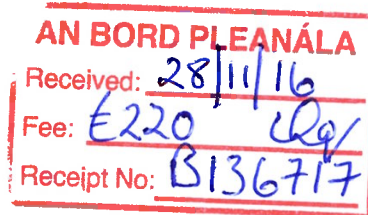


28<sup>th</sup> November 2016

The Secretary,  
An Bord Pleanála,  
64 Marlborough Street,  
Dublin 1



2nd Floor Seagrave House  
19 – 20 Earlsfort Terrace Dublin 2  
T: +353 (0)1 661 8500  
F: +353 (0)1 661 8568

**gva.ie**

Dear Sir/Madam,

**RE: Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22 - Section 5 Referral of South Dublin County Council Ref. ED16/0045**

**South Dublin County Council Ref. ED16/0045**

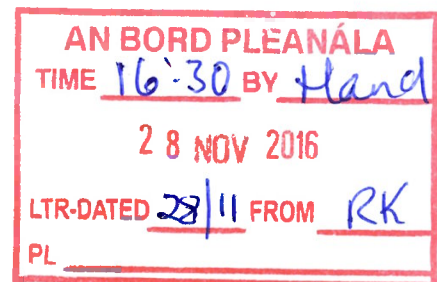
Please find attached a Referral Report prepared by GVA on behalf of our Client PKB Partnership, Unit D5, Swords Enterprise Park, Feltrim Road, County Dublin following the Decision of South Dublin County Council in relation to ED16/0045 made by order dated the 1<sup>st</sup> November 2016 and issued on the 2<sup>nd</sup> November 2016. We would request that all correspondence in relation to this observation should be sent to the Agents, GVA, Second Floor, Seagrave House, 19-20 Earlsfort Terrace, Dublin 2.

Enclosed is a cheque for €220 being the appropriate fee for a Referral. This Referral has been made within the statutory period (See Appendix I of enclosed Referral Report for a copy of the South Dublin County Council Decision).

Yours sincerely

**Robert McLoughlin**  
Director

**For and on behalf of GVA Planning and Regeneration Limited**





**GVA** Planning



## Referral Report

2nd Floor Segrave  
House  
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## Section 5 Referral

**Unit 3, Fonthill Retail Park, Fonthill  
Road North, Clondalkin, Dublin 22**  
Section 5 Referral Re: South Dublin  
County Council Ref. ED16/0045

November 2016

<b>AN BORD PLEANÁLA</b>	
TIME _____	BY _____
28 NOV 2016	
LTR-DATED _____	FROM _____
PL _____	

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6.	Conclusion .....	15

## Appendices

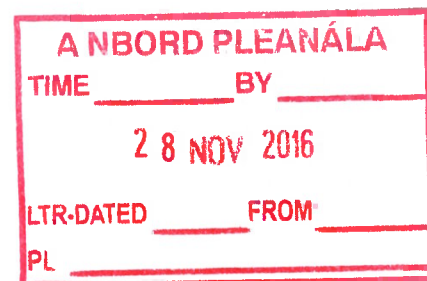
Appendix I Copy of Section 5 Declaration Decision

Prepared By: Robert McLoughlin

Status: Final

Draft Date: November 2016

For and on behalf of GVA Planning and Regeneration Limited



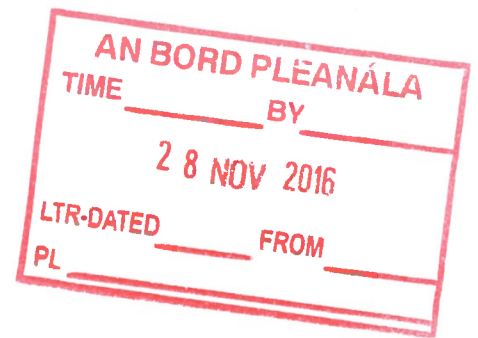
# 1. Introduction

We, GVA, have been retained by our client PKB Partnership, Unit D5, Swords Enterprise Park, Feltrim Road, County Dublin to submit this Referral to An Bord Pleanála in relation to Ref. ED16/0045. The Referral of this case is within the statutory period of 4 weeks and we enclose the appropriate fee being €220.

The Section 5 Declaration Request (Ref. ED16/0045) was submitted to South Dublin County Council in relation to Unit no. 3 at the Fonthill Retail Park, Clondalkin, Dublin 22 which requested a Declaration on the following question:

*'Whether a material change of use at retail unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.'*

Figure 1: Fonthill Retail Park



Source: Google Maps, 2016



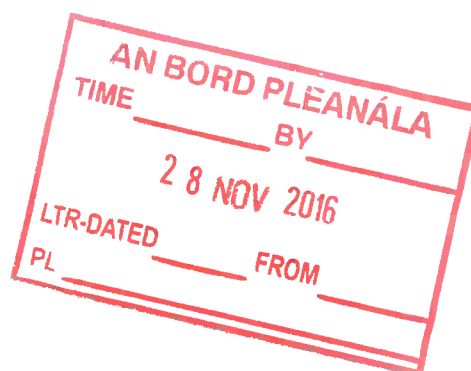
## 2. Preliminary Points

Our client appreciates that every case in relation to material change of use is different and subtleties exist which often are subjective, require objectivity and need to avoid conclusions based on perception. Planning law dictates that a planning permission should be interpreted objectively and not on foot of subjective considerations peculiar to an applicant, user or third party. Therefore, we would like to make some preliminary points which we would respectfully request An Bord Pleanála to consider throughout the assessment of this case:

- The Development authorised under Reg. Ref. S97A/0791 was for a retail use from which in legislative terms at the time (and still today) falls under the definition of a "shop". While subsequently the Retail Planning Guidelines (RPG's) provided a breakdown of different types of retail it did not exist at the time and therefore the authorisation was for open retail. It is noted that the public notice did refer to "warehouse" but that was in the context of describing the building within which the use would exist (it was then and still is today a warehouse type structure). As 'retail warehousing' as a defined form of retailing did not exist at the time (i.e. the RPG's did not exist) the application was not seeking permission for same and there could be no implied restriction on the retail use today.
- The question of whether development occurred in the first instance or not was not adequately dealt with in the Local Authority Assessment. The Planners Report outlined definitions from Planning Legislation but did not assess the core question of 'development' but instead moved to dealing with exemptions. This approach resulted in the substantive part of the Section 5 Declaration Request not receiving a proper and objective assessment. This may have been unintentional but also suggests that the Decision was already made before the assessment started (possibly due to perception). Therefore, the purpose of the Planning Report was to arrive as quick as possible to dealing with Condition no. 2 of Reg. Ref. SD15A/0152, a condition we believe is unenforceable.
- Further to the above, the planning status of a unit (retail in this case) needs to consider the point in time at which it was authorised and the context within which the decision was made. Planning should not seek to retrench on a position which has been established and seek to alter a landowners property rights either through enforcement actions or conditions on Planning Permissions which do not relate to the development sought. It cannot be the case that a member of the public seeking a Planning Permission for minor internal works and improvements to the outside of a building effectively becomes penalised (e.g. through conditions) in a manner that affects the value and enjoyment of their land.
- In many instances works similar to those sought under Reg. Ref. SD15A/0152 may be carried out under exemption (often over time) and in such instances there would be no restrictions on use. In this context the insertion of Condition 2 on Reg. Ref. SD15A/0152 is an opportunistic exercise seeking to curtail a use which when Granted Planning Permission originally (Reg. Ref.

S97A/0791) did not have such restrictions. Furthermore, this approach results in those units which seek to improve by way of layout, aesthetics etc. being penalised while units which do not engage with the planning system to improve the building fabric remain free of restrictions. This creates a competitive advantage for some units over others in a manner that cannot be considered fair or reasonable.

- The Courts have consistently over the years held that the requirement for planning permission represents an encroachment on property rights (*Ashbourne Holdings Ltd. v. An Bord Pleanála*). In this regard, there is a need for great care to ensure that planning conditions are not applied *ultra vires*.



### 3. Background

The need for this Referral has arisen on foot of not only the Decision of South Dublin County Council in relation to this particular case but also on foot of a Section 5 Declaration Decision (Ref. ED16/0025) issued by South Dublin County Council by order dated 3th June 2016 to a third party, Save Our Town Centres Limited. Subsequent to the aforementioned Decision a Warning Letter of alleged unauthorised development was issued to our client (Ref. ENF. S7743). Our client is concerned about the use of the planning system by Save Our Town Centres Limited whose actual objective in this instance may be due to commercial interests rather than a *bona fides* 'save our town centre' initiative as the name implies. In this regard we would question the intentions of Save Our Town Centres Limited, their purpose and indeed believe their Section 5 Declaration Request was sought and presented based on anti-competitive grounds. We acknowledge that every Section 5 Declaration request is assessed on its own merits and appreciate the difficulty the Planning Authority faced in recognising a potentially vexatious request. Therefore, we strongly object to the contention that unauthorised development has taken place at the unit and as such, it is the intention of this Referral to clarify that the type of retail goods are permitted at the subject retail unit.

**Local Authority Assessment of Section 5 Declaration request - Ref. ED16/0045**

As outlined above, we do not believe that the assessment at Local Authority level sufficiently dealt with the question posed and in particular the question of whether development has or has not occurred. The case presented on behalf of our Client, which demonstrated that no development occurred in the first instance, was not assessed. As a result the South Dublin County Council Planners Report does not contain any argument to the contrary with the result that arriving at the conclusion that development has occurred is unsubstantiated.

The Local Authority sought additional information around the type of goods currently being traded and the subsequent response detailed same. The response outlined the goods being sold which became the basis for the decision. However, it appears to have been predicated in a predetermined view that authorised goods to be sold were bulky goods. In this regard the Planners Report stated that "it is considered that a retail warehouse was permitted on site and Unit 3 was then subsequently subdivided into two units for the sale of bulky goods". It is our opinion that this is an incorrect interpretation of the Planning History for the following reasons:

1. In relation to the first part of the above statement (highlighted in green above), we would like to outline that when the parent Planning Permission (Reg. Ref. S97A/0791) was Granted 'retail warehouse' **did not exist** (as the RPG's did not exist) as a specific type of retailing. Therefore, all retailing was a "shop" in terms of legislation and the authorised use was to sell retail goods. In fact, retail warehousing formats as they exist in Ireland today were not something that widely existed in the late 1990's and many retail units traded in a form of scrambled

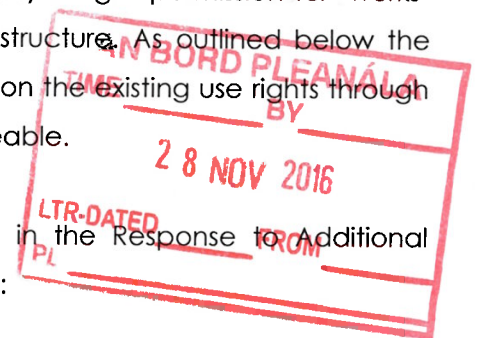


merchandising that shifted emphasis between bulky and non-bulky goods regularly in response to market demands. The reference to warehouse in the parent planning application described the type of building with the result that a warehouse structure was permitted for the purpose of retailing products. Therefore, it was not a Grant of Planning Permission for a 'retail warehousing use' as such a form of retailing did not exist and was not defined at the time.

2. The above extract from the Planners Report (highlighted in red) implies that a recent Planning Permission (Reg. Ref. SD15A/0152) sought permission for the "sale of bulky goods". This is factually incorrect as the planning application submitted only sought permission for 'works' that were required for the improvement/alteration of the structure. As outlined below the subsequent Grant of Planning Permission sought to impinge on the existing use rights through condition but it is contended that said condition is unenforceable.

In addition to the above we would like to outline points made in the Response to Additional Information which we believe were not given sufficient consideration:

- Permission was granted for the retail use of the premises *simpliciter*. There is no Condition attached to the parent Grant of Planning Permission that restricts the type of retail goods that can be sold from the unit.
- The permitted use of the unit is as a "shop", as defined in the Planning and Development Regulations 1994 (the appropriate legislation in place at the time of the grant of permission). As defined in legislation, a shop is a structure used for the retail sale of goods where the sale, display or service is principally to visiting members of the public.
- The Planning Authority made the assertion that a retail warehouse does not constitute a "shop", as defined in planning legislation. We respectfully requested that the Planning Authority provide clarification with regard to how they came to the conclusion that the unit does not comprise a "shop". We requested that the assessment be based in the context of planning legislation. It was further outlined that it was not considered appropriate to form an opinion of use based on the definition of "retail warehouse" taken from the South Dublin County Development Plan 2016-2022. In addition, it was pointed out that there is no definition of "retail warehouse" in planning legislation and the only definition that the retail unit can be deemed to fall under is the definition of a "shop", as it is evidently a structure used for the retail sale of goods. The aforementioned matters were not dealt with adequately in the assessment.
- The parent Planning Permission (Reg. Ref. S97A/0791) for the retail unit pre-dated not only the first national RPG's published in 2000 but also the first South Dublin County Development Plan in 1998. It was the RPG's, 2000 that introduced definitional clarity with regard to types of retail good categories and retail unit types.



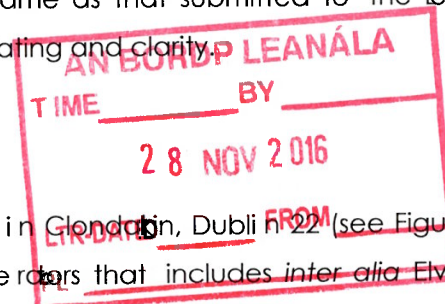
In addition to the above it was outlined to the Local Authority that our client was not relying on an exemption under the Planning and Development Regulations 2001 (as amended) to operate the retail unit as a "shop", but was the beneficiary of a Grant of Planning Permission authorising the retail use of the premises.

The above demonstrates that the limited assessment carried out in relation to the core question of 'development' occurring or not was based on an incorrect interpretation of Planning Permissions governing the subject Unit. We appreciate that there are subtleties in this case that need to be considered but our client have (a) always believed that they had Planning Permission for the retailing of any types of goods (as no distinction existed when they received Planning Permission) and (b) only sought permission for physical improvements with no intention of altering the use in any way.

On foot of all the above we believe that the original case submitted to the Local Authority as part of the Section 5 Declaration Request is still valid. Therefore, in the absence of any arguments to the contrary presented in the Local Authority assessment we reiterate the case below in this referral to An Bord Pleanála. The layout and content below is largely the same as that submitted to the local Authority but altered where appropriate for the purpose of up dating and clarity.

#### Site Location and Context

The subject site is located in the established Fonthill Retail Park in Glondra, Dublin 22 (see Figure 1 below). The retail park contains a broad mix of uses and operators that includes *inter alia* Elverys Sports, Smyths Toys, Wheelwork Bikes, Polonez foodstore, Power City and Aldi. These retail units provide for a full range of retail goods including convenience and comparison and varying mixes of same.



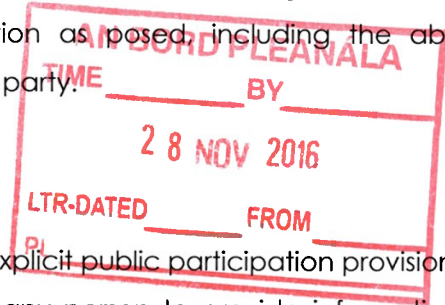
#### Previous Section 5 (Ref. ED16/0025)

This Referral is subsequent to a previous Section 5 Declaration made (Ref. ED16/0025) and requested by and issued to the above-mentioned third party, Save Our Town Centres Limited. The Section 5 Declaration request Ref. ED16/0025 sought the opinion of South Dublin County Council with regard to the following question:

*"Whether the change of use from the former retail warehouse to use as a discount store for the sale of non-bulky convenience goods is development, and is or is not exempted development". (Emphasis Added)*

It is respectfully suggested that the Planning Authority's decision in this case was not based on any objective evidence, in that the question raised was leading and provided no evidence to support it. The description of development is cited against a "discount store" use. In the first instance we note that a "discount store" is no longer a distinct category as contained in the RPG's for Planning

Authorities, 2012<sup>1</sup> and has no status in planning. Secondly, to describe the use being carried out as "non-bulky convenience goods" is disingenuous. The question as posed, including the above terminology, has sought to elicit a response that suited the third party.



### Public Participation

While the Section 5 Declaration process does not contain any explicit public participation provisions, it does however, give the Planning Authority the power to ask any person to provide information in relation to a Section 5 Declaration request. Unfortunately, in case Ref. ED16/0025, our client was not afforded the opportunity to provide any input into the assessment process. In this context, we note the following comments issued in a submission on planning legislation made to the Department of the Environment, Community and Local Government by An Bord Pleanála in 2014:

*'There is no provision for public participation in Section 5. Therefore one can have the situation where one person makes a request to the Planning Authority for a declaration, in respect of a property, and obtains a declaration. Another person, who may be the owner of the property involved, or a neighbour, can become aware of the declaration later, or when work commences, and has only one means of addressing the situation, by submitting a separate request for a declaration to the Planning Authority, which they then refer to the Board for review under Section 5 (3)(a) if they are not happy with the declaration.'*<sup>2</sup> (Emphasis Added)

Having been unable to participate in the assessment process of the Section 5 Declaration request Ref. ED16/0025, which resulted in a Warning Letter of alleged unauthorised development, our client sought to address the situation by way of requesting a Section 5 Declaration (subject of this referral) from the Planning Authority, based on a question that was fair and impartial, and one that did not serve to direct the Authority towards a pre-determined response.

However, under Ref. ED16/0045 a Declaration was issued which concluded that the "proposed development" was "declared not exempt" under the Planning and Development Regulations 2001 (as amended). This decision did not deal with the subject of the Declaration Request which sought clarity on the question of "development" primarily which the decision makes no reference to other than to mention a "proposed development" (but no development was proposed). Therefore, the Section 5 Declaration Decision is flawed as it did not provide a clear and justifiable position on the issue of whether development has or has not occurred in the first instance which in turn raises questions as to how a decision was made in relation to exemptions. In short, how can a decision be made on an exemption if it has not been decided if there is need for an exemption.

<sup>1</sup> Retail Planning – Guidelines for Planning Authorities, 2012, Department of Environment, pg. 35

<sup>2</sup> Submission on Legislation made to Department of the Environment, Community and Local Government by An Bord Pleanála, 2014, pg. 6

## Planning History

The following section provides a review of the Planning Permissions that are of importance in the assessment of the question as set out above.

SDCC Reg. Ref S97A/0791

The governing planning permission for development of the unit is SDCC Reg. Ref. S97A/0791, which provided consent for a retail warehouse development of c. 4,210sq.m. South Dublin County Council decided to Grant Planning Permission for the retail unit on the 3<sup>rd</sup> February 1998 and the Final Grant of Permission was issued on the 19<sup>th</sup> March 1998, subject to 17 no. conditions. It is noted that of the 17 no. conditions attached to the permission, there are no restrictive conditions in terms of limiting the type of retail goods that can be sold from the unit.

The date of decision and the date of the Final Grant of Planning Permission for the governing consent are important in that they pre-dated the finalisation of the first comprehensive RPG's, dated December 2000, and also the first South Dublin County Development Plan in 1998 (adopted in December of 1998). In terms of retail policy, the legislation in place at the time was the Local Government (Planning and Development) General Policy Directive, 1982. This Directive lacked detailed definitions or policy provision relating to retail and did not recognise different types of retail units, nor did it draw a distinction between types of retail goods. In addition, we note that the decision date for the permission pre-dates current planning legislation and as such the application was assessed in the context of the following:

- The Local Government (Planning and Development) Acts, 1963, (as amended); and
- The Local Government (Planning and Development) Regulations, 1994 (as amended)

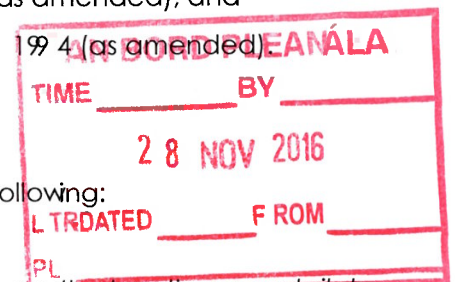
SDCC Reg. Ref. SD15A/0152

Planning application Reg. Ref. SD15A/0152 was granted consent for the following:

*'New internal subdivision walls, new loading door arrangement at south elevation, new toilets, 2 no. new fire exit doors to north elevation, new glazed double doors/screen to east elevation and signage to west elevation'.*

In Granting Planning Permission for the development, the Planning Authority applied 5 no. conditions including condition no. 2 that states:

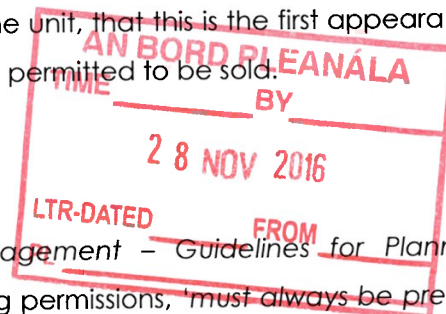
*'2. The range of goods to be sold in the extended retail warehouse unit shall be limited solely to "bulky goods" (as defined in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government*





in April 2012), and shall not include the sale of toys, footwear, sportswear or other clothing. Reason: In order to prevent an adverse impact on the viability and vitality of the town area and so as not to undermine the retail hierarchy of the area.' (Emphasis Added)

We note that in terms of the planning history associated with the unit, that this is the first appearance of a restriction being applied in terms of the type of retail goods permitted to be sold.



### Enforceability of Planning Conditions

The Department of the Environment's 'Development Management – Guidelines for Planning Authorities', 2007, sets out that conditions attached to planning permissions, 'must always be precise and unambiguous, particularly since the effectiveness of subsequent enforcement action may depend on the wording.'<sup>3</sup> Certain basic criteria are suggested as a guide to deciding whether to impose a condition and these include whether the condition is: **necessary**; relevant to planning; **relevant to the development to be permitted**; **enforceable**; **precise**; and, reasonable. With regards to enforceable conditions, the Guidelines provide that a condition should not be imposed if it cannot be made effective. Given the above, we would assess Condition no. 2 attached to planning permission Reg. Ref. SD15A/0152 (set out above) against some of these key criteria:

- **Necessary:** For the Planning Authority to apply the subject condition it must have been necessary to do so. It is reasonable to conclude therefore that the imposition of the condition was required in order to restrict the permissible uses of the retail unit against that which it had originally been granted permission for. If the unit was already restricted in terms of the retail goods permitted to be sold then the inclusion of this condition would not have been necessary.
- **Relevant to the Development to be permitted:** The planning application sought the subdivision of the retail unit and did not seek a change of use. It is considered that the subject condition was not relevant to the development as applied for and sought to impinge on existing use rights with the result that the attachment of the condition was *ultra vires*.
- **Precise:** The condition seeks to apply a restriction on the range of goods to be sold from the extended retail warehouse unit. The planning application as submitted to the Authority sought the sub-division of the existing retail unit. No extension of the unit was either applied for or granted, as evidenced by no development contributions being applied for additional floor space. This creates a level of uncertainty with regards to the intention of the condition and where the Authority sought to apply the restriction. Notwithstanding the ambiguity regarding the wording applied in the condition, it would be reasonable to assume that, if enforceable, the 'extended retail warehouse unit' refers to the newly created unit no. 3A (if at all) and not to the existing unit no. 3. In this context we note that the Section 5 Declaration submitted refers

<sup>3</sup> Development Management – Guidelines for Planning Authorities, 1997, Department of Environment, pg. 63



solely to unit no. 3, and not to unit no. 3A, and as such we do not believe that Condition no. 2 of Reg. Ref. SD15A/0152 applies.

- **Enforceable:** Given the ambiguity surrounding the intentions of the Planning Authority in attaching the above mentioned condition, including the relevance to the subject permission and the unit to which it relates, we would question whether, if required to do so, the condition would be enforceable.

Based on the above, we are of the opinion that Condition no. 2 attached to the consent for planning permission Reg. Ref. SD15A/0152 is not applicable in the assessment of this Referral. In the first instance, a literal interpretation of the condition raises questions as to whether the condition is relevant to the development permitted in that it refers to works that did not form part of the permission sought. Furthermore, it is our interpretation that the Planning Authority has intended to restrict the use of the type of goods to be sold from the newly created unit no. 3A, where it refers to the '*extended retail warehouse unit*' and not the existing unit no. 3 of which is the subject of this Referral. On this basis it is considered that Condition no. 2 attached to planning permission Reg. Ref. SD15A/0152 is not required to be factored into the assessment.



## 4. Question of “Development”

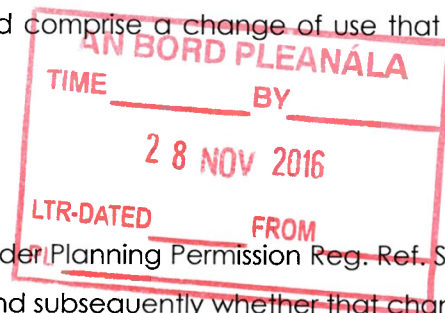
Development is defined in Section 3 of the Planning and Development Act 2000, as amended, and is set out as follows:

*“...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.”*

The test therefore, in terms of whether a change of use comprises development, is firstly whether there is a change of use and secondly whether the change of use is a material change of use. This test was not fully addressed in the Planner's Report neither of the Section 5 Declaration request, Ref. ED16/0025 nor as outlined above in this current case. For Article 9(1)(a)(i) of the Planning and Development Act 2000 (as amended) to apply, it must be clearly demonstrated that a material change of use has occurred. In order to determine whether there has been a material change of use it is necessary to determine the permitted use of the retail unit and, on that basis, to determine if the implementation of the question referred to above would comprise a change of use that would be material in nature.

### Change of Use

As set out above, the subject retail unit was permitted under Planning Permission Reg. Ref. S97A/0791. With regard to whether a change of use has occurred, and subsequently whether that change of use is considered to be material; this can only be the case if it is considered that development has taken place outside of that which the retail unit was Granted Planning Permission for. It is worth noting that it would be possible for any retailer to operate from the subject unit. The 'brand' or retailer is not a relevant planning consideration *per se*, but rather the nature of the goods to be sold can be relevant in certain instances. The question, therefore, is whether a material change of use arises as a result of the sale of different types of retail goods at the unit.



To ascertain the type of retail goods permitted to be sold from the unit we must first look at the relevant Planning Permission that governs the unit, and secondly, the legislative context within which the Permission was Granted. As set out above, the original Permission for the unit is Reg. Ref. S97A/0791 that provided consent for a retail warehouse development of c. 4,210sq.m. As set out in the development description for the development, the function of the retail warehouse was for the sale of retail goods, and thus it is reasonable to assume that the use of the unit as applied for and permitted is retail. In terms of the permitted retail use of the unit it is highlighted that no restriction on the type of retail goods permitted to be sold from the unit was applied by the Planning Authority by way of condition to the permission.

In addition to the relevant Planning Permission, it is necessary to assess the Permission in the context of the planning legislation in place at the time of the making of the decision. At the time of the Granting of Planning Permission, retail warehousing was not recognised in legislation as a distinct sector of retailing which sold a certain type of retail good. The Planning Regulations in place at the time were the Local Government (Planning and Development) Regulations 1994 (as amended), and these Regulations contained a definition for "shop" that is set out as follows:

*"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 cold food for consumption off the premises,*

*(e) for hairdressing,*

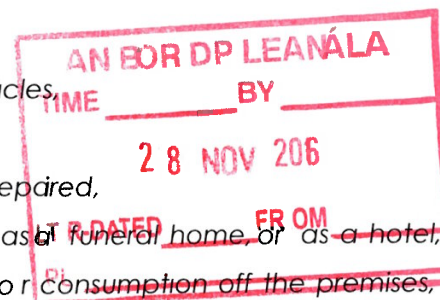
*(f) for the display of goods for sale,*

*(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 use for the direction of funerals 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, or any use to which class 2 or 3 of Part IV of the Second Schedule applies;' (Emphasis Added)*



Based on the above, it is our opinion that the Planning Authority permitted the use of the retail warehouse as a "shop" as defined by The Local Government (Planning and Development) Regulations 1994, as amended, in that the use of the unit was for the retail sale of goods. With regard to change of use, Article 11 of the 1994 Regulations stated that:

*"11. (1) Development which consists of a change of use within any one of the classes of use specified in Part IV of the Second Schedule and which does not involve the carrying out of any works, other than works which are exempted development, shall be exempted development for the purposes of the Acts, provided that the development, if carried out, would not contravene a condition attached to a permission under the Acts or be inconsistent with any use specified or included in such a permission." (Emphasis Added)*

The class of uses set out in Part IV of the Second Schedule of the Planning and Development Regulations 1994, as amended, included 'Use as a Shop' in Class 1 of specific planning uses. As such, it clearly sets out that development that consists of a change of use within a use class and which does not involve the carrying out of any works, other than works which are exempted development, shall be exempted development.

Based on the above, it is considered that unit no. 3 at the Fonthill Retail Park, Fonthill Road, Dublin 22 has Planning Permission for retail, from a warehouse type unit, that falls within the definition of a "shop", as set out in the Planning and Development Regulations 1994, as amended, in that its primary function is for the retail sale of goods. No conditions were attached to the Grant of Planning Permission that restricted the type of retail goods to be sold from the "shop". Taken in the context of the planning legislation in place at the time of receiving Planning Permission there was no provision in legislation that restricted the sale of certain types of retail goods at the unit and as such, there are no legal and/or planning grounds for retrospectively restricting the type of retail goods that can be sold from the unit.

It is our opinion that the permitted retail use of the unit has to be defined as understood by the Planning Authority at the time of the making of the decision to Grant Planning Permission. It is not reasonable to interpret the permitted development in the context of current Guidelines and legislation. It is considered that changing the type of retail goods sold from the unit falls within the remit of the original planning permission for the unit and as such does not constitute development by way of a change of use.

### Material Change of Use

Notwithstanding the above, if it was considered that a change in the type of retail goods being sold from the unit would comprise of a change of use, the next step would be to consider whether this change of use would be material and therefore constitute development. In this instance, the test for materiality is often approached by asking whether different planning considerations would have applied had planning permission been sought on the basis of the unit selling different types of goods.

As set out above, the relevant legislation in place at the time of Granting Planning Permission indicates that Permission was Granted for the unit to be used as a "shop" for the retail sale of goods. There were no definitions in planning legislation with regard to distinct types of retail goods and as such, the Planning Authority in their assessment, would have given due consideration to the material planning implications of permitting retail, in the general sense, at the subject site. Thus, the relevant material planning considerations would have been taken into consideration in the Authority's assessment of the proposal. Furthermore, should the Planning Authority have considered that the change of use in the type of retail goods sold from the unit would result in material planning implications; a condition restricting the type of goods to be sold from the unit would have been applied. It is considered, therefore, that the Planning Authority gave due consideration to the potential for material planning implications as part of the assessment process in permitting the subject retail unit and as such the use permitted at the unit is considered to be 'open retail'.

## 5. The Question of “Exempted development”

Development can be exempted from the requirement to obtain planning permission under planning legislation set out in the Planning and Development Act, 2000, (as amended) and the Planning and Development Regulations, 2001 (as amended). However, the provisions of exempted development are only applicable if development, in the first instance, has taken place. Having determined, as outlined above, that the change of use in the type of retail goods sold from the unit should not be considered a material change of use and therefore development, it is not necessary therefore to apply the provisions of exemption.

However, should the Board consider that development would occur by reason of the type of goods being sold at the unit, we would consider that the development should be considered to be exempt development by way of Article 10 of the Planning and Development Act 2000, as amended that states:

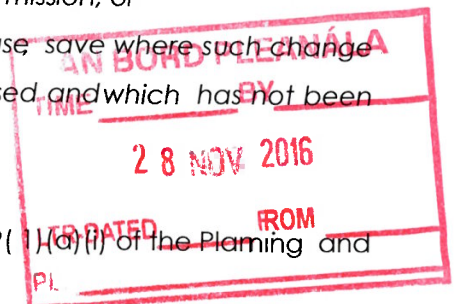
*“10. (1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—*

- (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.” (Emphasis Added)*

With regard to restrictions on exemption we note the provisions of Article 9(1)(a)(i) of the Planning and Development Act 2000, as amended, that states:

*“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.” (Emphasis Added)*

No condition restricting the type of retail goods to be sold from the unit was attached to the parent Planning Permission for the development Ref. S97A/0791. As set out above, Condition no. 2 attached to the consent for Planning Permission Reg. Ref. SD15A/0152 is not applicable in the assessment of this Section 5 Declaration request, as the restrictive condition relates to unit no. 3A, if at all, and not to unit no. 3. On this basis, it is considered that a change in the type of retail goods sold from the unit would comprise a change of use within Class 1 of Part 4 of Schedule 2 of the Planning and Development Act 2000, as amended, that is not restricted by way Article 9(1)(a)(i).



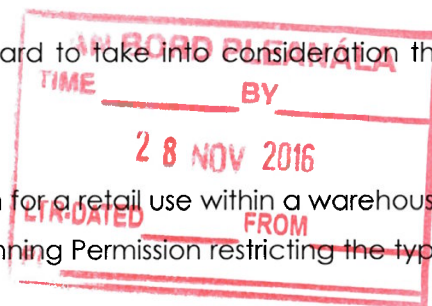


## 6. Conclusion

We respectfully request that An Bord Pleanála consider all the above objectively and provide our Client with an answer to the following question:

*'Whether a material change of use at retail unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.'*

In the assessment of the above question we request that the Board take into consideration the following:



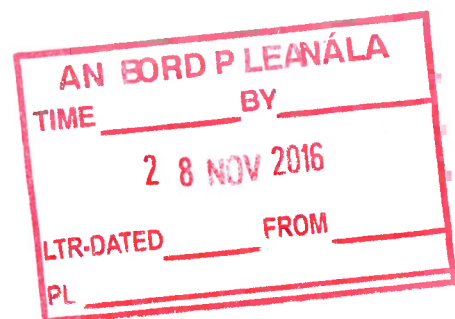
- Planning Permission Reg. Ref. S97A/0791 Granted Permission for a retail use within a warehouse structure. No conditions were attached to the Grant of Planning Permission restricting the type of retail goods to be sold from the unit.
- Legislation in place at the time of Granting the Planning Permission provided that the use of the unit was a 'shop' for the retail sale of goods. It is reasonable to assume that the use of the unit as applied for and permitted is retail.
- It is considered that changing the type of retail goods sold from the unit falls within the scope of the original planning permission for the unit and as such does not constitute development by way of a change of use.
- It is considered that the materiality of changing the type of retail goods sold at the unit was considered as part of the Planning Authority's assessment of the parent Planning Permission and as such the use permitted at the unit is considered to be 'open retail'.
- Retrospectively applying current planning legislation and guidance in the assessment of the unit is legally questionable as these documents did not form part of the decision making process within which the unit was permitted.
- The provisions of exempted development are not applicable as development, in the first instance, has not taken place (i.e. no restriction by condition applies).

While it is accepted that the subject retail unit comprises somewhat of an anomaly when set in the context of current planning legislation and guidance, we are of the opinion that the use of the unit is governed by the parent Planning Permission and the planning legislation in place at the time when it was permitted. As such, we would respectfully suggest that An Bord Pleanála concur with the following conclusion:

***A material change of use at retail unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 would not arise by reason of the type of goods being sold and would not be considered development in the first instance.***

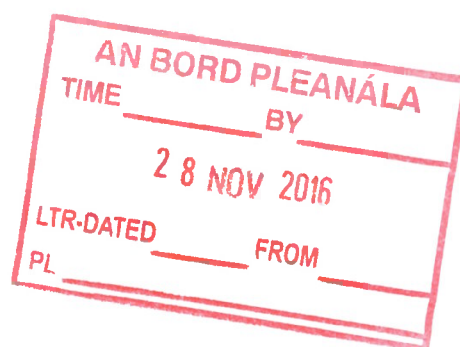
We are willing to attend a meeting with An Bord Pleanála on this matter under Section 136 of the Planning and Development Act 2000 (as amended). We would request that Save Our Town Centres Limited are also required to attend such a meeting as they are clearly party to the issue at hand.

We look forward to receiving your acknowledgement of this Referral and should you require any further information do not hesitate to contact us.





Appendix 1  
Copy of  
Section 5  
Declaration  
Decision





An Rannóg Talamhúsáide, Pleanála agus Iompair  
Telephone: 01 4149000 Fax: 01 4149104

Land Use, Planning & Transportation Department  
Email: [planning.dept@sdblincoco.ie](mailto:planning.dept@sdblincoco.ie)

Brian Wynne Bilfinger GVA  
Second Floor, Seagrave House  
19-20 Earlsfort Terrace  
Dublin 2

03 NOV 2016

02-Nov-2016

**Our Ref:** ED16/0045  
**Re:** Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22  
**Proposal:** Whether a material change of use at retail unit no.3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.

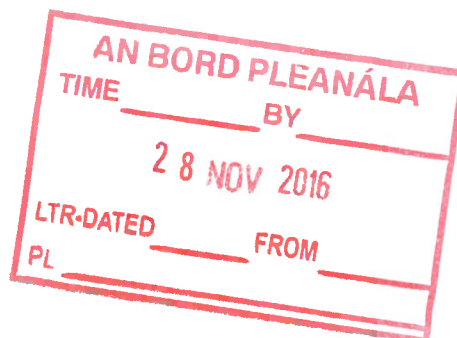
Dear Sir/ Madam,

I wish to inform you that the proposed development as outlined at the above location is, by Chief Executive's Order PR/1067 dated 01-Nov-2016, DECLARED NOT EXEMPT under the Planning and Development Regulations, 2001 (as amended) and therefore **DOES** require planning permission.

A copy of the planner's report is enclosed.

Yours faithfully,

  
**For Senior Planner**





# Comhairle Chontae Atha Cliath Theas

PR/1067/16

## Record of Executive Business and Chief Executive's Order

<b>Register Reference:</b>	ED16/0045
<b>Correspondence Name &amp; Address:</b>	Brian Wynne Bilfinger GVA Second Floor, Seagrave House, 19-20 Earlsfort Terrace, Dublin 2
<b>Development:</b>	Whether a material change of use at retail unit no.3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.
<b>Location:</b>	Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22
<b>Applicant:</b>	PKB Partnership

### Description of Site and Surroundings:

The site refers to Unit 3 Fonthill Retail Park, Clondalkin, Dublin and contains a retail warehouse unit which forms part of a terrace of three units. A large amount of surface car parking is located to the front of the units.

### Zoning:

The site is zoned 'RW' as per the South Dublin County Council Development Plan 2016-2022, the objective for which is 'To Provide for and consolidate Retail Warehousing'.

### Proposal:

This is an application requesting a Section 5 Declaration with regards to the following question:

*'Whether a material change of use at retail Unit No. 3 Fonthill Retail Park, Fonthill Road, Dublin arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.'*

### Relevant Planning History:

**ED16/0025;** change of use from the former retail warehouse to use as a discount store for the sale of non-bulky convenience goods.

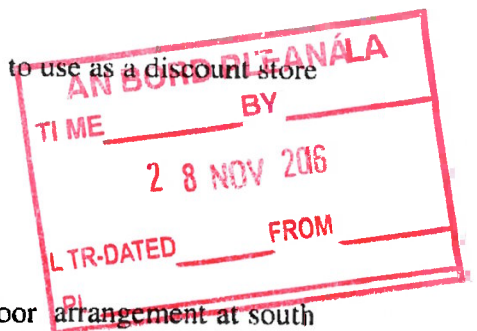
Decision; Declared Not Exempt.

**S97A/0791;** Retail warehouse development (c.4210sq.m)

Decision: permission granted subject to conditions.

**SD15A/0152;** new internal subdivision walls, new loading door arrangement at south elevation, new toilets, 2 new fire exit doors to north elevation, new glazed double doors/screen to east elevation and signage to west elevation.

Decision; permission granted subject to conditions.



# Comhairle Chontae Atha Cliath Theas

## Record of Executive Business and Chief Executive's Order

### Relevant Enforcement History

S7743; Warning Letter issued regarding alleged unauthorised development consisting of the change of use from a retail warehouse to use as a discount store for the sale of non-bulky convenience goods without planning permission.

### Assessment:

Consideration as to whether a development constitutes exempted development or not is governed by Sections 3, 4 and 5 of the Planning and Development Act 2000 (as amended) and Articles 5, 6, 7, 8, 9, 10, 11 of the Planning and Development Regulations 2001 (as amended)

### **Planning and Development Act 2000 as amended:**

**Section 2(1)** in this Act, except where otherwise requires –

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

**'structure'** as any building, structure, excavation or other thing constructed or made on, in or under any land, or part of a structure so defined, and –

- (a) Where the context so admits, includes the land on, in or under which the structure is situated

**'use'** in relation to land, does include the use of the land by the carrying out of works thereon

**Section 3(1)** defines **'development'** as *'the carrying out of any works on, in, over or under land or the making of any material change in the use of any structure or other land'*. The term **'works'** is defined in Section 2(1) of the 2000 Act as *'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.'*

### ***Is the proposed development exempted?***

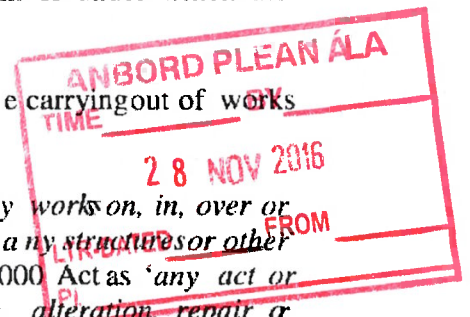
South Dublin County Council Development Plan 2016-2022 defines a **Retail Warehouse** as:

***A large single-level store specialising in the display and retail sale of bulky non-food, non-clainging household goods, such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers and often in out-of-centre locations.***

Planning and Development Regulations 2001 (as amended) Article 3

**'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

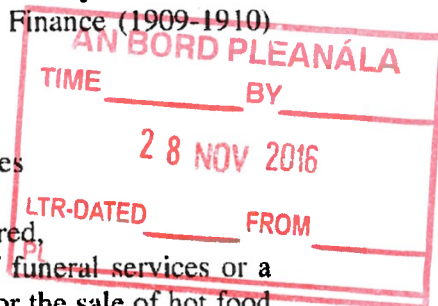
- (a) for the retail sale of goods,
- (b) as a post office



# Comhairle Chontae Atha Cliath Theas

## Record of Executive Business and Chief Executive's Order

- (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 retailers off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw. 7. & Geo. 5, c.8,
  - (e) for hairdressing
  - (f) for the display of good for sale
  - (g) for the hiring out of domestic or personal goods or articles
  - (h) as a laundrette or dry cleaners
  - (i) for the reception of goods to be washed, cleaned or repaired,
- but does not include any use associated with the provision of funeral services or a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies.



In addition reference should be made to Article 9 (1) (a) (i) – Restrictions on Exemption which also applies; *Development to which article 6 relates shall not be exempted development for the purposes of the Act – if the carrying out of such development would - contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.*

SD15A/0152 Condition No. 2 states:

*'The range of goods to be sold in the extended retail warehouse unit shall be limited solely to "bulky goods" (as defined in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government in April 2012), and shall not include the sale of toys, footwear, sportswear or other clothing.*

*REASON: In order to prevent an adverse impact on the viability and vitality of the town area and so as not to undermine the retail hierarchy of the area.'*

Annex 1 of the *Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government in April 2012* defines 'Bulky Goods' as follows;

- Goods generally sold from retail warehouses --where DIY goods or goods such as flatpack furniture are of such size that they would normally be taken away by car and not be portable by customers travelling by foot, cycle or bus, or that large floorspace would be required to display them e.g.
  - repair and maintenance materials; --
  - furniture and furnishings; --
  - carpets and other floor coverings; --
  - household appliances; --
  - tools and equipment for the house and garden;--
  - bulky nursery furniture and equipment including --perambulators;
  - bulky pet products such as kennels and --aquariums;

# Co mhairle Chontae Atha Cliath Theas

## Record of Executive Business and Chief Executive's Order

- audio-visual, photographic and information --processing equipment;
- catalogue shops and other bulky durables for --recreation and leisure.

The list is not exhaustive – bulky goods not mentioned in the list should be dealt with on their merits in the context of the definition of bulky goods. Bulky goods are generally not portable by customers travelling by foot, cycle or bus.

Planning permission was granted on site under S97A/0791 for a retail warehouse; the permission granted did not state 'shop' but specifically stated 'permission for a retail warehouse'. Planning permission granted under SD15A/0152 also refers to a retail warehouse on site for the sale of 'bulky goods'; the red line boundary of SD15A/0152 referred to both Units 3 and 3A. It is considered that a retail 'warehouse' is not and was not considered to be the same as a retail 'shop'. No details have been submitted with this application to provide information on the type of items being sold on site. This is critical to answering the question being posed – 'whether a material change of use at retail Unit No. 3 Fonthill Retail Park arises by reason of the type of goods being sold....'

### Conclusion:

Insufficient information has been submitted in order to fully assess the application. Further details are required with regards to the type of goods being sold on site in order to determine the application.

### Recommendation:

The applicant should be written to and informed that further information is required in order to fully assess the application.

### Additional Information

Additional Information was requested on the 14<sup>th</sup> September 2016.

Additional Information was received on the 12<sup>th</sup> October 2016.

The following additional information was requested:

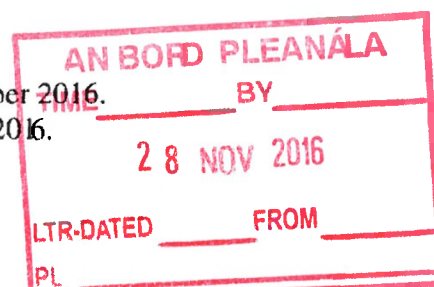
### Item No 1:

*Insufficient information has been submitted in order to fully assess the application.*

*The applicant, owner or developer is therefore requested to provide full details of the type of goods being sold at the premises.*

### Assessment – Item No. 1:

Submission received by Brian Wynne, GVA, dated 12<sup>th</sup> October 2016 states that products for sale on site relate to the following categories; food and drink, health and beauty, home and pet, gardening, leisure, entertainment, stationary, crafts, party and celebrations. Site visit confirmed that Unit 3 is occupied by 'Dealz' selling non-bulky goods (individual bars of chocolate, crisps, minerals, makeup, shampoo etc.) to





# Comhairle Chontae Atha Cliath Theas

## Record of Executive Business and Chief Executive's Order

visiting members of the public and Unit 3A is currently vacant. Having regard to the planning history on site it is considered that a retail warehouse was permitted on site and Unit 3 was then subdivided into two units for the sale of bulky goods. It is considered therefore that the sale of non-bulky goods would constitute non-compliance with the planning permission previously granted on site and would constitute a material change of use and would require a further grant of planning permission in the opinion of the Planning Authority.

### Conclusion

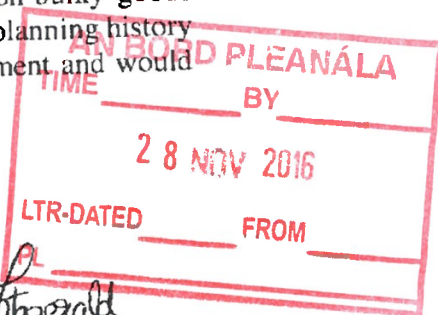
Having regard to the planning history on site it is considered that a retail warehouse was permitted on site and Unit 3 was then subdivided into two units for the sale of bulky goods. It is considered therefore that the sale of non-bulky goods would constitute non-compliance with planning permission previously granted on site and would constitute a material change of use and would require a further grant of planning permission in the opinion of the Planning Authority.

### Recommendation

The applicant should be written to and informed that the sale of non-bulky goods would constitute a material change of use on site having regard to the planning history on site and would therefore not be considered as Exempted Development and would require planning permission.

NJD  
R. P. Siobhan Duff,  
Senior Executive Planner

Endorsed: Mairead Fitzgerald  
Mairead Fitzgerald,  
Administrative Officer



### **ORDER:**

That the applicant be informed that the proposed development of Whether a material change of use at retail unit no.3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development at Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22 is not considered to be exempted development under the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended) and therefore does require planning permission.

Date: 14/16

N O Byrne  
Neil O'Byrne,  
Senior Planner



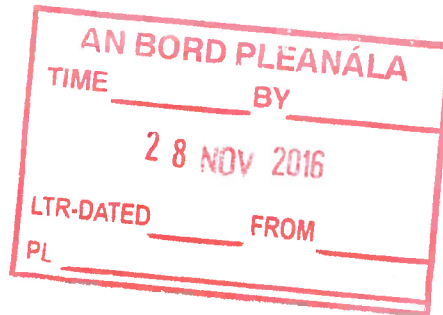


28<sup>th</sup> November 2016

The Secretary,  
An Bord Pleanála,  
64 Marlborough Street,  
Dublin 1

2nd Floor Seagrave House  
19 – 20 Earlsfort Terrace Dublin 2  
T: +353 (0)1 661 8500  
F: +353 (0)1 661 8568

**[gva.ie](http://gva.ie)**



Dear Sir/Madam,

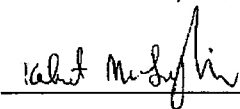
**RE: Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22 - Section 5 Referral of South Dublin County Council Ref. ED16/0045**

**South Dublin County Council Ref. ED16/0045**

Please find attached a Referral Report prepared by GVA on behalf of our Client PKB Partnership, Unit D5, Swords Enterprise Park, Feltrim Road, County Dublin following the Decision of South Dublin County Council in relation to ED16/0045 made by order dated the 1<sup>st</sup> November 2016 and issued on the 2<sup>nd</sup> November 2016. We would request that all correspondence in relation to this observation should be sent to the Agents, GVA, Second Floor, Seagrave House, 19-20 Earlsfort Terrace, Dublin 2.

Enclosed is a cheque for €220 being the appropriate fee for a Referral. This Referral has been made within the statutory period (See Appendix I of enclosed Referral Report for a copy of the South Dublin County Council Decision).

Yours sincerely



**Robert McLoughlin**

**Director**

**For and on behalf of GVA Planning and Regeneration Limited**





## Referral Report

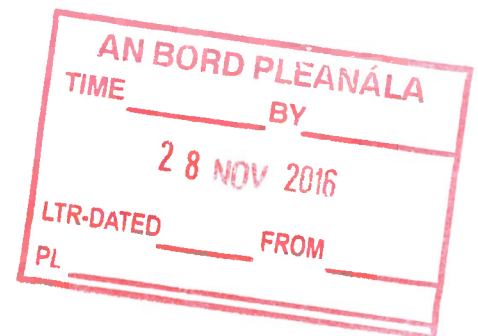
2nd Floor Segrave  
House  
19 – 20 Earlsfort  
Terrace Dublin 2

T: +353 (0)1 661 8500  
F: +353 (0)1 661 8568

## Section 5 Referral

**Unit 3, Fonthill Retail Park, Fonthill  
Road North, Clondalkin, Dublin 22**  
Section 5 Referral Re: South Dublin  
County Council Ref. ED16/0045

November 2016



## Contents

1.	Introduction .....	1
2.	Preliminary Points .....	2
3.	Background .....	4
4.	Question of "Development" .....	11
5.	The Question of "Exempted development" .....	14
6.	Conclusion .....	15

## Appendices

Appendix I Copy of Section 5 Declaration Decision

Prepared By: Robert McLoughlin

Status: Final

Draft Date: November 2016

**For and on behalf of GVA Planning and Regeneration Limited**





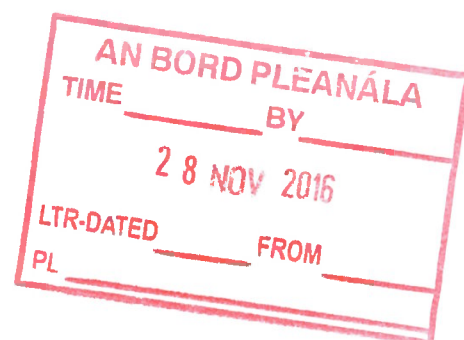
# 1. Introduction

We, GVA, have been retained by our client PKB Partnership, Unit D5, Swords Enterprise Park, Feltrim Road, County Dublin to submit this Referral to An Bord Pleanála in relation to Ref. ED16/0045. The Referral of this case is within the statutory period of 4 weeks and we enclose the appropriate fee being €220.

The Section 5 Declaration Request (Ref. ED16/0045) was submitted to South Dublin County Council in relation to Unit no. 3 at the Fonthill Retail Park, Clondalkin, Dublin 22 which requested a Declaration on the following question:

*'Whether a material change of use at retail unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.'*

Figure 1: Fonthill Retail Park



Source: Google Maps, 2016

## 2. Preliminary Points

Our client appreciates that every case in relation to material change of use is different and subtleties exist which often are subjective, require objectivity and need to avoid conclusions based on perception. Planning law dictates that a planning permission should be interpreted objectively and not on foot of subjective considerations peculiar to an applicant, user or third party. Therefore, we would like to make some preliminary points which we would respectfully request An Bord Pleanála to consider throughout the assessment of this case:

- The Development authorised under Reg. Ref. S97A/0791 was for a retail use which in legislative terms at the time (and still today) falls under the definition of a “shop”. While subsequently the Retail Planning Guidelines (RPG's) provided a breakdown of different types of retail it did not exist at the time and therefore the authorisation was for open retail. It is noted that the public notice did refer to “warehouse” but that was in the context of describing the building within which the use would exist (it was then and still is to day a warehouse type structure). As ‘retail warehousing’ as a defined form of retailing did not exist at the time (i.e. the RPG's did not exist) the application was not seeking permission for same and there could be no implied restriction on the retail use today.
- The question of whether development occurred in the first instance or not was not adequately dealt with in the Local Authority Assessment. The Planners Report outlined definitions from Planning Legislation but did not assess the core question of ‘development’ but instead moved to dealing with exemptions. This approach resulted in the substantive part of the Section 5 Declaration Request not receiving a proper and objective assessment. This may have been unintentional but also suggests that the Decision was already made before the assessment started (possibly due to perception). Therefore, the purpose of the Planning Report was to arrive as quick as possible to dealing with Condition no. 2 of Reg. Ref. SD15A/0152, a condition we believe is unenforceable.
- Further to the above, the planning status of a unit (retail in this case) needs to consider the point in time at which it was authorised and the context within which the decision was made. Planning should not seek to retrench on a position which has been established and seek to alter a landowners property rights either through enforcement actions or conditions on Planning Permissions which do not relate to the development sought. It cannot be the case that a member of the public seeking a Planning Permission for minor internal works and improvements to the outside of a building effectively becomes penalised (e.g. through conditions) in a manner that affects the value and enjoyment of their land.
- In many instances works similar to those sought under Reg. Ref. SD15A/0152 may be carried out under exemption (often over time) and in such instances there would be no restrictions on use. In this context the insertion of Condition 2 on Reg. Ref. SD15A/0152 is an opportunistic exercise seeking to curtail a use which when Granted Planning Permission originally (Reg. Ref.

- S97A/0791) did not have such restrictions. Furthermore, this approach results in those units which seek to improve by way of layout, aesthetics etc. being penalised while units which do not engage with the planning system to improve the building fabric remain free of restrictions. This creates a competitive advantage for some units over others in a manner that cannot be considered fair or reasonable.
- The Courts have consistently over the years held that the requirement for planning permission represents an encroachment on property rights (*Ashbourne Holdings Ltd. v. An Bord Pleanála*). In this regard, there is a need for great care to ensure that planning conditions are not applied *ultra vires*.



### 3. Background

The need for this Referral has arisen on foot of not only the Decision of South Dublin County Council in relation to this particular case but also on foot of a Section 5 Declaration Decision (Ref. ED16/0025) issued by South Dublin County Council by order dated 3th June 2016 to a third party, Save Our Town Centres Limited. Subsequent to the aforementioned Decision a Warning Letter of alleged unauthorised development was issued to our client (Ref. ENF. S7743). Our client is concerned about the use of the planning system by Save Our Town Centres Limited whose actual objective in this instance may be due to commercial interests rather than a *bona fides* 'save our town centre' initiative as the name implies. In this regard we would question the intentions of Save Our Town Centres Limited, their purpose and indeed believe their Section 5 Declaration Request was sought and presented based on anti-competitive grounds. We acknowledge that every Section 5 Declaration request is assessed on its own merits and appreciate the difficulty the Planning Authority faced in recognising a potentially vexatious request. Therefore, we strongly object to the contention that unauthorised development has taken place at the unit and as such, it is the intention of this Referral to clarify that the type of retail goods are permitted at the subject retail unit.

#### Local Authority Assessment of Section 5 Declaration request - Ref. ED16/0045

As outlined above, we do not believe that the assessment at Local Authority level sufficiently dealt with the question posed and in particular the question of whether development has or has not occurred. The case presented on behalf of our Client, which demonstrated that no development occurred in the first instance, was not assessed. As a result the South Dublin County Council Planners Report does not contain any argument to the contrary with the result that arriving at the conclusion that development has occurred is unsubstantiated.

The Local Authority sought additional information around the type of goods currently being traded and the subsequent response detailed same. The response outlined the goods being sold which became the basis for the decision. However, it appears to have been predicated in a predetermined view that authorised goods to be sold were bulky goods. In this regard the Planners Report stated that *"it is considered that a retail warehouse was permitted on site and Unit 3 was then subsequently subdivided into two units for the sale of bulky goods"*. It is our opinion that this is an incorrect interpretation of the Planning History for the following reasons:

1. In relation to the first part of the above statement (highlighted in green above), we would like to outline that when the parent Planning Permission (Reg. Ref. S97A/0791) was Granted 'retail warehouse' **did not exist** (as the RPG's did not exist) as a specific type of retailing. Therefore, all retailing was a "shop" in terms of legislation and the authorised use was to sell retail goods. In fact, retail warehousing formats as they exist in Ireland today were not something that widely existed in the late 1990's and many retail units traded in a form of scrambled

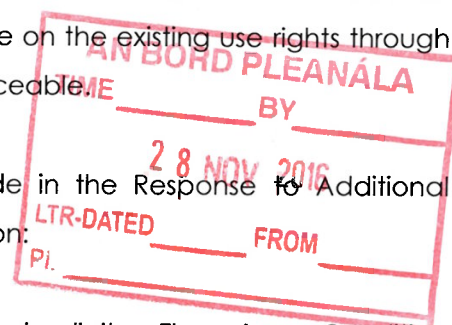


merchandising that shifted emphasis between bulky and non-bulky goods regularly in response to market demands. The reference to warehouse in the parent planning application described the type of building with the result that a warehouse structure was permitted for the purpose of retailing products. Therefore, it was not a Grant of Planning Permission for a 'retail warehousing use' as such a form of retailing did not exist and was not defined at the time.

2. The above extract from the Planners Report (highlighted in red) implies that a recent Planning Permission (Reg. Ref. SD15A/0152) sought permission for the "sale of bulky goods". This is factually incorrect as the planning application submitted only sought permission for 'works' that were required for the improvement/alteration of the structure. As outlined below the subsequent Grant of Planning Permission sought to impinge on the existing use rights through condition but it is contended that said condition is unenforceable.

In addition to the above we would like to outline points made in the Response to Additional Information which we believe were not given sufficient consideration:

- Permission was granted for the retail use of the premises *simpliciter*. There is no Condition attached to the parent Grant of Planning Permission that restricts the type of retail goods that can be sold from the unit.
- The permitted use of the unit is as a "shop", as defined in the Planning and Development Regulations 1994 (the appropriate legislation in place at the time of the grant of permission). As defined in legislation, a shop is a structure used for the retail sale of goods where the sale, display or service is principally to visiting members of the public.
- The Planning Authority made the assertion that a retail warehouse does not constitute a "shop", as defined in planning legislation. We respectfully requested that the Planning Authority provide clarification with regard to how they came to the conclusion that the unit does not comprise a "shop". We requested that the assessment be based in the context of planning legislation. It was further outlined that it was not considered appropriate to form an opinion of use based on the definition of "retail warehouse" taken from the South Dublin County Development Plan 2016-2022. In addition, it was pointed out that there is no definition of "retail warehouse" in planning legislation and the only definition that the retail unit can be deemed to fall under is the definition of a "shop", as it is evidently a structure used for the retail sale of goods. The aforementioned matters were not dealt with adequately in the assessment.
- The parent Planning Permission (Reg. Ref. S97A/0791) for the retail unit pre-dated not only the first national RPG's published in 2000 but also the first South Dublin County Development Plan in 1998. It was the RPG's, 2000 that introduced definitional clarity with regard to types of retail good categories and retail unit types.





In addition to the above it was outlined to the Local Authority that our client was not relying on an exemption under the Planning and Development Regulations 2001 (as amended) to operate the retail unit as a "shop", but was the beneficiary of a Grant of Planning Permission authorising the retail use of the premises.

The above demonstrates that the limited assessment carried out in relation to the core question of 'development' occurring or not was based on an incorrect interpretation of Planning Permissions governing the subject Unit. We appreciate that there are subtleties in this case that need to be considered but our client have (a) always believed that they had Planning Permission for the retailing of any types of goods (as no distinction existed when they received Planning Permission) and (b) only sought permission for physical improvements with no intention of altering the use in any way.

On foot of all the above we believe that the original case submitted to the Local Authority as part of the Section 5 Declaration Request is still valid. Therefore, in the absence of any arguments to the contrary presented in the Local Authority assessment we reiterate the case below in this referral to An Bord Pleanála. The layout and content below is largely the same as that submitted to the Local Authority but altered where appropriate for the purpose of updating and clarity.

#### Site Location and Context

The subject site is located in the established Fonthill Retail Park in Clondalkin, Dublin 22 (see Figure 1 below). The retail park contains a broad mix of uses and operators that includes *inter alia* Elverys Sports, Smyths Toys, Wheelwork Bikes, Polonez foodstore, Power City and Aldi. These retail units provide for a full range of retail goods including convenience and comparison and varying mixes of same.

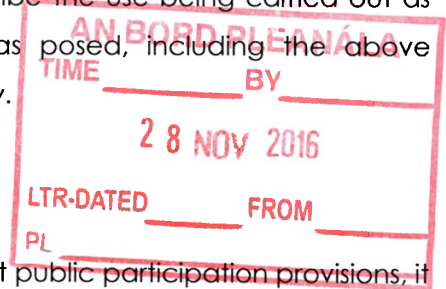
#### Previous Section 5 (Ref. ED16/0025)

This Referral is subsequent to a previous Section 5 Declaration made (Ref. ED16/0025) and requested by and issued to the above-mentioned third party, Save Our Town Centres Limited. The Section 5 Declaration request Ref. ED16/0025 sought the opinion of South Dublin County Council with regard to the following question:

*"Whether the change of use from the former retail warehouse to use as a discount store for the sale of non-bulky convenience goods is development, and is or is not exempted development". (Emphasis Added)*

It is respectfully suggested that the Planning Authority's decision in this case was not based on any objective evidence, in that the question raised was leading and provided no evidence to support it. The description of development is cited against a "discount store" use. In the first instance we note that a "discount store" is no longer a distinct category as contained in the RPG's for Planning

Authorities, 2012<sup>1</sup> and has no status in planning. Secondly, to describe the use being carried out as "non-bulky convenience goods" is disingenuous. The question as posed, including the above terminology, has sought to elicit a response that suited the third party.



### Public Participation

While the Section 5 Declaration process does not contain any explicit public participation provisions, it does however, give the Planning Authority the power to ask any person to provide information in relation to a Section 5 Declaration request. Unfortunately, in case Ref. ED16/0025, our client was not afforded the opportunity to provide any input into the assessment process. In this context, we note the following comments issued in a submission on planning legislation made to the Department of the Environment, Community and Local Government by An Bord Pleanála in 2014:

*'There is no provision for public participation in Section 5. Therefore one can have the situation where one person makes a request to the Planning Authority for a declaration, in respect of a property, and obtains a declaration. Another person, who may be the owner of the property involved, or a neighbour, can become aware of the declaration later, or when work commences, and has only one means of addressing the situation, by submitting a separate request for a declaration to the Planning Authority, which they then refer to the Board for review under Section 5 (3)(a) if they are not happy with the declaration.'<sup>2</sup> (Emphasis Added)*

Having been unable to participate in the assessment process of the Section 5 Declaration request Ref. ED16/0025, which resulted in a Warning Letter of alleged unauthorised development, our client sought to address the situation by way of requesting a Section 5 Declaration (subject of this referral) from the Planning Authority, based on a question that was fair and impartial, and one that did not serve to direct the Authority towards a pre-determined response.

However, under Ref. ED16/0045 a Declaration was issued which concluded that the "proposed development" was "declared not exempt" under the Planning and Development Regulations 2001 (as amended). This decision did not deal with the subject of the Declaration Request which sought clarity on the question of "development" primarily which the decision makes no reference to other than to mention a "proposed development" (but no development was proposed). Therefore, the Section 5 Declaration Decision is flawed as it did not provide a clear and justifiable position on the issue of whether development has or has not occurred in the first instance which in turn raises questions as to how a decision was made in relation to exemptions. In short, how can a decision be made on an exemption if it has not been decided if there is need for an exemption.

<sup>1</sup> Retail Planning – Guidelines for Planning Authorities, 2012, Department of Environment, pg. 35

<sup>2</sup> Submission on Legislation made to Department of the Environment, Community and Local Government by An Bord Pleanála, 2014, pg. 6

## Planning History

The following section provides a review of the Planning Permissions that are of importance in the assessment of the question as set out above.

SDCC Reg. Ref. S97A/0791

The governing planning permission for development of the unit is SDCC Reg. Ref. S97A/0791, which provided consent for a retail warehouse development of c. 4,210sq.m. South Dublin County Council decided to Grant Planning Permission for the retail unit on the 3<sup>rd</sup> February 1998 and the Final Grant of Permission was issued on the 19<sup>th</sup> March 1998, subject to 17 no. conditions. It is noted that of the 17 no. conditions attached to the permission, there are no restrictive conditions in terms of limiting the type of retail goods that can be sold from the unit.

The date of decision and the date of the Final Grant of Planning Permission for the governing consent are important in that they pre-dated the finalisation of the first comprehensive RPG's, dated December 2000, and also the first South Dublin County Development Plan in 1998 (adopted in December of 1998). In terms of retail policy, the legislation in place at the time was the Local Government (Planning and Development) General Policy Directive, 1982. This Directive lacked detailed definitions or policy provision relating to retail and did not recognise different types of retail units, nor did it draw a distinction between types of retail goods. In addition, we note that the decision date for the permission pre-dates current planning legislation and as such the application was assessed in the context of the following:

- The Local Government (Planning and Development) Acts, 1963, (as amended); and
- The Local Government (Planning and Development) Regulations, 1994 (as amended).

SDCC Reg. Ref. SD15A/0152

Planning application Reg. Ref. SD15A/0152 was granted consent for the following:

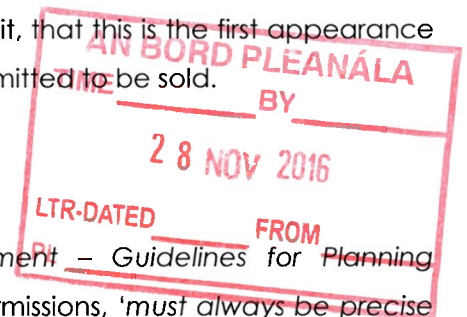
*'New internal subdivision walls, new loading door arrangement at south elevation, new toilets, 2 no. new fire exit doors to north elevation, new glazed double doors/screen to east elevation and signage to west elevation'.*

In Granting Planning Permission for the development, the Planning Authority applied 5 no. conditions including condition no. 2 that states:

*'2. The range of goods to be sold in the extended retail warehouse unit shall be limited solely to "bulky goods" (as defined in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government*

in April 2012), and shall not include the sale of toys, footwear, sportswear or other clothing. Reason: In order to prevent an adverse impact on the viability and vitality of the town area and so as not to undermine the retail hierarchy of the area.' (Emphasis Added)

We note that in terms of the planning history associated with the unit, that this is the first appearance of a restriction being applied in terms of the type of retail goods permitted to be sold.



### Enforceability of Planning Conditions

The Department of the Environment's 'Development Management – Guidelines for Planning Authorities', 2007, sets out that conditions attached to planning permissions, 'must always be precise and unambiguous, particularly since the effectiveness of subsequent enforcement action may depend on the wording.'<sup>3</sup> Certain basic criteria are suggested as a guide to deciding whether to impose a condition and these include whether the condition is: **necessary**; relevant to planning; **relevant to the development to be permitted**; **enforceable**; **precise**; and, reasonable. With regards to enforceable conditions, the Guidelines provide that a condition should not be imposed if it cannot be made effective. Given the above, we would assess Condition no. 2 attached to planning permission Reg. Ref. SD15A/0152 (set out above) against some of these key criteria:

- **Necessary:** For the Planning Authority to apply the subject condition it must have been necessary to do so. It is reasonable to conclude therefore that the imposition of the condition was required in order to restrict the permissible uses of the retail unit against that which it had originally been granted permission for. If the unit was already restricted in terms of the retail goods permitted to be sold then the inclusion of this condition would not have been necessary.
- **Relevant to the Development to be permitted:** The planning application sought the subdivision of the retail unit and did not seek a change of use. It is considered that the subject condition was not relevant to the development as applied for and sought to impinge on existing use rights with the result that the attachment of the condition was *ultra vires*.
- **Precise:** The condition seeks to apply a restriction on the range of goods to be sold from the extended retail warehouse unit. The planning application as submitted to the Authority sought the sub-division of the existing retail unit. No extension of the unit was either applied for or granted, as evidenced by no development contributions being applied for additional floor space. This creates a level of uncertainty with regards to the intention of the condition and where the Authority sought to apply the restriction. Notwithstanding the ambiguity regarding the wording applied in the condition, it would be reasonable to assume that, if enforceable, the 'extended retail warehouse unit' refers to the newly created unit no. 3A (if at all) and not to the existing unit no. 3. In this context we note that the Section 5 Declaration submitted refers

<sup>3</sup> Development Management – Guidelines for Planning Authorities, 1997, Department of Environment, pg. 63

solely to unit no. 3, and not to unit no. 3A, and as such we do not believe that Condition no. 2 of Reg. Ref. SD15A/0152 applies.

- **Enforceable:** Given the ambiguity surrounding the intentions of the Planning Authority in attaching the above mentioned condition, including the relevance to the subject permission and the unit to which it relates, we would question whether, if required to do so, the condition would be enforceable.

Based on the above, we are of the opinion that Condition no. 2 attached to the consent for planning permission Reg. Ref. SD15A/0152 is not applicable in the assessment of this Referral. In the first instance, a literal interpretation of the condition raises questions as to whether the condition is relevant to the development permitted in that it refers to works that did not form part of the permission sought. Furthermore, it is our interpretation that the Planning Authority has intended to restrict the use of the type of goods to be sold from the newly created unit no. 3A, where it refers to the '*extended retail warehouse unit*' and not the existing unit no. 3 of which is the subject of this Referral. On this basis it is considered that Condition no. 2 attached to planning permission Reg. Ref. SD15A/0152 is not required to be factored into the assessment.





## 4. Question of “Development”

Development is defined in Section 3 of the Planning and Development Act 2000, as amended, and is set out as follows:

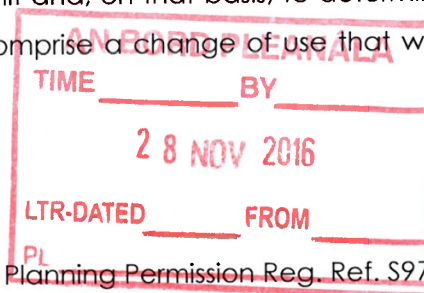
*“...the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.”*

The test therefore, in terms of whether a change of use comprises development, is firstly whether there is a change of use and secondly whether the change of use is a material change of use. This test was not fully addressed in the Planner's Report neither of the Section 5 Declaration request, Ref. ED16/0025 nor as outlined above in this current case. For Article 9(1)(a)(i) of the Planning and Development Act 2000 (as amended) to apply, it must be clearly demonstrated that a material change of use has occurred. In order to determine whether there has been a material change of use it is necessary to determine the permitted use of the retail unit and, on that basis, to determine if the implementation of the question referred to above would comprise a change of use that would be material in nature.

### Change of Use

As set out above, the subject retail unit was permitted under Planning Permission Reg. Ref. S97A/0791. With regard to whether a change of use has occurred, and subsequently whether that change of use is considered to be material; this can only be the case if it is considered that development has taken place outside of that which the retail unit was Granted Planning Permission for. It is worth noting that it would be possible for any retailer to operate from the subject unit. The 'brand' or retailer is not a relevant planning consideration *per se*, but rather the nature of the goods to be sold can be relevant in certain instances. The question, therefore, is whether a material change of use arises as a result of the sale of different types of retail goods at the unit.

To ascertain the type of retail goods permitted to be sold from the unit we must first look at the relevant Planning Permission that governs the unit, and secondly, the legislative context within which the Permission was Granted. As set out above, the original Permission for the unit is Reg. Ref. S97A/0791 that provided consent for a retail warehouse development of c. 4,210sq.m. As set out in the development description for the development, the function of the retail warehouse was for the sale of retail goods, and thus it is reasonable to assume that the use of the unit as applied for and permitted is retail. In terms of the permitted retail use of the unit it is highlighted that no restriction on the type of retail goods permitted to be sold from the unit was applied by the Planning Authority by way of condition to the permission.



In addition to the relevant Planning Permission, it is necessary to assess the Permission in the context of the planning legislation in place at the time of the making of the decision. At the time of the Granting of Planning Permission, retail warehousing was not recognised in legislation as a distinct sector of retailing which sold a certain type of retail good. The Planning Regulations in place at the time were the Local Government (Planning and Development) Regulations 1994 (as amended), and these Regulations contained a definition for "shop" that is set out as follows:

*"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 cold food for consumption off the premises,*

*( e ) for hairdressing,*

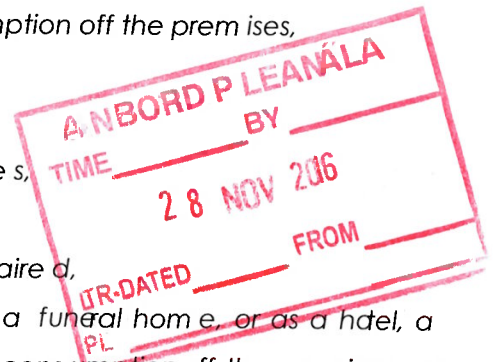
*( f ) for the display of goods for sale,*

*( 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 use for the direction of funerals 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, or any use to which class 2 or 3 of Part IV of the Second Schedule applies;' (Emphasis Added)*



Based on the above, it is our opinion that the Planning Authority permitted the use of the retail warehouse as a "shop" as defined by The Local Government (Planning and Development) Regulations 1994, as amended, in that the use of the unit was for the retail sale of goods. With regard to change of use, Article 11 of the 1994 Regulations stated that:

*"11. (1) Development which consists of a change of use within any one of the classes of use specified in Part IV of the Second Schedule and which does not involve the carrying out of any works, other than works which are exempted development, shall be exempted development for the purposes of the Acts, provided that the development, if carried out, would not contravene a condition attached to a permission under the Acts or be inconsistent with any use specified or included in such a permission." (Emphasis Added)*

The class of uses set out in Part IV of the Second Schedule of the Planning and Development Regulations 1994, as amended, included 'Use as a Shop' in Class 1 of specific planning uses. As such, it clearly sets out that development that consists of a change of use within a use class and which does not involve the carrying out of any works, other than works which are exempted development, shall be exempted development.

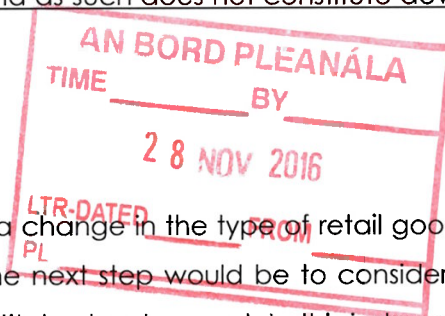
Based on the above, it is considered that unit no. 3 at the Fonthill Retail Park, Fonthill Road, Dublin 22 has Planning Permission for retail, from a warehouse type unit, that falls within the definition of a "shop", as set out in the Planning and Development Regulations 1994, as amended, in that its primary function is for the retail sale of goods. No conditions were attached to the Grant of Planning Permission that restricted the type of retail goods to be sold from the "shop". Taken in the context of the planning legislation in place at the time of receiving Planning Permission there was no provision in legislation that restricted the sale of certain types of retail goods at the unit and as such, there are no legal and/or planning grounds for retrospectively restricting the type of retail goods that can be sold from the unit.

It is our opinion that the permitted retail use of the unit has to be defined as understood by the Planning Authority at the time of the making of the decision to Grant Planning Permission. It is not reasonable to interpret the permitted development in the context of current Guidelines and legislation. It is considered that changing the type of retail goods sold from the unit falls within the remit of the original planning permission for the unit and as such does not constitute development by way of a change of use.

#### Material Change of Use

Notwithstanding the above, if it was considered that a change in the type of retail goods being sold from the unit would comprise of a change of use, the next step would be to consider whether this change of use would be material and therefore constitute development. In this instance, the test for materiality is often approached by asking whether different planning considerations would have applied had planning permission been sought on the basis of the unit selling different types of goods.

As set out above, the relevant legislation in place at the time of Granting Planning Permission indicates that Permission was Granted for the unit to be used as a "shop" for the retail sale of goods. There were no definitions in planning legislation with regard to distinct types of retail goods and as such, the Planning Authority in their assessment, would have given due consideration to the material planning implications of permitting retail, in the general sense, at the subject site. Thus, the relevant material planning considerations would have been taken into consideration in the Authority's assessment of the proposal. Furthermore, should the Planning Authority have considered that the change of use in the type of retail goods sold from the unit would result in material planning implications; a condition restricting the type of goods to be sold from the unit would have been applied. It is considered, therefore, that the Planning Authority gave due consideration to the potential for material planning implications as part of the assessment process in permitting the subject retail unit and as such the use permitted at the unit is considered to be 'open retail'.



## 5. The Question of “Exempted development”

Development can be exempted from the requirement to obtain planning permission under planning legislation set out in the Planning and Development Act, 2000, (as amended) and the Planning and Development Regulations, 2001 (as amended). However, the provisions of exempted development are only applicable if development, in the first instance, has taken place. Having determined, as outlined above, that the change of use in the type of retail goods sold from the unit should not be considered a material change of use and therefore development, it is not necessary therefore to apply the provisions of exemption.

However, should the Board consider that development would occur by reason of the type of goods being sold at the unit, we would consider that the development should be considered to be exempt development by way of Article 10 of the Planning and Development Act 2000, as amended that states:

*“10. (1) 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.” (Emphasis Added)*

With regard to restrictions on exemption we note the provisions of Article 9(1)(a)(i) of the Planning and Development Act 2000, as amended, that states:

*“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.” (Emphasis Added)*

No condition restricting the type of retail goods to be sold from the unit was attached to the parent Planning Permission for the development Ref. S97A/0791. As set out above, Condition no. 2 attached to the consent for Planning Permission Reg. Ref. SD15A/0152 is not applicable in the assessment of this Section 5 Declaration request, as the restrictive condition relates to unit no. 3A, if at all, and not to unit no. 3. On this basis, it is considered that a change in the type of retail goods sold from the unit would comprise a change of use within Class 1 of Part 4 of Schedule 2 of the Planning and Development Act 2000, as amended, that is not restricted by way Article 9(1)(a)(i).

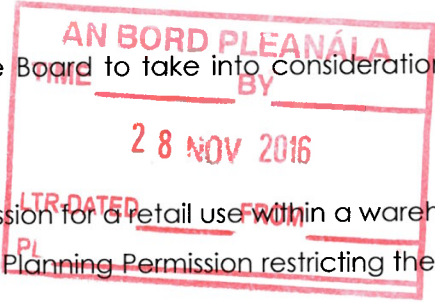


## 6. Conclusion

We respectfully request that An Bord Pleanála consider all the above objectively and provide our Client with and answer to the following question:

*'Whether a material change of use at retail unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.'*

In the assessment of the above question we request that the Board to take into consideration the following:

- 
- Planning Permission Reg. Ref. S97A/0791 Granted Permission for a retail use within a warehouse structure. No conditions were attached to the Grant of Planning Permission restricting the type of retail goods to be sold from the unit.
  - Legislation in place at the time of Granting the Planning Permission provided that the use of the unit was a 'shop' for the retail sale of goods. It is reasonable to assume that the use of the unit as applied for and permitted is retail.
  - It is considered that changing the type of retail goods sold from the unit falls within the scope of the original planning permission for the unit and as such does not constitute development by way of a change of use.
  - It is considered that the materiality of changing the type of retail goods sold at the unit was considered as part of the Planning Authority's assessment of the parent Planning Permission and as such the use permitted at the unit is considered to be 'open retail'.
  - Retrospectively applying current planning legislation and guidance in the assessment of the unit is legally questionable as these documents did not form part of the decision making process within which the unit was permitted.
  - The provisions of exempted development are not applicable as development, in the first instance, has not taken place (i.e. no restriction by condition applies).

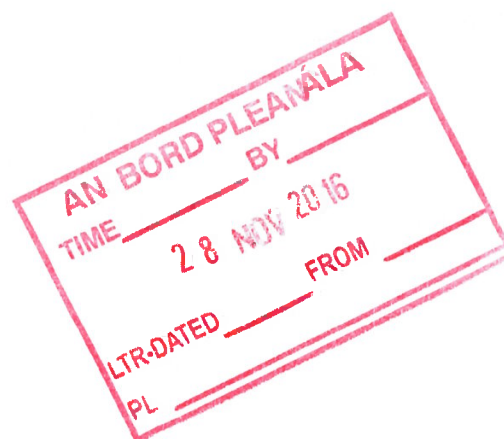
While it is accepted that the subject retail unit comprises somewhat of an anomaly when set in the context of current planning legislation and guidance, we are of the opinion that the use of the unit is governed by the parent Planning Permission and the planning legislation in place at the time when it was permitted. As such, we would respectfully suggest that An Bord Pleanála concur with the following conclusion:

***A material change of use at retail unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 would not arise by reason of the type of goods being sold and would not be considered development in the first instance.***



We are willing to attend a meeting with An Bord Pleanála on this matter under Section 136 of the Planning and Development Act 2000 (as amended). We would request that Save Our Town Centres Limited are also required to attend such a meeting as they are clearly party to the issue at hand.

We look forward to receiving your acknowledgement of this Referral and should you require any further information do not hesitate to contact us.





Appendix I  
Copy of  
Section 5  
Declaration  
Decision





An Rannóg Talamhúsáide, Pleanála agus Iompair  
Telephone: 01 4149000 Fax: 01 4149104

Land Use, Planning & Transportation Department  
Email: [planning.dept@sdublincoco.ie](mailto:planning.dept@sdublincoco.ie)

Brian Wynne Bilfinger GVA  
Second Floor, Seagrave House  
19-20 Earlsfort Terrace  
Dublin 2

03 NOV 2016

02-Nov-2016

**Our Ref:** ED16/0045  
**Re:** Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22  
**Proposal:** Whether a material change of use at retail unit no.3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.

Dear Sir/ Madam,

I wish to inform you that the proposed development as outlined at the above location is, by Chief Executive's Order PR/1067 dated 01-Nov-2016, DECLARED NOT EXEMPT under the Planning and Development Regulations, 2001 (as amended) and therefore **DOES** require planning permission.

A copy of the planner's report is enclosed.

Yours faithfully,

  
**For Senior Planner**



# Co mhairle Chontae Atha Cliath Theas

PR/1067/16

## Record of Executive Business and Chief Executive's Order

<b>Register Reference:</b>	ED16/0045
<b>Correspondence Name &amp; Address:</b>	Brian Wynne Bilfinger GVA Second Floor, Seagrave House, 19-20 Earlsfort Terrace, Dublin 2
<b>Development:</b>	Whether a material change of use at retail unit no.3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.
<b>Location:</b>	Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22
<b>Applicant:</b>	PKB Partnership

### Description of Site and Surroundings:

The site refers to Unit 3 Fonthill Retail Park, Clondalkin, Dublin and contains a retail warehouse unit which forms part of a terrace of three units. A large amount of surface car parking is located to the front of the units.

### Zoning:

The site is zoned 'RW' as per the South Dublin County Council Development Plan 2016-2022, the objective for which is 'To Provide for and consolidate Retail Warehousing'.

### Proposal:

This is an application requesting a Section 5 Declaration with regards to the following question:

*'Whether a material change of use at retail Unit No. 3 Fonthill Retail Park, Fonthill Road, Dublin arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development.'*

### Relevant Planning History:

**ED16/0025;** change of use from the former retail warehouse to use as a discount store for the sale of non-bulky convenience goods.

Decision; Declared Not Exempt.

**S97A/0791;** Retail warehouse development (c.4210sq.m)

Decision: permission granted subject to conditions.

**SD15A/0152;** new internal subdivision walls, new loading door arrangement at south elevation, new toilets, 2 new fire exit doors to north elevation, new glazed double doors/screen to east elevation and signage to west elevation.

Decision; permission granted subject to conditions.



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### Relevant Enforcement History

S7743; Warning Letter issued regarding alleged unauthorised development consisting of the change of use from a retail warehouse to use as a discount store for the sale of non-bulky convenience goods without planning permission.

### Assessment:

Consideration as to whether a development constitutes exempted development or not is governed by Sections 3, 4 and 5 of the Planning and Development Act 2000 (as amended) and Articles 5, 6, 7, 8, 9, 10, 11 of the Planning and Development Regulations 2001 (as amended)

### **Planning and Development Act 2000 as amended:**

**Section 2(1)** in this Act, except where otherwise requires –

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

**'structure'** as any building, structure, excavation or other thing constructed or made on, in or under any land, or part of a structure so defined, and –

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

**'use'** in relation to land, does include the use of the land by the carrying out of works thereon

**Section 3(1)** defines **'development'** as *'the carrying out of any works on, in, over or under land or the making of any material change in the use of any structure or other land'*. The term **'works'** is defined in Section 2(1) of the 2000 Act as *'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.'*

### ***Is the proposal exempted development?***

South Dublin County Council Development Plan 2016-2022 defines a **Retail Warehouse** as:

*A large single-level store specialising in the display and retail sale of bulky non-food, non-dothing household goods, such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers and often in out-of-centre locations.*

Planning and Development Regulations 2001 (as amended) Article 3

**'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

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- (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 retailers off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw. 7. & Geo. 5, c.8,
  - (e) for hairdressing
  - (f) for the display of good for sale
  - (g) for the hiring out of domestic or personal goods or articles
  - (h) as a laundrette or dry cleaners
  - (i) for the reception of goods to be washed, cleaned or repaired,
- but does not include any use associated with the provision of funeral services or a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies.

In addition reference should be made to Article 9 (1) (a) (i) – Restrictions on Exemption which also applies; *Development to which article 6 relates shall not be exempted development for the purposes of the Act – if the carrying out of such development would - contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.*

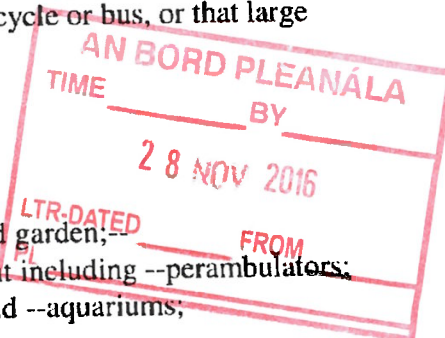
SD15A/0152 Condition No. 2 states:

*'The range of goods to be sold in the extended retail warehouse unit shall be limited solely to "bulky goods" (as defined in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government in April 2012), and shall not include the sale of toys, footwear, sportswear or other clothing.*

*REASON: In order to prevent an adverse impact on the viability and vitality of the town area and so as not to undermine the retail hierarchy of the area.'*

Annex 1 of the *Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government in April 2012* defines 'Bulky Goods' as follows;

- Goods generally sold from retail warehouses --where DIY goods or goods such as flatpack furniture are of such size that they would normally be taken away by car and not be portable by customers travelling by foot, cycle or bus, or that large floorspace would be required to display them e.g.
  - repair and maintenance materials; --
  - furniture and furnishings; --
  - carpets and other floor coverings; --
  - household appliances; --
  - tools and equipment for the house and garden; --
  - bulky nursery furniture and equipment including --perambulators;
  - bulky pet products such as kennels and --aquariums;



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- audio-visual, photographic and information --processing equipment;
- catalogue shops and other bulky durables for --recreation and leisure.

The list is not exhaustive – bulky goods not mentioned in the list should be dealt with on their merits in the context of the definition of bulky goods. Bulky goods are generally not portable by customers travelling by foot, cycle or bus.

Planning permission was granted on site under S97A/0791 for a retail warehouse; the permission granted did not state 'shop' but specifically stated 'permission for a retail warehouse'. Planning permission granted under SD15A/0152 also refers to a retail warehouse on site for the sale of 'bulky goods'; the red line boundary of SD15A/0152 referred to both Units 3 and 3A. It is considered that a retail 'warehouse' is not and was not considered to be the same as a retail 'shop'. No details have been submitted with this application to provide information on the type of items being sold on site. This is critical to answering the question being posed – 'whether a material change of use at retail Unit No. 3 Fonthill Retail Park arises by reason of the type of goods being sold....'

### Conclusion:

Insufficient information has been submitted in order to fully assess the application. Further details are required with regards to the type of goods being sold on site in order to determine the application.

### Recommendation:

The applicant should be written to and informed that further information is required in order to fully assess the application.

### Additional Information

Additional Information was requested on the 14<sup>th</sup> September 2016

Additional Information was received on the 12<sup>th</sup> October 2016

The following additional information was requested:

### Item No 1:

Insufficient information has been submitted in order to fully assess the application. The applicant, owner or developer is therefore requested to provide full details of the type of goods being sold at the premises.

### Assessment – Item No. 1:

Submission received by Brian Wynne, GVA, dated 12<sup>th</sup> October 2016 states that products for sale on site relate to the following categories; food and drink, health and beauty, home and pet, gardening, leisure, entertainment, stationary, crafts, party and celebrations. Site visit confirmed that Unit 3 is occupied by 'Dealz' selling non-bulky goods (individual bars of chocolate, crisps, minerals, makeup, shampoo etc.) to

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visiting members of the public and Unit 3A is currently vacant. Having regard to the planning history on site it is considered that a retail warehouse was permitted on site and Unit 3 was then subdivided into two units for the sale of bulky goods. It is considered therefore that the sale of non-bulky goods would constitute non-compliance with the planning permission previously granted on site and would constitute a material change of use and would require a further grant of planning permission in the opinion of the Planning Authority.

### Conclusion

Having regard to the planning history on site it is considered that a retail warehouse was permitted on site and Unit 3 was then subdivided into two units for the sale of bulky goods. It is considered therefore that the sale of non-bulky goods would constitute non-compliance with planning permission previously granted on site and would constitute a material change of use and would require a further grant of planning permission in the opinion of the Planning Authority.

### Recommendation

The applicant should be written to and informed that the sale of non-bulky goods would constitute a material change of use on site having regard to the planning history on site and would therefore not be considered as Exempted Development and would require planning permission.

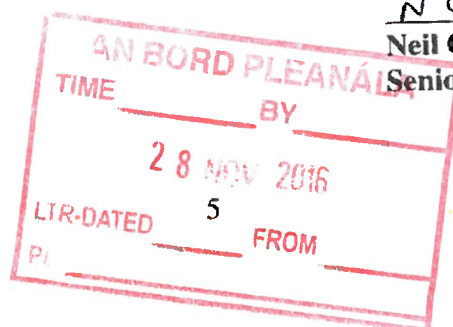
NJD  
R. P. Siobhan Duff,  
Senior Executive Planner

Endorsed: Mairead Fitzgerald  
Mairead Fitzgerald,  
Administrative Officer

**ORDER:** That the applicant be informed that the proposed development of Whether a material change of use at retail unit no.3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development at Unit 3, Fonthill Retail Park, Fonthill Road North, Clondalkin, Dublin 22 is not considered to be exempted development under the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended) and therefore does require planning permission.

Date: 14/11/16

Neil O'Byrne  
Neil O'Byrne,  
Senior Planner



Handwritten notes in the top right corner, possibly a signature or date, including the word "MAY" and some illegible scribbles.