible from the public park without adequate screening, individually and in combination, has an incongruous visual impact rendering the development inconsistent with the high-quality finish of the remainder of the Lidl building.

The act only provides for a question as to whether or not a development is exempt and does not allow for the question to extend to a question whether something is exempt under only one section but not another. The request for exemption only deals with Section 4 1(h) of the Act, which takes precedence over the planning regulations and hence this declaration does not consider other matters that may render the developments not exempt under the regulations. However, irrespective of section 4 1(h), other matters that need to be considered that are secondary are those that arise by virtue of Part 2 Article 9(1)(a)(i) of the Planning & Development Regulations, 2001-2021 'Restrictions on exemption', states the following:

Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) if the carrying out of such development would –

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act

Declaration and
referral on
development and
exempted
development.

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

Hence, although the question refers specifically to Section 4 (1) h, the declaration deals with the matter of exemption specified under Section 5 generally within the scope of the Act and not only Section 4(1)(h). Having assessed Part 2 Article 9 (detailed above), it is considered that the subject development is ~~considered development and that such development~~ also contravenes Condition 1 of Planning Permission ref. P10/12 as amended by 10/515, and therefore does not constitute exempt development having regard to the 'Restrictions on exemption' as set out in Part 2 Article 9(1)(a)(i) of the Planning & Development Regulations, 2001, as amended.

The nature and location of the works, relative to the location of the development in proximity to existing residential developments, and potential impacts on same formed part of the consideration of applications P.10/12 and P.10/515, and the conditions attached relate to the proposals considered as part of those applications. The works which form the subject to this Section 5 Declaration are considered to contravene and be inconsistent with the permission granted.

Dec 739 Recommendation

Having regard to the following;

- (i) the information submitted with the application documents,

- Pt.1 S.4 (1)(h) of the Planning and Development Act 2000, as amended
- (iii) Condition 1 of both grants of planning permissions ref. P. 10/12, and 10/515, and
 - (iv) Part 2 Article 9(1)(a)(i) of the Planning and Development Regulations 2001 as amended

It is considered that the works, relating to works as per the documents submitted, regarding alterations to the Lidl store and site, at the Johnswell Roads, Kilkenny materially affects the character of the building when viewed from the adjacent public spaces and are therefore inconsistent with the character of the building and contravenes the conditions attached to the permitted development as per grant of permissions ref. P.10/12 and P.10/515; that the works constitute development and which is not exempted development and therefore, planning permission is required.



25th May 2023

C. Kelly, Senior Executive Planner (Acting)



25/05/23

N. Louw, A/ Senior Planner

Declaration and Referral on Development and Exempted Development under Section 5 of the Planning & Development Act 2000, as amended

Kilkenny County Council Reference Dec 739

WHEREAS a question has arisen "as to whether:

1. The removal of 3 no. (high/eaves level) refrigeration units to Eastern elevation;
2. The installation of 1 no. Dry Cooler unit within the Loading bay area;
3. The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;
4. The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay area;
5. The installation of 4 no. (low/ground level) Air Conditioning units to the Northern Elevation;
6. The removal and relocation of 4 no. (low/ground level) Air conditioning units to within the Loading Bay Area;
7. The provision of a fifth (low/ground level) Air conditioning unit to within the Loading Bay Area;
8. The installation of 2 no. (low/ground level) air conditioning units to the Eastern elevation;
9. The provision of a screen/enclosure surrounding proposed air conditioning units and existing dry cooler refrigeration unit within the loading bay area; and
10. Landscaping and all associated and ancillary works and development.

Is or is not development or is, or is not exempted development and is or is not development", at Johnswell Road, Kilkenny.

AND WHEREAS the said question was referred to Lidl Ireland GmbH C/- The Planning Partnership.

AND WHEREAS the Planning Authority in considering this referral, had regard to

- (i) the information submitted with the application documents,
- (ii) S.4 (1)(h) of the Planning and Development Act 2000, as amended
- (iii) Restrictions on exemption by virtue of Part 2 Article 9(1)(a)(i) of the Planning and Development Regulations 2001, as amended
- (iv) Condition 1 of both grants of planning permissions ref. P. 10/12, and 10/515, and

AND WHEREAS :-

- it is considered that the addition and relocation of plant and machinery as listed, by virtue of their nature and location, do affect the external appearance of the structure in that proposed plant and machinery listed, both attached to the building and freestanding adjacent to the building and visible from the adjacent public space without adequate screening, individually and in combination, presents as haphazard and incongruous as regards visual impact and accordingly materially affect the development's character, rendering the developments inconsistent with the high-quality finish of the remainder of the building.
- it is considered that the adding and removal of plant and machinery, including screening (which is substandard) as listed contravenes Conditions 1 of Planning Permission ref. 10/12 as amended by ref. 10/515

NOW THEREFORE the Planning Authority, in exercise of the powers conferred on it by Section 5(2) (a) of the 2000 Act, as amended, hereby decides that:

The proposed works, plans and particulars for which were submitted to the Planning Authority on 28th April 2023, relating to, the works as set out above at Lidl, Johnswell Road, Kilkenny, constitutes development which is not exempt and therefore, requires planning permission.

MATTERS CONSIDERED

In making its decision, the Planning Authority has regard to those matters to which, by virtue of the Planning and Development Act 2000, as amended and Planning & Development Regulations 2001, as amended made thereunder, it was required to have regard.

U. Kealy

Administrative Officer

Footnote:

Section 5 (3)(a) of the Planning & Development Act 2000, as amended states '*Where a declaration is issued under this section, any person with a declaration under subsection 2 (a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration*'.

An Bord Pleanála, 64 Marlborough Street, Dublin 1, Tel. 01 8588100 or LoCall 1890 275175.

Appendix C

Section 5 Declaration Application Cover Letter



Planning Department
Kilkenny County Council
County Hall
John Street, Kilkenny

Thursday, 27th April 2023
[By Post]

Dear Sir/Madam,

RE: SECTION 5 DECLARATION APPLICATION IN RELATION TO (AT LIDL, JOHNSWELL ROAD, KILKENNY, CO. KILKENNY, R95 A329)

1.0 INTRODUCTION & SUMMARY

The Planning Partnership, McHale Retail Park, Castlebar, Co. Mayo have been retained by Lidl Ireland GmbH (the owner of the premises in question) to prepare this application.

The Applicant hereby seeks a Declaration from Kilkenny County Council under Section 5 of the *Planning and Development Acts, 2000-2022* to confirm our understanding that **no planning permission** is required in respect of the works in question.

The proposal is detailed below along with our planning opinion regarding the status of same, along with relevant drawings and documentation and the statutory fee of €80. The Applicant seeks the Council's determination as to whether;

1. *The removal of 3 no. (high / eaves level) refrigeration units to Eastern elevation;*
2. *The installation of 1 no. Dry Cooler unit within the Loading Bay Area;*
3. *The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;*
4. *The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area;*
5. *The installation of 4 no. (low / ground level) Air Conditioning units to the Northern Elevation;*
6. *The removal and relocation of 4 no. (low / ground level) Air Conditioning units to within the Loading Bay Area;*
7. *The provision of a fifth (low / ground level) Air Conditioning unit to within the Loading Bay Area;*
8. *The installation of 2 no. (low / ground level) Air Conditioning units to the Eastern Elevation;*
9. *The provision of a screen / enclosure surrounding proposed Air Conditioning units and existing Dry Cooler Refrigeration Unit within the Loading Bay area; and,*
10. *Landscaping and all associated and ancillary works and development.*

Is or is not development or is or is not exempted development under Section 4 (1) (h) of the Planning & Development Acts, 2000-2022 (in respect of works) and is or is not development (in respect of use, i.e. not a material change of use).

The Applicant seeks the Planning Authority's determination as to whether these works **are exempted development** under Section 4 (1) (h) of the *Planning and Development Acts 2000-2022*.

We trust that the Planning Authority will concur that the works in question are exempted development, however should any queries arise, please do not hesitate to contact us.

We also ask that the Planning Authority determine each element individually as well as cumulatively, i.e. should any element be of concern, we request that the determination clarify / isolate same in order to confirm the status of the remaining elements.

We note that a separate and concurrent Planning Application has been lodged to *Kilkenny County Council* in relation to relevant elements of the above (Reg. Ref: 23/60159).

That Planning Application is being lodged in the event that it is determined that some of the works may require permission.

For instance, in the event that this Section 5 Declaration Application is successful, it is envisaged that matters would be closed. If the Declaration is partially successful, any planning permission for the subject application being implemented only in respect of those element(s) not deemed exempted.

We note that the lodgement of a planning application does not estoppel the applicants / land owners exempted development rights in this regard, as per *Fingal County Council -v- William P. Keeling & Sons Ltd., [2005] IESC55 (2005)*.

We submit that no change of use would occur *material* or otherwise, with the development in question being limited to the physical works / installation, which we submit can be considered as exempted development under Section 4 (1) (h) of the *Planning and Development Acts 2000-2022*.

2.0 WORKS / DEVELOPMENT CONTEXT

2.1 Development & Works

The proposed works, as summarised above, are illustrated under the referred drawings prepared by Darmody Architects and Austen Associates and otherwise illustrated below. *Works* and *Development* are defined in the *Planning and Development Acts 2000-2022* as:

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

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

2.2 Relevant Exempted Development Provisions

Section 4 (1) (h) of the *Planning and Development Act 2000-2022* states:

*"The following shall be exempted developments for the purposes of this Act... (h) development consisting of the carrying out of works for the **maintenance, improvement or other alteration of any structure**¹, 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 character² of the structure or of neighbouring structures"*
[Our emphasis]

¹ Defined in the Planning & Development Acts, 2000-2022 as: "any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and — (a) where the context so admits, includes the land on, in or under which the structure is situate..."

² Which, in the judgement of Finley C.J. in the case of *Cairnduff v O'Connell* (1986) I.R. 73, was described as: "'Character" as provided for in the subsection relates to shape, colour, design, ornamental features and layout of the structure concerned and is not dependent upon the use to which the structures are being made at any particular time."

Section 4 (1) (h) of the *Planning and Development Act 2000-2022* provides a broad exemption, and one which is not restricted by Articles 6, 9 or 10 of the *Planning and Development Regulations 2001-2022*. In effect, reliance on Section 4 of the *Planning and Development Act 2000-2021* provides immunity from restrictions or limitations as may otherwise be relevant under the *Regulations*.

An Bord Pleanála (in Ref: PL29S.RL.2120) confirmed same, stating: "...the restrictions on exemption contained in Article 9 of the *Planning and Development Regulations, 2001* ... do not restrict any exempted development under section 4(1) of the *Planning and Development Act, 2000*".

2.3 Immaterial Deviations

We also note that certain modifications to the previously permitted drawings / details may not be material in nature and hence would be 'permitted' and within the scope of the permission.

We note that this principle, being of *immaterial deviations* is well established in case law, etc. For instance, Eamon Galligan, Senior Counsel summarises the principle as follows: "... an immaterial variation ... does not involve any breach of permission at all but recognises that from a practical point of view there must be some tolerance of variations from the permitted plans in certain circumstances." ³

The following outlines relevant examples / precedents of such scenarios, which in our opinion demonstrates the scope for *immateriality* to arise. In *O'Connell v. Dungarven Energy Ltd [2000] IEHC 101*, Finnegan J., quoting Lord Denning states:

"... planning permission covers work which is specified in the detailed plans and any immaterial variation therein. I do not use the words "de minimis" because that would be misleading. It is obvious that, as the developer proceeds with the work there will necessarily be variations from time to time. Things may arise which were not foreseen. It should not be necessary for the developers to go back to the planning authority for every immaterial variation. The permission covers any variation which is not material". [Our Emphasis]

Lord Denning in *Lever (Finance) Ltd v City of Westminster* also states:

"... after detailed planning permission had been given, it is a common occurrence to find that minor modifications are needed: and that when the necessity does arise, the common the practice [sic] "is for/developers' architect to submit any such proposed modification to the planning officer. If the planning officer thinks it is not material, he says so and the development then goes forward in accordance with the modified plans as approved in that sense by the planning officer; and nobody thinks it necessary to submit a further application.....That is an eminently sensible practice." [Our Emphasis]

In *Bailey V Kilvinane Wind Farm Ltd*. [Court of Appeal 2014 No. 1037], Mr. Justice Gerard Hogan stated:

"A consideration of the case-law on this topic to date suggests that the question of material / non-material deviations from the terms of an existing permission has been approached from a practical and common sense perspective: is the deviation of such materiality that it would realistically impact on the rights or interests of third parties or be such as would affect planning considerations." [Our Emphasis]

³ In his paper 'Planning Enforcement' delivered at the Roundhall Planning & Environmental Law Conference 2008 (8th November 2008).

In addition, in the case of *Kenny -v- Dublin City Council* [2009] IESC 19, the Supreme Court held:

"There will inevitably be small departures from some or even many of the plans and drawings in every development. There can be discrepancies between and within plans, drawings, specifications and measurements; there can be ambiguities and gaps. ... However, planning laws are not intended to make life impossible for developers, for those executing works such as architects, engineers or contractors or for the planning authorities in supervising them. Nor are they there to encourage fine-tooth combing or nit-picking scrutiny of the works." [Our emphasis.]

We respectfully submit that the preceding examples of *immaterial deviations* may also be directly relevant to the subject scenario.

The issue of immaterial deviations has also been considered by An Bord Pleanála on a number of occasions.

For instance, *ABP Ref: PL 24.RL2606* where the Board ruled that a deviation from the detail of plans submitted with an application for planning permission (in relation to an increase in the ridge height) was *"de minimis and would accordingly be in accordance with the said planning permission"*.

In addition, in a case at Mount Alverno, Nerano Road and Sorrento Road, Dalkey, County Dublin, An Bord Pleanála (*ABP Ref: PL 06D.RL2671*) assessed a number of modifications (from what was permitted) arising during the construction process.

These cases, in addition to the legal precedents, demonstrate that the principle of *immaterial deviations* is well established, and can potentially include considerable alterations in physical terms so long as such alterations have limited or immaterial effect.

In another case for instance (*ABP Ref: ABP-300772-18*), where changes to a structure were deemed to be 'immaterial', the relevant test employed by An Bord Pleanála related to: *"the deviation in this instance between what has been constructed and the approximate figure dimensions is minor in the context of the development, does not have any material impacts on adjoining property and is, therefore, de minimus, and is exempted development."*

And in another case for instance (*ABP Ref: ABP-303200-18*), where changes to a structure were deemed to be 'material', the Board Inspector also noted that:

"the question of material / non-material deviations should be approached from a practical and common-sense perspective. The question arising is whether the deviation is of such materiality that it would realistically impact on the rights or interests of third parties or be such as would affect planning considerations."

As set out below, we consider that the various alterations highlighted would not give rise to any material effects on the amenities of the surrounding area.

2.0 SITE CONTEXT

2.1 Site Location & Description

The subject site is located on Johnswell Road, and has been in operation as a Discount Foodstore since November 2010. The site is bounded by housing to the west, north and south, with a public park adjoining the site to the east.

In terms of proximity to residential development we submit that no material impacts would be likely to arise, given the existing operation on the site.

The existing store on site was permitted in 2010 under *Reg. Ref: 10/12*, with a net sales area of 1,270 sqm. Planning permission was subsequently granted later in 2010 under *Reg. Ref: 10/515* for modifications to same, including an 80 sqm extension to the permitted building, resulting in a Licensed Discount Foodstore of 1,727 sqm (gross floor area) and 1,354 sqm (net retail area).

The existing development on site has therefore become an established feature of the area, and the facilities / services available therein.

We respectfully submit that the nature of the proposed development will not materially alter as a result of the subject application, hence no substantive planning considerations would be likely to arise.

Plate 1: Aerial View of Subject Site and Surrounds (site outlined approximately in red)



Source: BingMaps

2.2 The Parent Permissions

As noted above, the existing store was permitted under *Reg. Ref: 10/12*, with the 'bakery extension' being permitted under *Reg. Ref: 10/515* as the original store was under construction, where the Store (inclusive of the bakery) commenced trading thereafter.

As part of the parent permission, we note that a Noise Assessment was prepared by the Applicant, and submitted at Further Information stage, wherein it was stated:

"It is understood that heating, water and refrigeration plant will be contained within the internal plant room at the south eastern corner of the building and some items of refrigeration plant will be located externally adjacent to the Secure Store."

[Our Emphasis]

Permission was subsequently granted for the scheme, as revised at Further Information stage, inclusive of the above terms.

We understand that the store operations included the presence of an array (3 no. separate units) erected at high / eaves level along the Eastern façade (and adjacent to the Secure Store). Plate 1 below illustrates these units.

These have now been removed, and replaced by a single unit (as detailed in Section 2.2 below)

Plate 1: Eastern Façade Refrigeration Units (now removed)



Source: ICAN Acoustics

3.0 QUESTIONS POSED

3.1 The removal of 3 no. (high / eaves level) refrigeration units to Eastern elevation

As noted above, and illustrated in Plate 1 above, the pre-existing refrigeration units have been removed, as they have been replaced by a single Dry Cooler Unit (no. 2 / Section 3.2 below).

As noted above also, those 3 no. units are considered to be part of the original planning permission and their removal results in an alteration of the permitted appearance of the structure and site. For clarity therefore, confirmation of the exempted status of their removal is requested.

We consider that their removal, in tandem with replacement elsewhere, clearly represents *works for the maintenance, improvement or other alteration of any structure, 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.*

The character of the structure is that of a Foodstore, with a pre-existing and long established element of associated plant and machinery and service infrastructure, ranging from bin stores, loading bay with dock leveller, (and an also now removed waste compactor), etc.

The Foodstore structure, and structures of the same type, are expected and understood to have various service areas and elements visible, as a natural requirement of their operations. Changes to those elements and features, including through removal of redundant / replaced equipment, is equally relevant.

3.2 The installation of 1 no. Dry Cooler unit within the Loading Bay Area

The installation of a Dry Cooler Refrigeration Unit is part of an upgrade programme at the store, to ensure that appropriate equipment is relied upon, where energy (and noise) efficiency and standards increase over time.

As such the introduction of new equipment, in a suitable location, has the potential to improve an existing situation.

In this regard, we consider that this element also represents *works for the maintenance, improvement or other alteration of any structure, 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.*

The installed structure, with or without the proposed screen (no. 9 / Section 3.9) would not in our opinion *materially affect the external appearance of the structure so as to render the appearance inconsistent with its character*, as the character normally includes the provision of various elements of equipment on and around the elevations.

The Dry Cooler whilst ground mounted is nonetheless part of the overall structure in terms of being within the loading bay area and thus within the building curtilage and can be considered to be 'part of' the structure accordingly as the loading bay and Cooler therein is not a divisible element from the Foodstore.

In the alternative, the 'structure' concerned is the loading bay area, within which the Dry Cooler is situated. Both interpretations are valid in our opinion, as supported by the definition of a structure in the Planning & Development Acts, which highlights that one 'structure' can also be a part of another 'structure'. The Planning Acts and exemptions therein apply to all structures.

Visually, the location and (partly below ground level) of the cooler ensures that the appearance of the structure is not materially altered.

3.3 The erection of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area

We note the erection of a green mesh fence also, which (as per no. 4 / Section 3.4 below) is to be removed, however the Applicant seeks confirmation of the status of same for completeness. Plate 2 below illustrates the fence in question whilst Plate 3 provides a (Google) Streetview comparison for context.

Plate 2: View of Green Mesh Fence



Source: Lidl Ireland GmbH

Plate 3: Comparison View



Source: Google Streetview

For the avoidance of doubt, the exempted development provision in question in this instance is also Section 4 (1) (h) of the *Planning and Development Act 2000-2022* relating to *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.*

As illustrated under Plates 2 & 3 above, the works relate to an existing structure (either that of the overall Foodstore or the Loading Bay structure) and the works would not in our opinion *materially affect the external appearance of the structure*, and more importantly would be well below the relevant threshold of *'inconsistency with the character of the structure or of neighbouring structures'*.

As such, the works can be considered to be exempted development in our opinion.

3.4 The removal of green mesh fence surrounding Dry Cooler unit within the Loading Bay Area

As noted above, the fence in question is intended to be removed, however for completeness the Applicant seeks that the Planning Authority confirm that its removal, in addition to its installation, would be exempted development, also under Section 4 (1) (h) of the *Planning and Development Act 2000-2022*.

3.5 The installation of 4 no. (low / ground level) Air Conditioning units to the Northern Elevation

The Applicant had commenced the installation of Air Conditioning units to the Northern Elevation, as part of the (national) roll out of a store enhancement strategy.

These units are currently in situ however are to be removed, and for completeness, the Applicant seeks a formal determination as to their status, as originally installed, as illustrated below.

Plate 4: View of Northern Elevation & Air Conditioning units



Source: Lidl Ireland GmbH

Plate 5: View of Northern Elevation & Air Conditioning units



Source: Lidl Ireland GmbH

Plate 6: Side View



Source: Lidl Ireland GmbH

For the avoidance of doubt, these units form part of the building or structure, as they are an inherent part of the premises, notwithstanding that they are a new addition.

They form part of the building fabric by virtue of the fact that they are attached to and inform the appearance of the façade, similar to fenestration, rainwater pipes and guttering, etc. or other materials and equipment.

Having regard to this, the question arises (again in respect of Section 4 (1) (h) of the *Planning and Development Act 2000-2022*) whether these works:

- Are for the maintenance, improvement or other alteration of any structure;
- Which do not materially affect the external appearance of the structure; and, ⁴
- If they materially affect the external appearance of the structure is it to the extent so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

The provision of Air Conditioning within the store is clearly for the improvement of the Foodstore, but could also be considered as an 'other alteration'.

The provision of the units would not in our opinion materially affect the external appearance of the structure for a number of reasons, including:

- The units are located to the rear of the store;
- The units are at low level, well below eye level;
- The existing elevation they are located on is non-descript and its appearance, rhythm or configuration is not visually affected by the installation of the units; and,
- The visibility of the units, and the façade in general, is somewhat obscured by landscaping and vegetation.

Furthermore, as regards the character of the structure, the provision of the units are entirely in keeping with the character of a Foodstore, where such equipment would be expected to be visible, as is the case in many stores and other commercial establishments nationally and locally.

As such there would not be any level of incongruity arising.

Finally, with regard to neighbouring structures, there is already a fundamental difference between the subject Foodstore and the surrounding neighbourhood style, such that this pre-existing balance and contrast will not be affected.

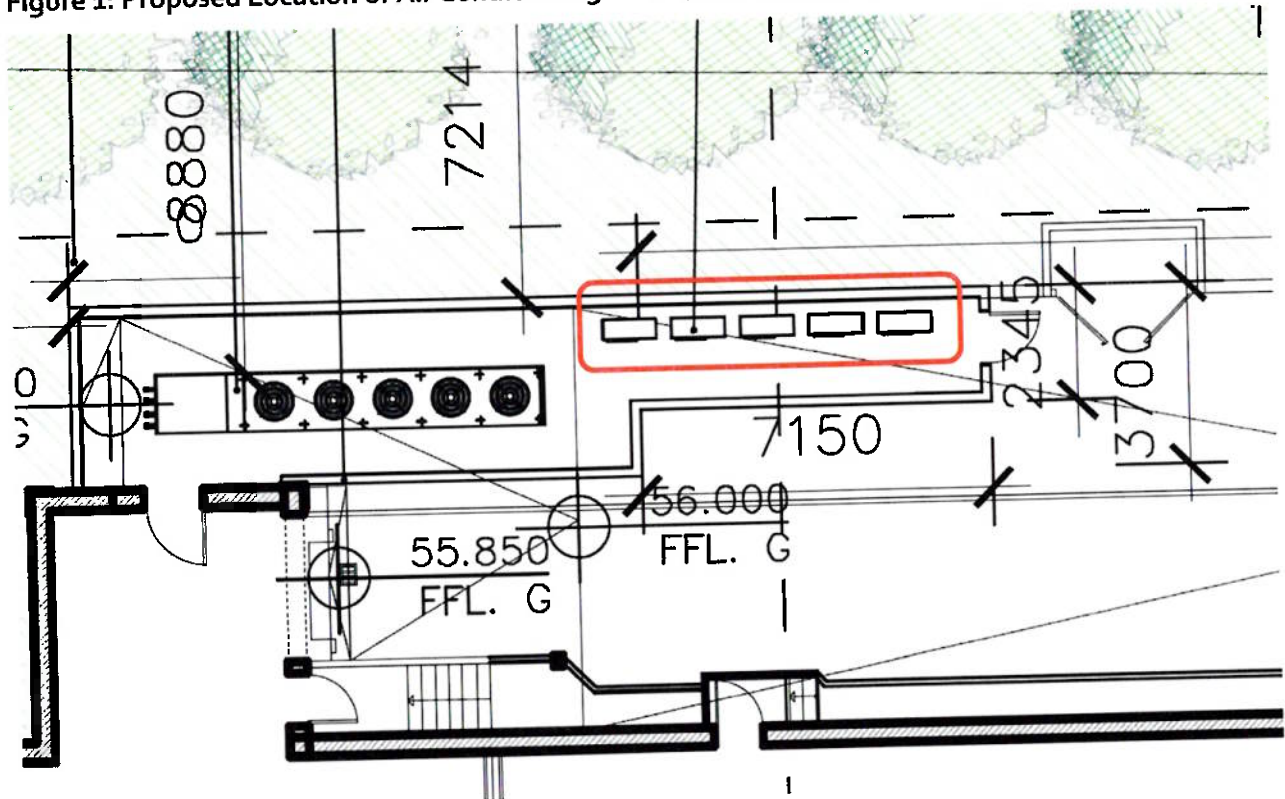
Having regard to the foregoing, we consider that the Planning Authority can be fully satisfied that the works in question qualify under Section 4 (1)(h) and would be exempted development accordingly.

3.6 The removal and relocation of 4 no. (low / ground level) Air Conditioning units to within the Loading Bay Area

Notwithstanding the above, the units in question are intended to be removed, hence the Applicant seeks that the Planning Authority confirm that their removal and relocation would also be exempted development, also under Section 4 (1) (h) of the *Planning and Development Act 2000-2022*.

⁴ As noted above, a material change in appearance is still exempted development, so long as such change does not render the appearance inconsistent with the character of the structure or of neighbouring structures. Hence *consistency* rather than *materiality* is the key threshold.

Figure 1: Proposed Location of Air Conditioning Units (Outlined in Red)



Source: Darmody Architecture

The above Figure 1 illustrates the proposed location of the units (including a 5th unit as addressed in no. 7 / Section 3.7 below, which can be disregarded for the purposes of this question, no. 6).

The location of the units, alongside the above referred Dry Cooler, would be clustered within the existing Loading Bay area, which forms part of the existing Lidl Store footprint.

As such and otherwise, they form part of the structure (either the overall structure or the Loading Bay structure, or both).

As per the above questions, Section 4 (1)(h) arises in this instance, also.

We submit that the units, with or without the proposed screen (elaborated on below in no. 9 / Section 3.9), would also be exempted development, in that:

1. They relate to an improvement to the structure;
2. They would not materially alter the appearance of the structure; and,
3. Nor would they alter the character of the structure or surrounding structures.

Similar to no. 2 / Section 3.2 above, these units are to be located in a service area, where equipment of various types is to be expected and the norm. The units would not appear out of place in any respect.

As such, they would clearly comply with the *appearance* and *character* requirements of Section 4 (1)(h), thus should be deemed to be exempted development.

3.7 The provision of a fifth (low / ground level) Air Conditioning unit to within the Loading Bay Area

We note that the completion of the Air Conditioning system requires a 5th (7th overall) unit to be provided, which has not been installed to date.

As such, it is proposed, as part of the preceding works, to include a 5th unit to complete the specification. We consider that the same characteristics arise as in the case of no. 6 / Section 3.6 above and the Planning Authority should similarly conclude that the provision of an additional unit would also be exempted development.

3.8 The installation of 2 no. (low / ground level) Air Conditioning units to the Eastern Elevation

In addition to the proposed 5 no. units to be clustered within the Loading Bay area / structure, we note that a further 2 no. Air Conditioning units are existing on the Eastern elevation, as illustrated in Plate 7 below.

Plate 7: View of Eastern Elevation & Air Conditioning units



Source: Lidl Ireland GmbH

Similar to no. 5 / Section 3.5 above, these units form part of the building or structure, as they are an inherent part of the premises, notwithstanding that they are a new addition.

They form part of the building fabric by virtue of the fact that they are attached to and inform the appearance of the façade, similar to fenestration, rainwater pipes and guttering, CCTV, gas meter, crash barrier, lighting, etc. or other materials and equipment.

Having regard to this, the question arises (again in respect of Section 4 (1) (h) of the *Planning and Development Act 2000-2022*) whether these works:

- Are for the maintenance, improvement or other alteration of any structure;
- Which do not materially affect the external appearance of the structure; and,
- If they materially affect the external appearance of the structure is it to the extent so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

The provision of Air Conditioning within the store is clearly for the improvement of the Foodstore, but could also be considered as an 'other alteration'.

The provision of the units would not in our opinion materially affect the external appearance of the structure for a number of reasons, including:

- The units are located to the side of the store;
- The units are at low level, well below eye level;
- The existing elevation they are located on is non-descript and its appearance, rhythm or configuration is not materially visually affected by the installation of the units⁵; and,
- The visibility of the units, and the façade in general, is somewhat obscured by landscaping and vegetation.

Furthermore, as regards the character of the structure, the provision of the units are entirely in keeping with the character of a Foodstore, where such equipment would be expected to be visible, as is the case in many stores and other commercial establishments nationally and locally.

As such there would not be any level of incongruity arising.

Finally, with regard to neighbouring structures, there is already a fundamental difference between the subject Foodstore and the surrounding neighbourhood style, such that this pre-existing balance and contrast will not be affected.

Having regard to the foregoing, we consider that the Planning Authority can be fully satisfied that the works in question qualify under Section 4 (1)(h) and would be exempted development accordingly.

3.9 The provision of a screen / enclosure surrounding proposed Air Conditioning units and existing Dry Cooler Refrigeration Unit within the Loading Bay area

With a view to addressing any potential concerns regarding visual or aural effects of equipment on site, perceived or otherwise, the Applicant is amenable to the installation of a screen / enclosure around the existing Dry Cooler and the proposed 5 no. Air Conditioning units.

Details of same are illustrated under Figures 2-4 below, along with the enclosed Darmody Architecture Drawing no. PA-400.

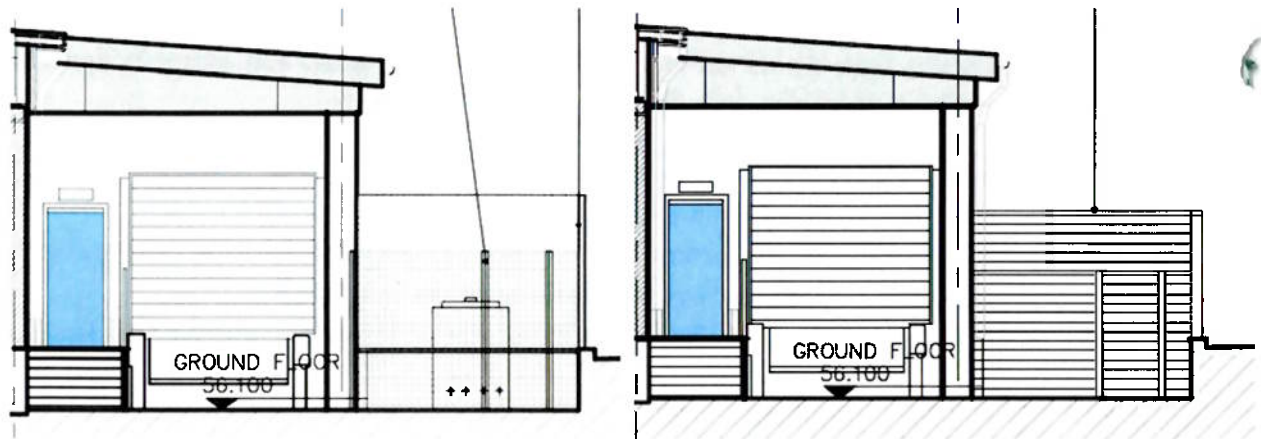
The screen is considered to be limited in scale and visibility, and would assimilate into the overall 'built' environment of the loading bay, as framed to the East by an established tree line.

Furthermore, the proposed timber finish, would result in a suitably neutral appearance. The screen could also 'improve' the overall loading bay appearance in our opinion, not least by providing greater enclosure, from an aesthetic perspective (rather than in terms of the character determination).

As such, the screen would not be considered to materially alter the appearance of the Loading Bay, however in any event we consider that any appearance alteration would not be such that it would constitute an inconsistency in terms of the character of the structure, or of surrounding structures.

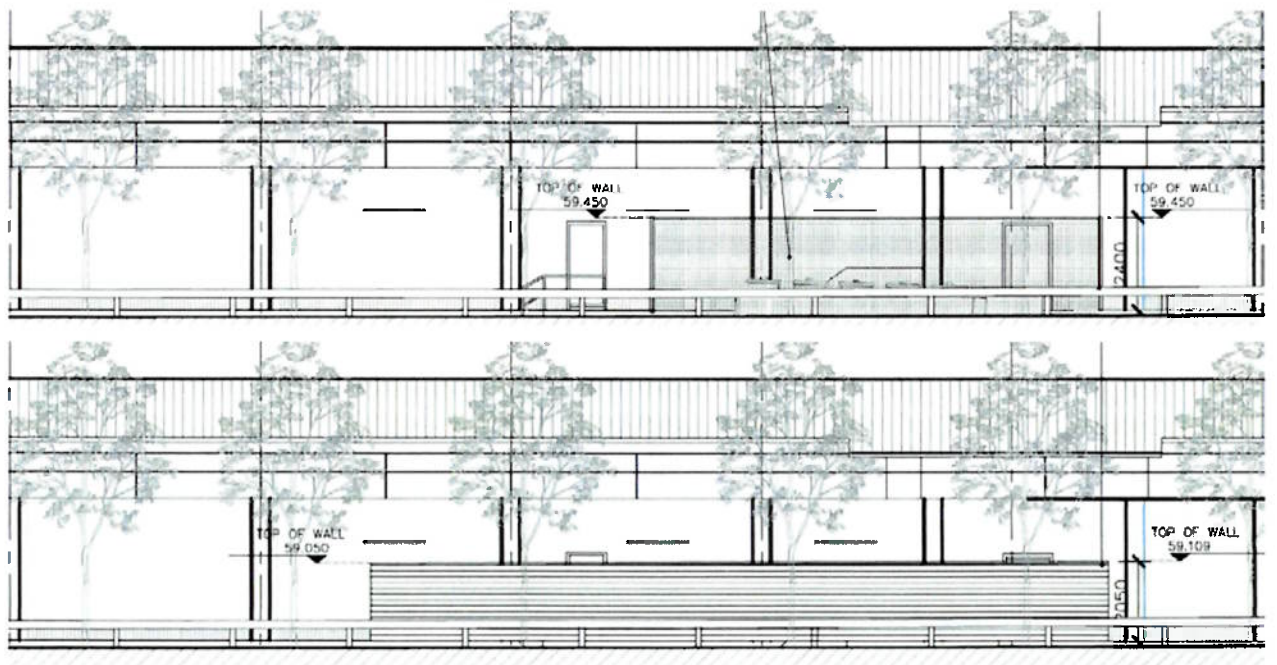
⁵ Whilst the elevation colour is a factor, we consider that the elevation is nonetheless not materially affected, for a number of reasons, in particular including the low level nature of the units and also the existence of several other long established interruptions in the façade and colour 'block' in this area as illustrated in Plate 7. For the avoidance of doubt, if colour is a material concern, the ducting / cable tray, etc. can be coloured to blend in with the existing rainscreen cladding, however this element is not dissimilar to the existing pattern of rainwater pipes in any event.

Figure 2: Southern Elevation (Existing to Left, Proposed to Right)



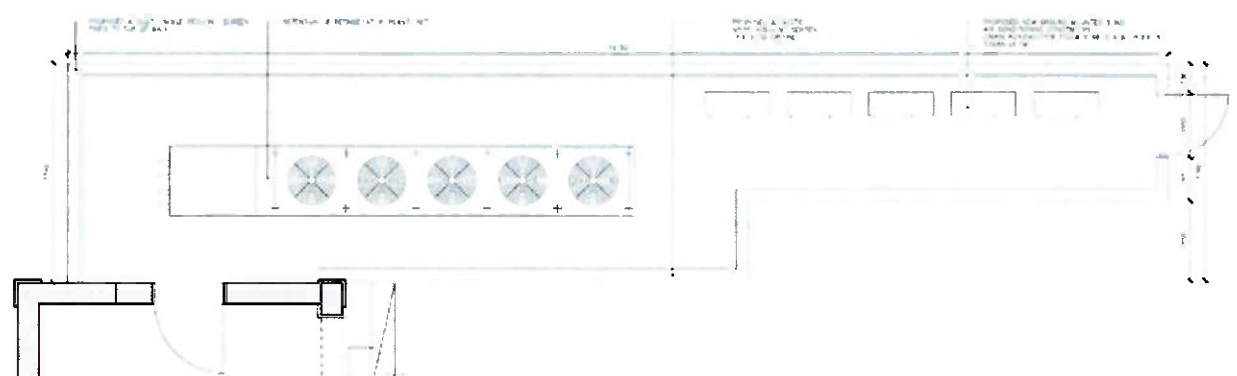
Source: Darmody Architecture

Figure 3: Eastern Elevation (Existing top, Proposed bottom)



Source: Darmody Architecture

Figure 4: Plan View



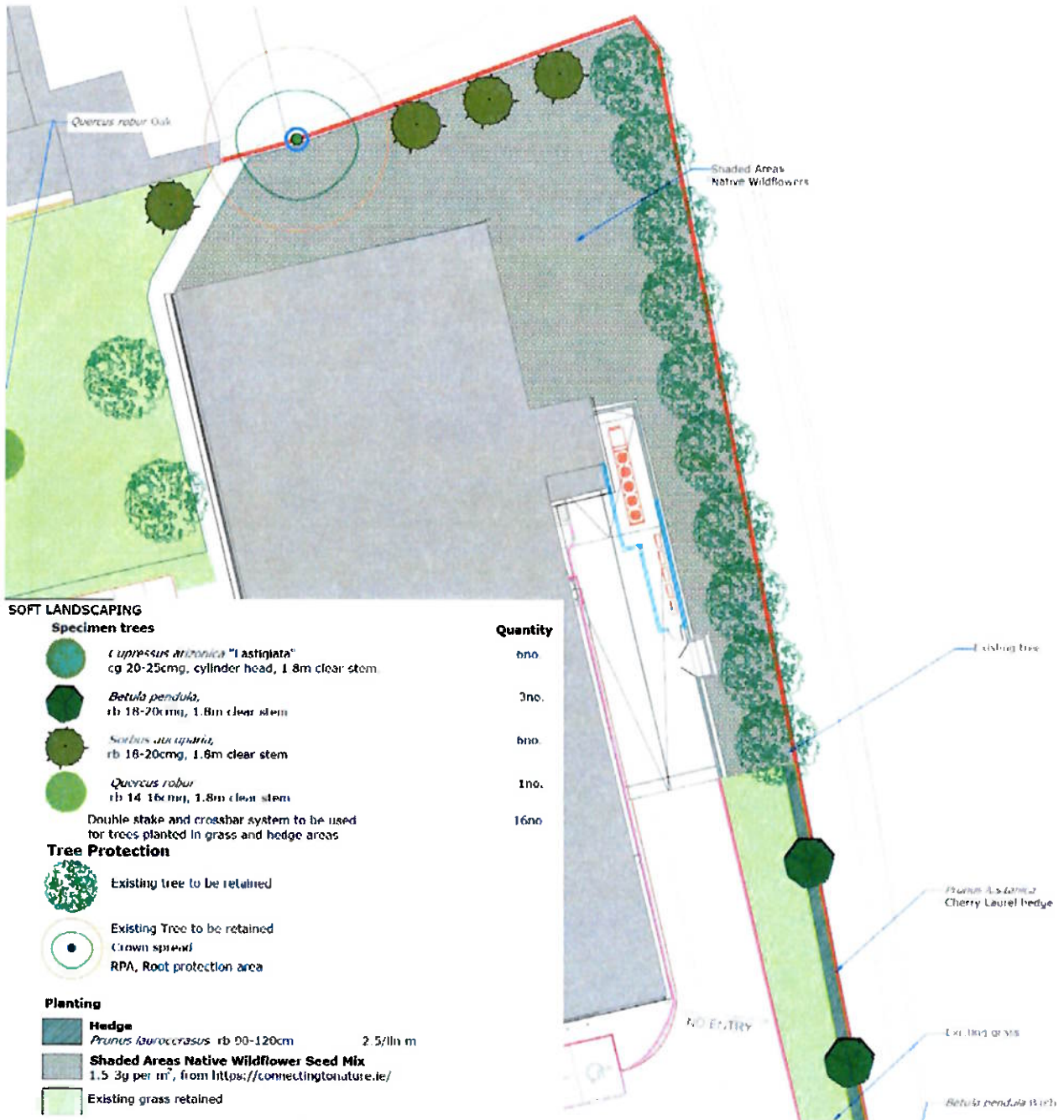
Source: Darmody Architecture

3.1.0 Landscaping and all associated and ancillary works and development

Finally, and for completeness, we note the Applicant intends to carry out certain landscaping works, as specified by the scheme Landscape Architects, illustrated in Figure 5 below, generally including wildflower planting and a number of additional trees to the rear of the store.

We consider that these works would also be within the scope of Section 4(1)(h) whether as maintenance or improvement works, or both, and the Planning Authority are requested to confirm the exempted status of same.

Figure 5: Landscaping



Source: Austen Associates Drawing no. 075321_LP_01

4.0 CONCLUSION

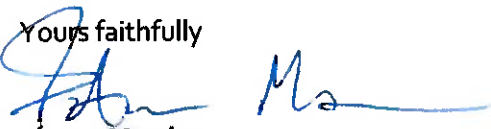
The Applicant seeks the Planning Authority's determination as to whether the existing and/or proposed works **are exempted development** under Section 4 (1) (h) of the *Planning and Development Acts 2000-2022*.

In summary, we reiterate that the existing and/or proposed works are limited in nature and within the norm of what would be observed in many retail and commercial environments.

We trust that we have provided adequate information in this regard and should further information be required we are in a position to assist. We look forward to an early and favourable determination in respect of the works.

I trust the above is of interest and should you have any queries or wish to discuss further please do not hesitate to contact me.

Yours faithfully



Fintan Morrin

Associate

The Planning Partnership

Encl.