

Karen Hickey

Mary T

From: Caoimhe Ní Raghallaigh <caoimhe.niraghallaigh@rmla.ie>
Sent: Tuesday 21 May 2024 14:37
To: Appeals2
Cc: Daragh Cagney; Rory Cagney; kevinhamell.kh@gmail.com; Robert McLoughlin
Subject: Submission on ABP-318832-24
Attachments: 240521_Submission on Board Ref 318832_24.pdf
Follow Up Flag: Follow up
Flag Status: Flagged

Caution: This is an **External Email** and may have malicious content. Please take care when clicking links or opening attachments. When in doubt, contact the ICT Helpdesk.

To whom it may concern,

Further to the Board correspondence dated 2nd May 2024 requesting submissions/observations on the Referral relating to Unit No.3 Fonthill Retail Park, Fonthill Road, Dublin 22 (Board Ref. 318832-24), please see attached submission on behalf of PKB Partnership.

In addition to issuing all correspondence to our Client, PKB Partnership, going forward could a copy of all correspondence in relation to his Case also be issued to RMLA at the below address.

Kind Regards

Caoimhe Ní Raghallaigh
Director

RMLA.
Planning Consultants

Mobile + 353 (0) 86 0473200
Caoimhe.niraghallaigh@rmla.ie
Unit 3B, Santry Avenue Industrial Estate,
Santry Avenue, Santry, Dublin 9,
D09 PH04

www.rmla.ie
linkedin.com/company/rmla-planning/

This email is confidential and may be privileged. It is for use of the named recipient(s) only.
If you have received it in error, please notify us immediately. Do not copy or disclose its contents to any person or body, and delete it from your computer systems.
Email transmission cannot be guaranteed to be secured or error free as information could be intercepted, corrupted, lost, destroyed, arrive late, or incomplete or contain virus.
The sender therefore does not accept liability for any errors or omissions in the content of this message, which arise as a result of an email transmission.
PLEASE NOTE: The attached file has been checked for viruses, however there is NO GUARANTEE that the file is virus free.
We recommend that you do not open email attachments unless you are satisfied that you have adequate virus protection measures in place.

RMLA.

Planning Consultants

RMLA Limited,
Unit 3B, Santry Avenue Industrial Estate,
Santry Avenue, Santry,
Dublin 9, D09 PH04

Phone: 083 2068716
Website: www.rmla.ie
Email: admin@rmla.ie
Date: 21/05/2024

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

Dear Sir/Madam,

Re: Submission to the Board in relation to Board Ref. RL06S.318832 – Remitted to the Board following the High Court Decision, Record No. 2018 No. 661JR.

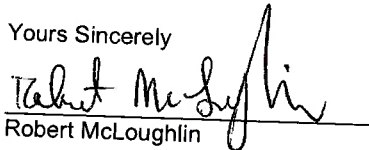
An Bord Pleanála Ref. ABP-318832-24

Previous Reference: RL3520

Following correspondence from An Bord Pleanála dated 2nd May 2024 requesting submissions/ observations in relation to the Section 5 Referral Request on Unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 (see Appendix I of the attached Report), please find attached Planning Report prepared on behalf of our Client, PKB Partnership. This Report has been prepared to assist the Board with making the Section 5 Referral on foot of the remittal from the High Court and seeks to ensure that the Board has the relevant information required to inform the Section 5 Referral.

This Response is being submitted within the stated period set out in the abovementioned Board correspondence, i.e. on or before 22nd May 2024. In addition to issuing all correspondence to our Client, PKB Partnership, going forward could a copy of all correspondence in relation to his Case also be issued to RMLA at the above address.

Yours Sincerely



Robert McLoughlin

Managing Director

For and on Behalf of RMLA Limited

RMLA.

Planning Consultants

**Submission to the Board in relation to
Board Ref. RL06S.318832:**

**‘Whether a material change of use
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’**

**Unit no. 3 Fonthill Retail Park, Fonthill
Road, Dublin 22**

Planning Report

Board Ref. ABP-318832-24

Prepared by RMLA Limited

On behalf of PKB Partnership

May 2024

Table of Contents

1.	Introduction	3
2.	Site Context	4
3.	Planning History	4
4.	Planning Review to Inform the Board's Assessment	19
5.	Conclusion	50
Appendices		53

Prepared By: Robert McLoughlin

Contact No.: 083 2068716

Status: Final

1. Introduction

1. This Report has been prepared by RMLA Limited on behalf of PKB Partnership following correspondence from An Bord Pleanála dated 2nd May 2024 requesting submissions/observations in relation to the Section 5 Referral request on Unit no. 3, Fonthill Retail Park, Fonthill Road, Dublin 22 (Board Ref. 318832), see Appendix I.
2. Our Client had previously sought a Referral from the Board under Board Ref. RL 3520, which was subsequently Judicially Reviewed by our Client, with the previous decision of the Board quashed by the High Court. On foot of the High Court Order the planning status of unit no. 3, as permitted under the Reg. Ref. S97A/0791 (parent permission) has been clarified, with the Court confirming that the permission does not entail a restriction on retail warehouse use equivalent to that now found in the Retail Planning Guidelines. This is significant and as set out below alters the planning basis of the Section 5 Declaration issued by South Dublin County Council (Reg. Ref. ED16/0045) and the Board's previous Section 5 Referral, now quashed. It also highlights the incorrect approach/assumptions of the Planning Authority in dealing with this unit previously, specifically in relation to Reg. Ref. SD15A/0152, bringing into question the enforceability of conditions attached to that permission.
3. The facts of the case, including the items specifically referred to in the correspondence from the Board dated 2nd May 2024 are addressed below. As our Client has always contended, the permitted use of unit no. 3 under the parent permission was unrestricted retail, as now confirmed by the High Court, and that the retrospective application of a restriction based on current definitions of retail warehouse was not appropriate and has significantly and negatively impacted how the unit has been addressed through the planning process by both the Planning Authority and An Bord Pleanála. As directed by the Court, this remittal is an opportunity for the Board to take the findings of the Court and apply them to the facts of the case. This Report has been prepared to assist the Board with this process and to ensure that the Board has the relevant information required to inform the Section 5 Referral.

2. Site Context

4. The subject site is located in the well-established Fonthill Retail Park in Clondalkin, Dublin 22 which contains a broad mix of uses and operators including *inter alia* Aldi foodstore, Polonez foodstore, Eurasia Supermarket, Elverys Sports, Smyths Toys, Wheelworx Bikes and Power City. These retail units provide a mix of convenience and comparison goods, with the varied retail offer of Fonthill Retail Park long established, with stores trading from the Retail Park for almost 30 years.

3. Planning History

3.1 Introduction

5. Establishing the planning context of the subject site was a central element of the Section 5 Requests at both Planning Authority and Board levels. As above, the High Court ruling has clarified the status of unit no. 3 as permitted under the parent permission (Reg. Ref. S97A/0791). An overview of the planning history, with reference to the High Court judgement, is provided below which demonstrates not only the basis of the Judgement but also the significant impact that the misinterpretation of the parent permission by the Planning Authority has had on the subsequent permission (Reg. Ref. SD15A/0152) and the Section 5 Declaration relating to unit no. 3. It also demonstrates that the previous Section 5 Referral by the Board was not only informed by an incorrect Section 5 Declaration by the Planning Authority but that the Board's own basis for the now quashed Section 5 Referral was also flawed due to the misinterpretation of the parent permission (Reg. Ref. S97A/0791).

3.2 Reg. Ref. S97A/0791

6. Unit no. 3 was granted planning permission under Reg. Ref. S97A/0791, which provided consent for a retail warehouse development of c. 4,210m². A Notification of Decision to Grant Permission was made on 3rd February 1998, with planning permission granted by South Dublin County Council (SDCC) on 19th March 1998 subject to 17 no. conditions, none of which applied any restriction to the type of retail goods which could be sold from the retail unit.

7. As set out in the Section 5 Declaration and Referral Requests, the date of decision and the date of the Final Grant of this parent permission are significant as they not only pre-date current planning legislation but also the finalisation of the first comprehensive Retail Planning Guidelines, dated December 2000, and 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.
8. The Planning Regulations in place at the time were the Local Government (Planning and Development) Regulations 1994 (as amended) which 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)
9. Our Client has long contended 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. The

1998 permission contained no restriction on the type of retail goods permitted to be sold from the 'shop' and there are no legal and/or planning grounds for retrospectively restricting the type of retail goods that can be sold from unit no. 3.

10. Mr Justice Cian Ferriter in his Judgement clarified, and upheld our Client's long-standing contention, stating that to interpret the scope of the use permitted under Reg. Ref. S97A/0791, by having regard to the content of the Retail Planning Guidelines, 2000 which post-dated the permission was an error, as was construing that the 1998 permitted "retail warehouse" use as being confined to the retail sale of bulky goods when no such restriction was stipulated in the terms of the 1998 permission itself¹. Justice Ferriter summarised this by stating:

"For the Board's assistance following remittal, for the reasons set out in detail in this judgment, I have decided that 1998 permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the retail planning guidelines²."

11. Our Client has always contended that the permitted retail use of unit no. 3 has to be defined as understood by the Planning Authority at the time of the making of the decision to grant permission and framed the Section 5 Declaration and Referral Requests in this context. However, an alternative interpretation, now clarified as incorrect by the High Court, has resulted in a misinformed rewording of the Referral Request by the Board which pre-determined the Section 5 Referral. This issue is dealt with in detail below.

3.3 Reg. Ref. SD15A/0152

12. Planning application Reg. Ref. SD15A/0152 sought permission for minor internal and external alterations to unit no. 3 as follows:

'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'.

¹ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 30.

² Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 34.

13. 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)

14. The meaning of the phrase "*the extended retail warehouse unit*" has been interpreted by Justice Ferriter who has found that condition no. 2 of the 2015 permission is enforceable and effective and applies to both unit no. 3 and unit no. 3A³. However, he has not, nor was he asked to, consider how the permitted use of unit no. 3 as unrestricted retail impacted the planning history of the site. Specifically, the Court was not asked to determine if condition no. 2 of Reg. Ref. SD15A/0152 which would have resulted in a change of use via condition was enforceable, given that the application was for minor internal works and made no reference to use. In this regard, the Court has remitted the case back to the Board to allow for a full assessment and specifically to apply the findings to the fact of the case⁴. This presents the Board with the opportunity to ensure that the overall picture is viewed, not just a small section in isolation, as supported by the Courts⁵.

3.4 Third Party Section 5 Declaration - Reg. Ref. ED16/0025

15. A request for a Section 5 Declaration was lodged by a Third Party with SDCC on 9th May 2016 asking the Planning Authority to address the following question:

³ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 34.

⁴ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 34.

⁵ The People (Attorney General) v Kennedy [1946] 517 at 536.

"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."

16. The question, which was stated as referring to 'Dealz, Fonthill Retail Park, Dublin 22' was leading in its use of terms such as 'discount store' and 'non-bulky convenience goods', the latter having a set meaning in the context of the Retail Planning Guidelines in place at the time which tied such goods to "*generally sold from retail warehouses*⁶", with the definition of retail warehousing limiting the goods sold to "*bulky household goods*⁷". In addition, while the terminology was leading the application presented no evidence to support the use of such terminology or in relation to the claim made in the Request. The question posed sought to elicit a response that suited the Third Party, with our Client of the opinion that were the question posed in a different manner, based on the actual planning status of the unit as supported by evidence, a different response could have been determined.
17. While the Section 5 Declaration process does not contain any explicit public participation provisions, Section 5(2)(c) of the Planning and Development Act, 2000 (as amended) gives the Planning Authority the power to ask any person to provide information in order to enable the Authority to issue the declaration on the question. In fact, the Courts have since found that once it is accepted that a Section 5 Declaration or decision may affect the rights and/or interests of third parties, it seems difficult to justify their exclusion from participation in the process leading to such declaration or decision⁸. However, in the case of Reg. Ref. ED16/0025, our Client was not afforded the opportunity to provide any input into the assessment process.
18. As a result, a subsequent Section 5 Declaration Request was sought on behalf of our Client (Reg. Ref. ED16/0045), as discussed below, based on a very different question to that asked by the Third Party and informed by different planning facts and circumstances. These planning facts, particularly that the parent permission (Reg. Ref. S97A/0791) permitted open retail, were central to the Section 5 Declaration Request on behalf of our Client but were not even

⁶ Retail Planning Guidelines, 2012, pg. 53.

⁷ Retail Planning Guidelines, 2012, pg. 54.

⁸ Judgment of Mr Justice Maurice Collins delivered on 17 November 2021, Court of Appeal Record Number 2020/233, Neutral Citation Number: [2021] IECA 307, Pg. 5.

mentioned in the Planning Authority's review and assessment of this Third Party Request. Thus while Reg. Refs. ED16/0025 and ED16/0045 refer to the same land not only are the questions posed completely different, but the evidence presented on behalf of our Client demonstrated a change in the planning facts and circumstances from the Planning Authority's determination. This is further dealt with below in Section 4.6 in the context of the Court of Appeal case of *Narcanon Trust v. An Bord Pleanála* [2021] IECA 307.

3.5 Section 5 Declaration - Reg. Ref. ED16/0045

19. A request for a Section 5 Declaration was lodged with SDCC on 12th October 2016 asking that the Planning Authority address 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."

20. As set out in the Request, it was the intention of our Client to request a Section 5 Declaration 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. The main purpose of the Section 5 Declaration request was *"to clarify the type of retail goods that are permitted to be sold at the subject retail unit"*.
21. As part of the Section 5 Referral Request the planning history of the site was addressed, including the facts set out in Section 3.2 above in relation to the unrestricted retail use permitted under the parent permission (Reg. Ref. S97A/0791). In addition, Reg. Ref. SD15A/0152 was also addressed, including the enforceability of condition no. 2 attached to same in the context of the actual unrestricted retail use of the unit. In this regard, we note that while the High Court ruling has determined that condition no. 2 of the 2015 permission is enforceable and effective and applies to both unit 3 and unit 3A, the Court did not, nor was it asked to consider how the permitted use of unit no. 3 as unrestricted retail impacted the planning history of the site and in turn the appropriateness of attaching such a condition in the first instance to what was an application for minor internal works. The Court was also not asked to determine if Reg. Ref. SD15A/0152 was enacted.

22. The initial assessment, as set out in the Planner's Report dated 14th September 2016, reviewed the planning history of the site, and concluded that:
- "It is considered that a retail 'warehouse' is not and was not considered to be the same as a retail 'shop'⁹".*
23. The above statement has since been found to be incorrect by Justice Ferriter¹⁰. Following a Request for Further Information (FI) in relation to the type of goods being sold at unit no. 3, our Client once again took the opportunity to re-affirm a number of key points set out in the initial Section 5 Declaration Request that may not have been given due consideration in the assessment process. This included the nature of the retail permitted under the parent permission and the need to assess the subject unit in light of the legislative parameters in which it was permitted. It clearly set out that unit no. 3 was the beneficiary of a grant of planning permission authorising the retail use of the premises simpliciter. It set out that the use of the premises for retailing of all types of retail goods falls within the use authorised by the grant of planning permission i.e. the permitted use¹¹.
24. Notwithstanding the evidence presented on behalf of our Client, due consideration was not given to establishing the permitted 'retail' use under the parent permission, with the term 'retail warehouse' tied to the sale of 'non-bulky goods' by the Planner in their finding that:

"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."

⁹ Planner's Report dated 14th September 2016, Reg. Ref. ED16/0045, pg. 4

¹⁰ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 28.

¹¹ Response to FI Request dated 12th October 2016, pg. 3.

25. The outcome of the misinterpretation of the planning history of the site was the finding that planning permission was required. In line with the statutory provisions of the Act our Client referred the question to the Board for determination.

3.6 Section 5 Referral – Board Ref. RL06S.RL3520

26. As the Planning Authority's analysis and decision appeared to have been predicated on a predetermined view that the authorised goods to be sold were limited to bulky goods a Referral Request was made to the Board. This Request addressed the Section 5 Declaration from SDCC and demonstrated that a limited assessment had been carried out in relation to the core question of 'development' occurring or not, and that it was based on an incorrect interpretation of the planning permissions governing the subject site. The fact that the parent permission (Reg. Ref S97A/0791) granted an unrestricted retail use was presented, as was the issue of development in the first instance, the legality and enforceability of condition no. 2 of Reg. Ref. SD15A/0152 and the exempted nature of the works undertaken. As the original case submitted to the Planning Authority as part of the Section 5 Declaration Request was still valid it was also submitted to the Board.
27. The Inspector's Report in assessing the case examined the planning history, concluding that:
- "It is not reasonable to suggest that because the permitted 'retail warehouse' predated the Retail Planning Guidelines and an informed definition of a retail warehouse, that the structure is not a retail warehouse but is in fact a shop¹²."*
28. As above, Justice Ferriter did not believe the Inspector to be correct on this point¹³, confirming in his Judgement that the 1998 permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the retail planning guidelines¹⁴. However, based on the incorrect assertion that the permitted use was as a retail warehouse in the context of the subsequent Retail Planning Guidelines the Inspector found that:

¹² Inspector's Report dated 21st March 2017, Board Ref. RL3520, Para. 10.1.

¹³ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/61JR, pg. 28.

¹⁴ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 34.

"The Board can only assess the case on the permitted use as a Retail Warehouse against current use as a Discount Store. Therefore, the question arising in this Referral, needs to be reformatted to take account of the permitted and the existing use of the premises in order to establish if a change of use has occurred. The question posed to the Board is vague and does not accurately describe the matters arising¹⁵."

29. As we now know, the question posed to the Board was correct and was based on the actual planning facts of the case. The Inspector by rewording the question, based on an incorrect interpretation of the planning history and status of the unit, like the Planning Authority predetermined the outcome of the Referral, notwithstanding the actual facts of the case. The new question sought to establish *"whether a change of use from a permitted retail warehouse to use as a discount store for the sale of non-bulky goods including the retail sale of convenience goods is or is not development or is or is not exempted development"*.
30. The newly formatted question was clearly constructed based on the Retail Planning Guidelines in place at the time and was leading in its use of terms such as 'discount store' and 'non-bulky convenience goods', the latter having a set meaning at the time which tied such goods to *"generally sold from retail warehouses¹⁶"*, with the definition of retail warehousing limiting the goods sold to *"bulky household goods¹⁷"*. In addition, the Inspector stated:

"It is clear from the site inspection that the retail warehouse unit is used for the sale of non-bulky items of merchandise. In my opinion, it cannot be concluded the unit specialises in the sale of bulky goods, as required by the guidelines¹⁸."

31. Again the Inspector in misinterpreting the actual permitted use under the parent permission has doubled down on the mistake, continuing to retrospectively apply current legislation to the 1998 permission and now in the context of a leading question, formulated under the current Retail Planning Guidelines, 2012. This is further indicated by the Inspector's conclusion that the retail format employed by the occupier fails to satisfy the requirements for retail warehousing (the

¹⁵ Inspector's Report dated 21st March 2017, Board Ref. RL3520, Para. 10.1.

¹⁶ Retail Planning Guidelines, 2012, pg. 53.

¹⁷ Retail Planning Guidelines, 2012, pg. 54.

¹⁸ Inspector's Report dated 21st March 2017, Board Ref. RL3520, Para. 10.4.

permitted use on the subject site)¹⁹, a fact which Justice Ferriter has now clarified is not the case.

32. We would also note that the Inspector undertook a site visit on 27th May 2017 at the request of the Board and prepared a Memo dated 04th July 2017. While this Memo provides an option on compliance with condition no. 2 of Reg. Ref. SD15A/0591, the finding that the permission has been carried out was based on works being undertaken with no consideration if such works could have been carried out under exempt development provisions. In fact, the Inspector didn't even consider if the works that were carried out were those permitted under Reg. Ref. SD15A/0591. This issue is discussed further under Section 4.2.
33. The Board in concluding that the reformatted question constitutes development being a material change of use also concluded that *"the subsequent permission to subdivide the unit (planning register reference number SD15A/0152) did not alter the retail warehouse use of any element of the unit"* which we now know is not the case as if applicable Reg. Ref. SD15A/0152 would have amended the permitted use of unit no. 3 via condition on an application for minor works.
34. The Board also concluded that *"the retail sale of convenience goods is not consistent with the permitted use, and does not come within the scope of the definition of activities of a retail warehouse as set out in the said Retail Planning Guidelines"* again demonstrating the central role that the misinterpretation of the parent permission, through the retrospective application of the Retail Planning Guidelines, had on the Board's decision. Thus, the Board by starting with the incorrect permitted use have answered the question the Inspector posed correctly in the general but not the actual question as posed by our Client in relation to unit no. 3.

3.7 Judicial Review Decision (Record No. 2018/661JR)

35. As noted above, in making his decision on the Judicial Review application made by our Client, PKB Partnership (Record No. 2018/661JR) Mr. Justice Cian Ferriter ruled on 2 no. items concluding the following:

¹⁹ Inspector's Report dated 21st March 2017, Board Ref. RL3520, Para. 10.4.

- That the 1998 permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the Retail Planning Guidelines.
- Condition no. 2 of the 2015 permission is enforceable and effective and applies to both unit 3 and unit 3A.

36. It is noted that the ruling of the Court is in response to the case brought by our Client. It did not, nor could it, address unforeseen consequences of determining the answers to the questions. In this regard, the Court determined the proper interpretation of condition no. 2 in the first instance, in the context of the grounds made by our Client and then established the permitted use of unit no. 3. These two items were addresses consecutively and the Court was not asked to consider how the finding in relation to the permitted use influenced the planning history of the site and would have impacted the attachment of condition no. 2 in the first instance, the necessity of the condition and its enforceability in the context of the permitted unrestricted retail use of unit no. 3.

3.7.1 Condition No. 2 of Reg. Ref. SD15A/0591

37. Firstly, in relation to condition no. 2 of the 2015 permission, the case before the Court was that the condition was too uncertain and imprecise, as the permitted development was not for an "extended retail warehouse unit", that it was not capable of invocation by the Inspector or the Board in the Referral. The Court considered the proper interpretation of condition no. 2 (Reg. Ref. SD15A/0152) in this context, i.e. in terms of the reference to "extended retail unit", having regard to legal precedent relating to the principles by which grants of planning permissions should be construed.

38. In relation to condition no. 2, Justice Ferriter stated:

"In my view, this is not a scenario where there was a level of vagueness, imprecision or uncertainty such as to render condition 2 unworkable or incapable of being relied on by the planning authority in the s.5 process²⁰."

²⁰ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 19.

39. Again, the assessment of condition no. 2 by the Court relates to its wording and the interpretation of same. In reaching his decision on the proper interpretation of condition no. 2, Justice Ferriter stated that:

"It is clear that the planning authority was imposing condition 2 in respect of both unit 3 and unit 3A. The condition does not in any way seek to differentiate between the two newly sub-divided units. It clearly envisaged an entire retail warehouse in 2015 subject at that point to the retail planning guidelines and essentially involving retail premises for the sale of bulky goods²¹."

40. Justice Ferriter found that while an inelegant use of the word 'extended', the word was simply seeking to convey the extension of the number of units from one existing unit to two units following the subdivision and was not intended to address an actual physical extension of the existing retail warehouse premises²². With regard to the "proper scope" of condition no. 2, the Court agreed with the Board's submission that "both units are governed by condition no. 2²³". In agreeing with the Board Justice Ferriter stated:

"As noted earlier, the Board contends that this is effectively dispositive as regards any remaining issues in the case on the basis that, as the current use of the premises is clearly not compliant with condition 2, it follows that there has been a material change of use which is development and is not exempted development²⁴."

41. In this regard, the Court is simply stating that the Board are claiming that the sale of non-bulky goods from retail unit nos. 3 and 3A does not comply with condition no. 2. It is important to note that at this time the Court had not determined the permitted use of unit no. 3 and is making no judgement as to whether condition no. 2 is enforceable in the first instance.

²¹ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 19.

²² Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 19.

²³ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 20.

²⁴ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 21.

42. It is clear from the above that the Court confined its assessment and findings to the issues raised in the case before it, i.e. the wording of condition no. 2, specifically the phrase 'extended', and sought to establish the scope of condition no. 2. As stated previously, the conclusion of the Court in this regard stated:

"However, I have also found that condition 2 of the 2015 permission is enforceable and effective and applies to both unit 3 and unit 3A. It is now over to the Board to apply those findings to the facts of case²⁵."

43. This conclusion is made in the context of establishing the proper scope of condition no. 2 as applying to both unit 3 and unit 3A, and that it is enforceable and effective when the word 'extended' is taken as per the Court's conclusion i.e. to convey the extension of the number of units from one existing unit to two units.
44. It is important to highlight, as above, that the Court addressed the issue of the wording of condition no. 2 in the first instance and then clarified the permitted use of unit no. 3. Following the determination of the permitted use of unit no. 3 the Court was not asked to consider how the permitted use of unit no. 3 as unrestricted retail impacted the planning history of the site. Specifically, the Court was not asked to determine if condition no. 2 of Reg. Ref. SD15A/0152, which would have resulted in a change of use via condition, was enforceable given that the application was for minor internal works and made no reference to use.
45. To clarify the Court was not asked to examine or determine the enforceability of condition no. 2 of Reg. Ref. SD15A/0152 in the context of the permitted 'shop' use of unit no. 3. This is dealt with in Section 3.7.2 below.

3.7.2 Permitted Use of Unit no. 3.

46. Establishing the permitted use of unit no. 3 is of such significance to its current planning status that it was the basis of both the first and second challenge to the decision of the Board on Judicial Review. Our Client has always held that unit no. 3 as permitted had an unrestricted

²⁵ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 34.

retail use and that the Planning Authority could not now retrospectively apply the provisions of the Retail Planning Guidelines as a means of restricting this use.

47. In this regard, as part of his assessment of the Board's reasoning behind their conclusion on the Referral, Justice Ferriter stated the Board erred in law in its conclusions relating to the following;

"(b) The subsequent permission to subdivide the unit (planning register reference number SD15A/0152 [i.e. the 2015 permission]) did not alter the retail warehouse use of any element of the unit; and

(d) The retail sale of convenience goods is not consistent with the permitted use, and does not come within the scope of the definition of activities of a retail warehouse as set out in the said Retail Planning Guidelines."

48. Justice Ferriter states that the permitted use in 1998 as a retail warehouse was not confined to use for the retail sale of 'bulky goods' and that the assumption that the retail sale of non-bulky goods was impermissible under both the 1998 permission and the 2015 permission is incorrect²⁶.

49. Importantly, Justice Ferriter noted that starting from a flawed premise the Board doubled-down on this flawed premise in arriving at its ultimate decision²⁷. As demonstrated in Section 4.3 below, this 'doubling-down' on the flawed premise in relation to the permitted use of unit no. 3 has been the case throughout its planning history and has directly resulted in incorrect determinations by the Planning Authority and the Board as well as legal proceedings against our Client.

50. Clarifying the permitted use of unit no. 3 was the second item addressed by Justice Ferriter as part of the Judicial Review who concluded:

²⁶ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 32.

²⁷ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 32.

"For the Board's assistance following remittal, for the reasons set out in detail in this judgment, I have decided that 1998 permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the retail planning guidelines²⁸."

51. This finding was based on an examination of the parent permission which did not contain any conditions relating to the type of retail activity permitted in the retail warehouse development. Furthermore, Justice Ferriter found that *"it was not legitimate to rely on the Retail Planning Guidelines 2000 in interpreting the scope of the permitted use under the 1998 permission²⁹"*.
52. As the High Court has confirmed that there is no restriction on the permitted retail use of unit no. 3, as per the parent permission unit no. 3 has a 'shop' use which has been the permitted use since the unit was granted in 1998. There has not been a subsequent application that sought to change the permitted use of unit no. 3.
53. As set out below, previous determinations by the Planning Authority and the Board were based on the incorrect assumption that the permitted use as a retail warehouse limited the sale of goods to those defined by the Retail Planning Guidelines as 'bulky goods'. In planning terms this has had a significant impact on previous decisions as well as resulting in the attachment of conditions that were unnecessary and unenforceable.
54. We note that the Court was not requested to determine the implications of its decision relating to the permitted use, on the enforceability of condition no. 2 of Reg. Ref. SD15A/0152 or on the query being referred to the Board. However, the findings of the Court in relation to the permitted use of unit no. 3 impacts all of these items, which are considered to be relevant to the current planning status of unit no. 3. These are addressed in Section 4.4 below.

²⁸ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 34.

²⁹ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 32.

4. Planning Review to Inform the Board's Assessment

4.1 Introduction

55. As set out previously, this Report has been prepared following correspondence from the Board dated 2nd May 2024 requesting submissions/observations in relation to the Section 5 Referral Request on Unit no. 3 (Board Ref. 318832). Our Client welcomes the opportunity to engage in the process, following the decision of the High Court on the Judicial Review case and the subsequent remittal to the Board for review and determination.
56. As set out above, the Judgement by Justice Ferriter has confirmed our Client's contention that the permitted use of unit no. 3 as per the parent permission is unrestricted retail. While the Judgement provided a ruling on 2 no. distinct items, i.e. the proper interpretation of Condition no. 2 in the first instance and then the permitted use of unit no. 3, the Court did not, nor could it, address unforeseen consequences of determining the answers to the questions. In this regard, these two items were addressed consecutively and the Court was not asked to consider how the finding in relation to the permitted use influenced the planning history of the site. The Judge hands it over to the Board to apply the facts to the case³⁰ thus the Board must determine what question is actually appropriate in the context of the Court's ruling and how the Court's ruling impacts the planning status of unit no. 3.
57. Having reviewed the planning history under Section 3 above, this Section seeks to inform the Board in applying the facts to the case and addresses in turn the actual planning status of unit no. 3, the Court Judgment and legal precedent in the area. In addition, it advances on the original Referral Request on behalf of our Client that highlighted "*in many instances works similar to those sought under Reg. Ref. SD15A/0152 may be carried out under exemption*"³¹ but sets out that the works undertaken were exempt in accordance with the provisions of the Planning and Development Act, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended). As set out below, basing the assessment on the actual

³⁰ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 34.

³¹ Referral Request dated 28th November 2016, pg. 2.

permitted retail use of unit no. 3, as permitted under the parent permission, results in a different outcome for the Referral.

4.2 Implementation of Reg. Ref. SD15A/0152

58. While Justice Frettier first dealt with the issue of the enforceability of condition no. 2 of Reg. Ref. SD15A/0152 he did so in the context of establishing the proper scope of the Condition as applying to both unit no. 3 and unit no. 3A and that it is enforceable and effective when the word 'extended' is taken as per the Court's conclusion i.e. to convey the extension of the number of units from one existing unit to two units. The Court was not asked to determine the implications of its ruling in relation to the unrestricted retail use of unit no. 3 on the enforceability of condition no. 2 of Reg. Ref. SD15A/0152 or to determine if Reg. Ref. SD15A/0152 was enacted in the first instance.

59. On the matter of the enactment of Reg. Ref. SD15A/0152, as noted above the Board issued a Memo to the Inspector dated 7th April 2017 stating:

"The Board also needs confirmation from the Inspector on whether the permission granted under SD15A/0791 has been carried out."

60. While Reg. Ref. SD15A/0791 is not a valid planning application register reference number we are assuming that as the Board Reference on the Memo is correct that the Board was meaning to reference Reg. Ref SD15A/0152. In response to this request the Inspector undertook a site visit on 27th May 2017 and prepared a Memo dated 04th July 2017 which found:

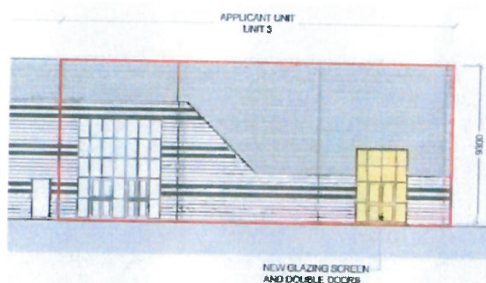
"Having examined the property internally and externally again on the 27th of May 2017 at the request of the Board. I can confirm that the permission granted under SD15SA/0591 has been carried out. Unit 3A is occupied by Cash and Carry kitchens and in my opinion complies with Condition No. 2 in that I would consider the use of the unit to be the sale of bulky goods. The residual part of the building is a Dealz shop, associated storage area, loading bay and staff facilities. I do not consider this element to be in compliance with Condition No. 2 of SD15A/0591." (Emphasis Added)

61. While different to the incorrect Reg. Ref. referenced by the Board, Reg. Ref. SD15A/0591 is also not a valid planning application register reference number. Again however, taking Reg. Ref. SD15A/0152 to be the intended reference, we would note that the Inspector's conclusion that the permission granted under Reg. Ref. SD15A/0152 was carried out lacks any review of the actual works undertaken on the ground, consideration if the works undertaken align with those permitted under Reg. Ref. SD15A/0152 or if the works that were undertaken could be exempt. In this regard, the focus of the Memo is the use of unit nos. 3 and 3A on the day of the site visit. As our Client was not aware of this Memo until after the commencement of the Judicial Review proceedings, our Client was not afforded the opportunity to clarify for the Board if Reg. Ref. SD15A/0152 had actually been enacted.

62. With regard to the works carried out, our Client decided not to implement the permission as granted under Reg. Ref. SD15A/0152. Instead, our Client relied on the exempt development provisions of both the Act and the Regulations to undertake minor alterations to unit no. 3. This approach is demonstrated by the works which were and were not carried out externally as set out below.

4.2.1 New Glazing Screen and Double Doors

63. A key feature of the 2015 permission was the provision of a 'new glazing screen and double doors' on the east elevation, see Drawing no. 15/2/1/P4 and below image. However, following the decision not to implement Reg. Ref. SD15A/0152 this screen and double doors were not provided.



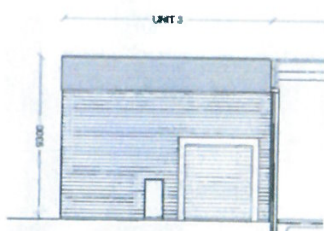
Proposed East Elevation showing a 'new glazing screen and double doors' - Extract from Drawing no. 15/2/1/P4 of Reg. Ref. SD15A/0152



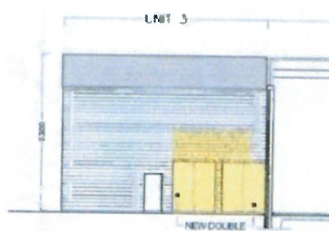
Photo of existing arrangement from Google Maps showing that the 'new glazing screen and double doors' as permitted under Reg. Ref. SD15A/0152 were not provided on the east elevation.

4.2.2 Loading Door Arrangement

64. While the loading door arrangement was altered after Reg. Ref. SD15A/0152 was granted, and reflects the arrangement sought under Reg. Ref. SD15A/0152 i.e. 2 no. doors, as shown below the works proposed under Reg. Ref. SD15A/0152 were not undertaken, with the two doors currently *in situ* within the original loading door area that is still clearly visible. The works to remove the original loading door and reclad the area as permitted under Reg. Ref. SD15A/0152 have not been undertaken.



EXISTING SECTION A-A/
Extract from Drawing no. 15/2/1/P4
of Reg. Ref. SD15A/0152



PROPOSED SECTION A-A/
Extract from Drawing no. 15/2/1/P4
of Reg. Ref. SD15A/0152



Photo of Existing Arrangement

65. While development has occurred by way of works, in terms of blocking up the original large loading door and replacing it with 2 no. smaller doors, such works come within the remit of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) which provides for the following to be exempt development for the purposes of the Act:

*“development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not **materially affect** the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures” (Emphasis Added)*

66. The application of Section 4(1)(h) is subject to significant legal precedent, and we specifically note Simons on Planning Law (third edition, 2021), at para. 2-195 and the reference to Dublin City Council v Lowe and McCabe v Córas Iompair Éireann³² as follow:

³² Dublin City Council v Lowe [2004] IESC 106, [200] 4 I.R. 259; McCabe v Córas Iompair Éireann [2006] IEHC 356, [2007] 2 I.R. 392.

"The determining factor is whether the works material affect and not just affect the external appearance of the structure."

67. We also note Simons on Planning Law (third edition, 2021), at para. 2-197 reference to Cairnduff v. O'Connell³³ as follow:

"In determining whether or not exterior works affect the character of a structure regard should be had to the appearance of the structure prior to (although not necessarily immediately prior to) the works."

68. Firstly, in relation to the character of the structure, retail unit no. 3/3A, it is part of a row of large format retail units in the Fonthill Retail Park that front the Fonthill Road to the east and an internal access road to the west. While it has two main customer accesses, there are also a number of other doors on its facades as well as a loading area on its western elevation which it shares with unit nos. 1 and 2. The subject doors are located within this loading area, on the return of the unit and facing onto the loading area, not towards the internal road. The area has three other large, single loading doors as well as a number of other standard sized doors.
69. Given the existing character of the unit, as well as the location of the doors in a loading area, we would submit that the replacement of one large loading bay door with 2 no. smaller doors does affect the external appearance of the structure but that this affect is not material. Notwithstanding the immaterial nature of the affect, having regard to the existing character of the structure, its nature and scale, the change would not be considered to render the appearance inconsistent with the character of the structure itself.
70. In relation to the character of neighbouring structures, as unit no. 3/3A is part of a row of three large format retail units, in the same architectural style, the same rationale applies i.e. notwithstanding the immateriality of the affect, the change would not be considered to render the appearance inconsistent with the character of neighbouring structures. In addition, as the wider area, also within the Retail Park, accommodates large format retail units the replacement of one large loading bay door with 2 no. smaller doors, in a loading bay area, is not considered

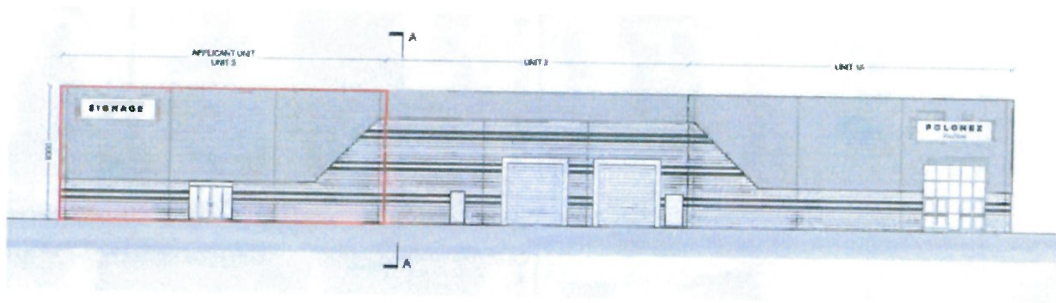
³³ Cairnduff v. O'Connell [1986] I.R. 73, [1968] I.L.R.M. 465.

to render the appearance inconsistent with the character of these neighbouring structures either.

71. Having regard to the above, we would submit that the replacement of one large loading bay door with 2 no. smaller doors, as indicated on the drawing and photo above, comes within the remit of Section 4(1)(h) of the Act and is considered to be exempt development.

4.2.3 Glazed entrance on the west elevation

72. We note that based on the Block Drawings and the Elevations/Sections submitted under Reg. Ref. SD15A/0152 there was a glazed entrance in place at that time and that no alterations were sought to this entrance under Reg. Ref. SD15A/0152, see images below.



'Existing West Elevation' (no changed proposed) - Extract from Drawing no. 15/2/1/P4 of Reg. Ref. SD15A/0152



West Elevation with enlarged glazed entrance — Image from Google Maps

73. This glazed entrance was enlarged following the 2015 permission and is now of a similar scale to the western entrance to unit no. 1. In addition, the existing entrance to unit no. 3 on the eastern elevation is also large and glazed.
74. Applying the provisions of Section 4(1)(h) of the Act to the enlargement of the western entrance to unit no. 3A, given the existing character of the unit i.e. a large format retail unit, we would

submit that the replacement of an existing door with a larger glazed door affects the external appearance of the structure but that this affect is not material. Notwithstanding the immateriality of the affect, having regard to the existing character of the structure, its nature and scale and the scale of the door on the eastern elevation, the change would not be considered to render the appearance inconsistent with the character of the structure itself.

75. In relation to the character of neighbouring structures, as unit no. 3/3A is part of a row of three large format retail units, in the same architectural style the same rationale applies i.e. notwithstanding the immateriality of the affect, the change would not be considered to render the appearance inconsistent with the character of neighbouring structures. In fact, the enlarged entrance balances the scale of the western entrance to unit no. 1 which now visually reads as one coherent façade.
76. In addition, as the wider area, also within the Retail Park, accommodates large format retail units the enlargement of western entrance to unit no. 3/3A is not considered to render the appearance inconsistent with the character of these neighbouring structures either.
77. Having regard to the above, the enlargement of the glazed entrance on the western façade of unit no. 3/3A comes within the remit of Section 4(1)(h) of the Act and could be considered to be exempt development. As above, this alteration to the façade was not part of the 2015 permission but was undertaken after 2015 to accommodate the sub-division of unit no. 3 and as with the other works was undertaken under exemption.

4.2.4 Sub-Division of Unit No. 3

78. The issue of subdivision has been addressed on several previous occasions including in the Section 5 Declaration on Mahon Shopping Centre (CCC Reg. Ref. R622/20) where the subdivision of the anchor unit formerly occupied by Debenhams was considered development and was exempted development and the Section 5 Referral at the River Centre in Pelletstown (Board Ref. RL2308) where the Board itself found that:

"(a) The proposed subdivision of an existing anchor retail unit, to create two new retail units plus an internal shared lobby service area, does not constitute a material change in the use of any structure or other land; (b) The proposed subdivision involves the carrying out of works and is, therefore, development; (c) The said works affect only the interior of the structure or do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures and (d) The said sub-division of the shop unit comes within the scope of the exempted development provisions of Section 4(1)(h) of the Planning and Development Act, 2000."

79. Section 4(1)(h) of the Act was also determined to be applicable by the Board in finding that the subdivision of a retail warehouse unit at Butlerstown Retail Park, County Waterford (Reg. Ref. R2603) was exempt as follows:

"The subdivision of permitted unit number 9, to create current unit number 8, including the construction of internal dividing walls, would involve the carrying out of works of construction that would be classified as development, but the said works would not render the appearance of the structure inconsistent with its character and would come within the scope of the said Section 4(1)(h)."

80. It is clear from the precedent in the area that the internal works to subdivide unit no. 3 to provide unit nos. 3 and 3A are exempt under Section 4(1)(h) of the Act. Some internal works as well as the external works set out above have been undertaken to the unit to accommodate the new subdivision, and these are also exempt in accordance with the provisions of Section 4(1)(h) of the Act being work that only affect the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures. Thus, as with the works undertaken, the sub-division of the unit has been undertaken under exempt development provisions and did not rely on the enactment of Reg. Ref. SD15A/0152. As unit no. 3 was authorised by the 1998 as having an unrestricted retail use, and as its sub-division did not extend the retail area permitted, potentially decreasing it due to the need to accommodate the storage requirements

of two separate tenants, in line with the above referenced cases, no intensification has occurred.

4.2.5 Summary

81. It is clear from the above that a number of works to the façade of unit no. 3/3A were undertaken after Reg. Ref. SD15A/0152 was granted, some of which were similar to works permitted by that permission and others which were not addressed by it at all. As above, all of the works undertaken are considered to come within the provisions of Section 4(1)(h) of the Act and are exempt. In addition, and as set out above, unit no. 3 was also sub-divided utilising the exempt development provisions of Section 4(1)(h) of the Act which has been found to be applicable in the sub-division of retail units on multiple occasions by Planning Authorities and the Board.
82. It is our Clients contention that the works undertaken, which varied from those permitted under Reg. Ref. SD15A/0152 were undertaken under exemption and that Reg. Ref. SD15A/0152 has not been enacted. This does not negate the Court's ruling in relation to the interpretation of the phrase "*the extended retail warehouse unit*" or that condition no. 2 of the 2015 permission which references this 'extended retail warehouse unit' is enforceable and effective and applies to both unit no. 3 and unit no. 3A. It does however, clarify for the Board, as sought in the Board's Memo dated 7th April 2017, that Reg. Ref. SD15A/0152 was not enacted. As Reg. Ref. SD15A/0152 was not enacted, the provisions of condition no. 2 attached to same are not applicable and should not form part of the Board's consideration of the Referral.

4.3 Application of the Court's Ruling to the Planning History of Unit No. 3

4.3.1 Introduction

83. As set out above, the internal and external works undertaken to subdivide unit no. 3 were undertaken under the exempt development provisions of the Act, specifically Section 4(1)(h). Thus as Reg. Ref. SD15A/0152 has not been enacted the provisions of condition no. 2 attached to same are not applicable. Notwithstanding this, given the misinterpretation of the planning status of unit no. 3 by both the Board and the Planning Authority, which has resulted in Enforcement Action against our Client, we would like to clarify the impact that the correct

interpretation of the parent permission has on the planning history of the unit. In this regard, we refer to Black J. in *The People (Attorney General) v Kennedy* where he stated:

"A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and looks at the whole canvas, the close-up of the small section is often found to have given a wholly wrong view of what it really represented"³⁴.

84. This precedent is relevant in the current case, as to look at the Court Judgement on the permitted use of unit no. 3 under the 1998 permission in isolation does not demonstrate the significant impact the misinterpretation of this use by both the Planning Authority and the Board has had on the planning status of the unit to date.

4.3.2 Reg. Ref. SD15A/0152

85. As set out in Section 3.3 above, under Reg. Ref. SD15A/0152 permission was sought for minor internal and external works only, with no change to the use permitted by the parent permission (Reg. Ref. S97A/0791) sought. In this regard, the drawings clearly stated that the unit had a 'retail' use, as distinct to a restricted bulky goods retail use, a differentiation that existed at the time the application was made in 2015.
86. In making a determination on this planning application the Planner's Report notes the Retail Planning Guidelines, 2012 and refers to unit no. 3 as a retail warehouse throughout. This application was made and reviewed in 2015 and given the definition of 'retail warehouse' in the Retail Planning Guidelines, 2012, the Planner was assuming that the permitted use of unit no. 3 was restricted to bulky goods. We now have confirmation from the High Court that this assumption was incorrect.
87. This incorrect assumption is further indicated by the analysis in the Planner's Report that emphasises the distinction between retail warehousing and existing retail centres in the area and the importance of preventing an adverse impact on the viability and vitality of the Town area and of not undermining the retail hierarchy of the area. This should not have been a consideration, as while a change of use from a retail warehouse to a 'shop' may have had an

³⁴ *The People (Attorney General) v Kennedy* [1946] 517 at 536.

impact, and necessitate the attachment of a restrictive condition, as the permitted use of unit no. 3 was 'shop' retail, and no change of use was sought, there would not be any impact.

88. No consideration was given in the Planner's Report to the actual permitted use of unit no. 3. Based on an incorrect assumption that the permitted use already restricted the sale of goods to 'bulky goods' the Planner's Report, in recommending a grant of permission, attached condition no. 2. Given that the Planner's Report had described unit no. 3 throughout as a retail warehouse unit, albeit incorrectly in the context of the Retail Planning Guidelines, 2012, in this context condition no. 2 would have been reaffirming what had wrongly been assumed to be the existing limitation to 'bulky goods'. This assumption was based solely on the 'retail warehouse' reference in the parent permission almost 20 years earlier, prior to the Retail Planning Guidelines introducing the concept of 'bulky goods'.
89. Instead of reaffirming the permitted use, condition no. 2, which limited the range of goods to be sold in the extended retail warehouse to solely 'bulky goods' as defined in Annex 1 of the Retail Planning Guidelines, 2012 actually had the effect of altering the permitted use. We contend that changing the use of a retail unit via condition on a permission that related solely to minor works is *ultra vires* as it would have sought, by way of condition, to impinge on our Clients' existing rights to use the unit for open retail, had Reg. Ref. SD15A/0152 been implemented. It is important to note that the Planner's Report makes no reference to a change of use, nor does it state any intention of changing the use via condition. In addition, the reason for the condition also makes no reference to a change of use of unit no. 3.
90. The enforceability of condition no. 2 in terms of changing the permitted use of unit no. 3 via a condition attached to a permission for internal works and minor external alterations is addressed in Section 4.4 below.

4.3.3 Third Party Section 5 Declaration - Reg. Ref. ED16/0025

91. The detail of the Third Party Section 5 Declaration is set out in Section 3.4 above. Again, the misinterpretation of the permitted retail use of unit no. 3 has a significant role to play. In this regard, in making the determination on the Section 5 Request the Planner's Report sought to determine if the change of use from retail warehouse to retail (shop) was exempt development,

referencing SDCC's definition of Retail Warehouse i.e. "...*retail sale of bulky non-food, non-clothing household goods...*"³⁵ as well as the definition of shop as per the Planning and Development Regulations, 2001 (as amended).

92. It is clear that in determining if the change of use from retail warehouse to shop was exempt the Planner's Report assumed in the first instance that the permitted use of unit no. 3 was retail warehouse as per the definition at that time. Again, the planning history of the site was not reviewed in the context of establishing the permitted use of unit no. 3. In addition, condition no. 2 of Reg. Ref. SD15A/0152 was referenced in the context of Article 9(1)(a)(i) which restricts exemptions in the case of contravening a condition attached to a permission, with no analysis if the subject permission had been enacted. The queried change of use at unit no. 3 was found not to be considered exempt in this regard.

93. It is clear that the initial failure to establish the permitted use of unit no. 3 when assessing Reg. Ref. SD15A/0152, and instead assuming a retail warehouse use as per the Retail Planning Guidelines, 2012, was a double-down by the Planning Authority in the consideration of this Section 5 Request and in fact formed the basis of the Planning Authority's Declaration. The Declaration while correct in the abstract was not correct when the permitted use of unit no. 3, the implementation of Reg. Ref. SD15A/0152 and the enforceability of condition no. 2 of same are considered, see Section 4.4 below.

4.3.4 PKB's Section 5 Declaration Request – Reg. Ref. ED16/0045

94. Section 3.5 above addresses the Section 5 Declaration made to SDCC on behalf of our Client which was made in order to have an input into the planning process and clearly set out the permitted use of unit no. 3 as unrestricted retail, as per the parent permission. A key planning fact not considered in the Third Party Section 5 Declaration. The question posed, which was different to that previously posed by the Third Party, was fair and impartial, and one that did not serve to direct the Authority towards a pre-determined response.

³⁵ Planner's Report, Reg. Ref. ED16/0025, Pg 3.

95. As part of this process the issue of the permitted use of unit no. 3 as per the 1998 permission was raised and addressed in detail on behalf of our Client. The facts set out to the Planning Authority in this regard align with the High Court finding, i.e. there is no condition on Reg. Ref. S97A/0791 restricting the use of the unit and that current planning policy cannot be applied retrospectively to the 1998 permitted use. Notwithstanding this the Planner's Report concluded:

"Planning permission was on site under S97A/0791 for a retail warehouse; permission granted did not state 'shop' but specifically stated 'permission for a retail warehouse. It is considered that a retail 'warehouse' is not and was not considered to be the same as a retail 'shop'³⁶".

96. It is clear from the above that the Planner assessed the Section 5 Declaration Request in the context that unit no. 3 was a permitted retail warehouse with a restricted retail use and not a 'shop' as set out by our Client, even though a retail warehouse is a form of 'shop'.
97. In addition, the submission on behalf of our Client assessed the enforceability of condition no. 2 as per the Development Management Guidelines, 2007, albeit without the benefit of the High Court's determination on the permitted land use.
98. Further Information (FI) was sought in relation to the type of goods sold from the unit, in response to which the permitted 'shop' use of the unit was again highlighted and it was stated 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" as the unit is the beneficiary of a grant of planning permission authorising the retail use of the premises.
99. On foot of receipt of the FI Response the Planner's Report stated:

"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

³⁶ Planner's Report, Reg. Ref. ED16/0045, Pg. 4.

constitute a material change of use and would require a further grant of planning permission in the opinion of the Planning Authority³⁷".

100. The above conclusion in the Planner's Report clearly ties the finding that a material change of use has occurred to the incorrect assumption that the permitted use of unit no. 3 was restricted to 'bulky goods' retailing. The same question with the correct understanding of the permitted use i.e. 'shop' would have resulted in a different conclusion as 'non-bulky' goods come within the definition of 'shop' and therefore, the change of use is within Class 1 of Part 4 of Schedule 2 which is exempt under Article 10(1) of the Regulations.

4.3.5 PKB's Section 5 Referral Request – Board. Ref. RL3520

101. As set out in Section 3.6 it has been established by the Court that the Board erred in determining that the permitted use of unit no. 3 was retail warehouse in the context of a restriction to 'bulky goods' applying to the permitted use. In fact, this error became central to the Board's consideration of the Referral as the Inspector altered the question before it to the following:

"Whether the use of a permitted retail warehouse unit to use as a discount store for the sale of small scale convenience goods at Unit Number 3, Fonthill Retail Park, Retail Road, Dublin is or is not development or is or is not exempted development"

102. This rewording of the question before the Board was based on the Inspector's opinion as follows:

"The development as permitted under S97A/0791 was for a 'retail warehouse', as stated above in my opinion, this is not a shop as defined by the current and preceding Planning legislative framework. At the time of the permission there was no clear definition of a retail warehouse, which came two years later with the Publication of the Retail Planning Guidelines 2000³⁸."

103. In addition, in formulating their recommendation the Inspector stated that the permitted use of the premises, as per the parent permission, is restricted to retail warehousing only as defined

³⁷ Planner's Report, Reg. Ref. ED16/0045, Pg. 5

³⁸ Inspector's Report, Board Ref. 06S.RL3520, pg. 8.

in the Retail Planning Guidelines³⁹. In arriving at its conclusion that development had occurred and that it is not exempted development the Board also references Reg. Ref. SD15A/0152 to note that this permission "*did not alter the retail warehouse use of any element of the unit*"⁴⁰. It is very clear from the above that the Inspector and the Board considered that the permitted use of unit no. 3, as per the parent permission, was retail warehouse which did not permit the retail sale of convenience goods and that this was not changed by the 2015 permission (Reg. Ref. SD15A/0152). We would note however, if the permission "*did not alter the retail warehouse use of any element of the unit*", as noted by the Inspector, then the use permitted under the 1998 permission, i.e. unrestricted retail, would continue to be the permitted use of unit no.3/3A.

104. Like the Planning Authority had done throughout the planning history of unit no. 3, the Board by starting with the incorrect permitted use have answered the question posed correctly in the general but not the question as posed by our Client or one which is relevant to unit no. 3 and it's permitted 'shop' use. This is significant as if the question referred to the actual permitted 'shop' use and its use as a 'discount store for the sale of small scale convenience goods' the answer would be that the a change of use within Class 1 of Part 4 of Schedule 2 has occurred which is exempt under Article 10(1) of the Regulations.

4.3.6 Summary

105. Given that the unrestricted retail use of unit no. 3 is now established by the Court as the permitted use under the parent permission, should the Board now consider condition no. 2 of Reg. Ref. SD15A/0152 it would have to in the first instance consider the enforceability of condition no. 2 in the context of the permitted 'shop' use. As demonstrated above, as all deliberations and decisions by the Planning Authority to date have been based on the incorrect assumed permitted use, the Referral should be examined *de novo* by the Board in the context of the actual permitted unrestricted retail use and the fact that no application has ever been made to amend or alter this use.

³⁹ Inspector's Report, Board Ref. 06S.RL3520, pg. 11.

⁴⁰ Board Order, 06S.RL.3520, pg. 2

4.4 Enforceability of Condition No. 2 following the High Court Judgement

106. As shown above, the planning history demonstrates that all decisions and determinations by the Planning Authority and An Bord Pleanála in relation to unit no. 3 have been made based on an incorrect assumption regarding the permitted retail use being restricted to 'bulky goods' retailing. The impact of this incorrect assumption is most significant in relation to Reg. Ref. SD15A/0152 as it resulted in the attachment of a condition to an application for internal works and minor external alterations that would have *de facto* changed the permitted use of the unit. While condition no. 2 is only relevant were Reg. Ref. SD15A/0152 implemented, which it was not, as it forms part of the planning history of the site its enforceability in the context of the High Court Judgment is reviewed below.
107. The Court in setting out the permitted use of unit no. 3 did not, nor was it asked to, consider the enforceability of condition no. 2 in the context of the permitted 'shop' use as per Reg. Ref. S97A/0791. As directed by the Court, the Board must now apply its findings to the facts of case which includes the planning history and condition no. 2 of Reg. Ref. SD15A/0152.
108. As set out above Reg. Ref. SD15A/0152 sought permission primarily for internal works and minor external alterations only to sub-divide unit no. 3. The works themselves would have been exempt as per the provisions of Section 4(1)(h) of the Act. Based on the incorrect assumption by the Planner that the permitted retail use was restricted to 'bulky goods' retailing, condition no. 2 was attached, which would be standard for existing retail warehouse units with a restricted retail permission i.e. 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. Given that no change of use was proposed and the unit had a permitted 'shop' use since it was granted in 1998 the continuation of this use would not adversely impact the viability and vitality of the town area so to undermine the retail hierarchy of the area i.e. it already existed as a shop in the hierarchy for c. 20 years.

4.4.1 Legal Precedent – Imposition of Planning Conditions

109. Having regard to the actual permitted unrestricted retail use of unit no. 3 and the fact that the application related to minor works only, with no reference to a change of use, the legality and

enforceability of condition no. 2 is questionable. With regard to the appropriate application of conditions Simons on Planning Law (third edition, 2021), at para. 4-228 states:

"The better view would be that this requirement extends to an obligation to consider whether or not conditions might be attached which would save an application which would otherwise have to be refused."

110. Given that Reg. Ref. SD15A/0152 related solely to minor internal and external works to a retail unit that had been trading for c. 20 years, which could be undertaken using exemptions, the imposition of condition no. 2 is in no way related to the permission being granted or not. Simons on Planning Law goes on to state:

*"When imposing a planning condition, the planning authority must ensure that the condition is reasonably related to the permitted development and is not being imposed for an **ultra virus or ulterior motive**⁴¹" (Emphasis Added)*

111. With regard to an *ultra virus* or ulterior motive, the courts have found that the condition imposed must be for a planning purpose and must fairly and reasonably relate to the development permitted⁴². As above this is not the case with regard to condition no. 2 which does not relate to the development sought i.e. minor internal and external alterations to a permitted retail unit. In this regard, Reg. Ref. SD15A/0152 made no reference to the use of the unit and did not seek any alteration to the permitted use, which our Client has always contended was unrestricted retail as confirmed by the Court Judgement. Previous Judgements have found that the imposition of a condition such as condition no. 2 is wrong with Simons on Planning Law (third edition, 2021), at para. 4-234 stating:

"It would be equally wrong to attempt to regulate development which is not the subject of the application for planning permission: for example it would be wrong to seek to retrench on (unrelated) existing use rights⁴³."

⁴¹ Simons on Planning Law (third edition, 2021), at para. 4-229.

⁴² Quinlan v An Bord Pleanála [2009] IEHC 228 at p. 25.

⁴³ State (O'Hara and McGuniness Ltd) v An Bord Pleanála, unreported High Court, Barron J., 8 May 1986. See also Kelly v An Bord Pleanála unreported High Court, Flood J., 19 November 1993.

112. The above is exactly what condition no. 2 does, by seeking to restrict the permitted 'shop' retail use through an application for minor internal and external works, condition no. 2 retrenches on existing, and well established, permitted use rights. Given that this issue has been adjudicated on previously by the Courts, to continue to apply condition no. 2, which has been imposed for an *ultra virus* or ulterior motive, would leave any such decision open to further legal challenge.

113. With regard to *ultra vires* conditions, which based on legal precedent we contend condition no. 2 of Reg. Ref. SD15A/0152 is, Simons on Planning Law (third edition, 2021), at para. 4-241 states:

"where a condition is ultra virus, it appears that the entire permission will be quashed where that condition is an essential part of the grant of permission and cannot be severed from the grant without materially altering its terms."

114. In the current case, as condition no. 2 does not relate to the minor works sought under Reg. Ref. SD15A/0152, this condition could be 'severed' without having any impact on the overall permission. Notwithstanding this, should the permission be quashed, as it has not been implemented and as the works that have been undertaken have been carried out under exemption, this would not impact the continued trading of unit no. 3.

4.4.2 Development Management Guidelines, 2007

115. Condition no. 2, which would result in a change to the permitted use, is also unenforceable when the provisions of the Development Management Guidelines, 2007, are considered. These set out criteria as a guide for planning authorities in deciding whether or not to impose a condition including whether the condition is:

- Necessary;
- Relevant to planning;
- Relevant to the development permitted;
- Enforceable;
- Precise;
- Reasonable.

116. **Necessary** - With regard to determining the need for a condition the Development Management Guidelines, 2007, state that a useful test is whether, without the condition, either permission for the proposed development would have to be refused, or the development would be contrary to proper planning and sustainable development in some identifiable manner.
117. While the Planner's Report gave consideration to potential negative impacts on the vitality and viability of existing retail centres in the area this was based on an incorrect assumption regarding the permitted retail use of unit no. 3 being restricted to 'bulky goods' retailing. As established by the Court Judgement unit no. 3 has the same permitted 'shop' retail use as the other retail centres referred to and has operated with this use since it commenced trading some 20 years earlier. Therefore, the continuation of the permitted use would not have any impact on surrounding centres thus the development would not have been contrary to proper planning and sustainable development in any identifiable manner.
118. In addition, as the proposed development primarily related to internal works and minor external alterations to sub-divide the unit, which would be exempt under Section 4(1)(h) of the Act, the attachment of condition no. 2 was in no way necessary to allow the proposed development to be permitted. In fact, unit no. 3 was subsequently subdivided utilising exempt development provisions. Notwithstanding this, considering that unit no. 3 had the benefit of a permitted and established 'shop' retail use and given the nature of the development proposed under Reg. Ref. SD15A/0152, we can see no situation where the imposition of a condition that *de facto* changed the land use would be necessary.
119. **Relevant** - The Development Management Guidelines, 2007 state that a condition that has no relevance to the "proper planning and sustainable development of the area" ought not to be attached to a planning permission. In fact, the Guidelines clarify that:

"Unless the requirements of a condition are directly related to the development to be permitted, the condition may be ultra vires and unenforceable⁴⁴"

⁴⁴ The Development Management Guidelines, 2007, pg. 64.

120. As above, the development to be permitted under Reg. Ref. SD15A/0152 related to internal works and minor external alterations, that would come within the scope of Section 4(1)(h) of the Act. No change of use was sought and unit no. 3 would continue to operate as per its permitted 'shop' use. The requirements of condition no. 2 that relates solely to use and which would result in a change of use to the permitted use, restricting it to 'bulky goods' retail, are in no way 'directly related' to the construction of internal walls, the provision of toilets or new doors at unit no. 3. Based on this and as per the provisions of the Development Management Guidelines, 2007 condition no. 2 is *ultra vires* and unenforceable.
121. The Development Management Guidelines, 2007 go on to state that:
- "Moreover, where a condition requires the carrying out of works, or regulates the use of land, its requirements must be connected with the development permitted on the land to which the planning application relates⁴⁵." (Emphasis Added)*
122. It is clear from the Retail Planning Guidelines, 2012 as well as the planning history of the site that the distinction between the permitted development of unit no. 3 i.e. 'shop' and the incorrectly perceived restricted 'bulky goods' retail is significant in terms of the development permitted on the land to which the planning application relates.
123. Had the permitted use of unit no. 3 been restricted 'bulky goods' retail then the requirements of condition no. 2 that sought to reaffirm the restricted retail use of the land would have been enforceable and relevant. However, the Court has clarified that the permitted use is 'shop', a separate and distinct use to restricted 'bulky goods' retail, meaning the requirements of condition no. 2 are not connected with the development permitted on the land to which the planning application related and therefore, do not meet the requirements of the Development Management Guidelines, 2007 relating to a condition that regulates the use of land.
124. **Enforceable** – The issue of enforceability is dealt with in the Development Management Guidelines, 2007 in the context of the imposition of a condition if it cannot be made effective. As per the guidance in relation to 'relevance', as discussed above, enforceability is also subject

⁴⁵ The Development Management Guidelines, 2007, pg. 64.

to the requirements of a condition being directly related to the development to be permitted⁴⁶.
In relation to the latter, as set out above, condition no. 2 is unenforceable.

125. In relation to the imposition of a condition if it cannot be made effective, the works sought under Reg. Ref. SD15A/0152 related to internal works and minor external alterations, that would come within the scope of Section 4(1)(h) of the Act. Given that these works could be undertaken as exempt development and undertaken without planning permission, the attachment of a condition relating to land use, which has no relevance to the works proposed, cannot be made effective. In this regard, our Client subsequently choose to undertake the works to sub-divide unit no. 3 under the exempt development provisions of Section 4(1)(h) of the Act.
126. **Precise** - Every condition should be precise and clearly understandable. The issue of the clarity and precision of condition no. 2 in terms of its wording and specifically the use of the term 'extended' has been adjudicated by the Court. As set out above, the High Court's ruling in relation to the permitted use of unit no. 3 was dealt with subsequently and separately.
127. **Reasonable** – According to the Development Management Guidelines, 2007 a condition may be so unreasonable that it would be in danger of rejection by the Courts. The example provided by the Guidelines in this regard is directly relevant to unit no. 3 and condition 2 of Reg. Ref. SD15A/0152 as follows:

"For example, it would normally be lawful to impose a continuing restriction on the hours during which an industrial or other use can be carried out, if the use of the premises outside these hours would seriously injure the amenities of property in the vicinity, but it would be unreasonable to restrict the hours of operation to such an extent as to effectively nullify the permission⁴⁷."

128. This example is directly relevant as Reg. Ref. SD15A/0152 related to internal works and minor external alterations only. While these works were permitted, condition no. 2 is unreasonable as it would seek to restrict the 'shop' use to 'bulky goods' retail to the extent that it effectively nullifies the purpose of applying for permissions in the first instance i.e. to secure a tenant for

⁴⁶ The Development Management Guidelines, 2007, pg. 64.

⁴⁷ The Development Management Guidelines, 2007, pg. 65.

unit no. 3 under open retail use (shop). Restricting the retail use of unit no. 3 via condition would in fact make the unit even less attractive to the retail market and therefore, further exacerbate the challenge at that time of securing a tenant. In line with the provisions of the Development Management Guidelines, 2007 and the above example contained therein, condition no. 2 is also unreasonable when regard is had to the actual permitted 'shop' use of the unit.

4.4.3 Office of the Planning Regulator, PR Practice Note PN03 - Planning Conditions, October 2022

129. The Office of the Planning Regulator (OPR) PR Practice Note PN03 on 'Planning Conditions' reiterates the six basic criteria for imposing conditions as set out in the Development Management Guidelines, 2007 and addressed in turn above. In this regard the OPR note that:

"The guidelines suggest that, for conditions to be legally valid, they should satisfy six basic criteria..."⁴⁸ (Emphasis added)

130. We note the 'Planning Condition Appraisal Checklist' attached to the Practice Note, and again highlight the detailed assessment of condition no. 2 against the 6 no. criteria undertaken previously.
131. This Section addresses the other provisions of the Practice Note and guidance of the OPR in relation to the attachment of conditions that are directly relevant to the enforceability of condition no. 2 following the High Court Judgement on the permitted unrestricted retail use.
132. The purpose of the Practice Note is to promote the application of conditions that are fair, reasonable and practicable⁴⁹. In addressing the purpose of planning conditions the OPR clearly states:

*"Conditions designed to modify a development or to ensure the details of the development, from a planning perspective are acceptable, **should not substantially alter the nature of the development proposed**. The development, as modified by conditions, should remain essentially that for which planning permission was sought*

⁴⁸ Office of the Planning Regulator, PR Practice Note PN03 - Planning Conditions, October 2022, pg. 3.

⁴⁹ Office of the Planning Regulator, PR Practice Note PN03 - Planning Conditions, October 2022, pg. 5.

*and which was the subject of public consultation. Therefore, **conditions substantially altering the nature of the proposal should not be imposed and may be beyond the powers of the planning authority***⁵⁰.” (Emphasis added)

133. The attachment of a condition that would result in a change of use of unit no. 3 from retail, shop, to restricted 'bulky goods' retail, when the development proposed only related to internal works and minor external alterations comes within the above scope of “*substantially altering the nature of the proposal*”. In line with the above, the attachment of condition no. 2 is beyond the powers of the Planning Authority and the condition is unenforceable.
134. The OPR states that the Practice Note seeks to promote the application of conditions that are fair, reasonable and practicable. In this regard, in relation to the attachment of conditions, the OPR states:

*“Careful consideration is required to ensure that conditions are relevant and appropriate to the particular development proposal*⁵¹.” (Emphasis added)

135. Given that the development proposed under Reg. Ref. SD15A/0152 related to internal works and minor external alterations only, the attachment of a condition that would result in a change to the permitted use is neither relevant or appropriate to the development proposed. Again condition no. 2 fails to meet the requirements set out by the OPR in relation to the attachment of conditions and is unenforceable.

4.4.4 Conclusion

136. Taking the permitted use of unit no. 3 as unrestricted retail at the time Reg. Ref. SD15A/0152 was applied for, as confirmed by the High Court ruling, having regard to the nature of the development proposed i.e. internal works and minor external alterations, legal precedent in the area and adhering to the requirements of the Development Management Guidelines, 2007 and the OPR Practice Note in relation to the criteria for imposing a condition, it is clear that condition no. 2 is not Necessary; Relevant to planning; Relevant to the development permitted;

⁵⁰ Office of the Planning Regulator, PR Practice Note PN03 - Planning Conditions, October 2022, pg. 5.

⁵¹ Office of the Planning Regulator, PR Practice Note PN03 - Planning Conditions, October 2022, pg. 4.

Enforceable; or Reasonable. In addition, condition no. 2 does not meet the basis requirements for conditions as set out by the OPR.

137. Therefore, it can be concluded that had the correct permitted use, i.e. unrestricted retail, formed the basis of the Planning Authority's assessment under Reg. Ref. SD15A/0152 then condition no. 2 should not and could not have been attached. As the Court has clarified the permitted use as unrestricted retail, this is upheld by legal precedent in the area and is further demonstrated by the fact that condition no. 2 fails to meet the requirements of the Development Management Guidelines and does not comply with the guidance from the OPR.
138. Condition no. 2 is *ultra vires* and has been attached with the ulterior motive of restricting the use of unit nos.3/3A via permission for minor interior and exterior works that made no reference to and sought no change to the permitted use. Notwithstanding the fact that Reg. Ref. SD15A/0152 has not been implemented, should condition no. 2 continue to be a consideration in determining the planning status of unit no. 3, in light of the Court's ruling on the unrestricted retail use under the 1998 permission, this would leave the process open to further legal proceedings.

4.5 Review of the Board's Previous Referral

139. The background to the previous Referral to the Board (Board Ref. RL 3520), now quashed, is set out in Section 3.6 above. The Referral Request on behalf of our Client addressed the Section 5 Declaration from SDCC and demonstrated that a limited assessment had been undertaken in relation to the core question of 'development' occurring or not, and that the assessment undertaken was based on an incorrect interpretation of the parent permission (Reg. Ref S97A/0791), which granted an unrestricted retail use. In addition to addressing the issues before it, the manner in which the Inspector reviewed the Referral and the findings of the Board were addressed by the High Court, as set out below.
140. The question posed on behalf of our Client in the Section 5 Referral Request was as follows:

"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 and is or is not exempted development"

141. This question was formulated having undertaken a detailed review of the planning history of the site and in the context of the parent permission allowing for unrestricted retail. As with the Section 5 Declaration Request, the relevant facts, including the planning history of the site, were discussed in detail as part of the Referral Request.

142. With regard to the Board's assessment of the Referral Request Justice Frettier summarised this as follows:

"...the material change of use analysis is premised on a determination that the permitted use for the premises (being that of "retail warehouse" in the 1998 permission) did not extend to retail use as a convenience store selling non-bulky goods and this remained essentially unaltered by the 2015 permission⁵²".

143. In this regard, the Inspector reviewed the Referral request on behalf of our Client, stating:

"The Referrer makes the claim that the parent permission is for a 'shop' as defined by the Planning and Development Regulations 1994. It is further submitted the structure is a warehouse used for retailing, the development description relates to the building only, which it is, and used for retailing products. I do not agree with this argument for the simple reason been that even though the terminology 'retail warehouse' predates the Retail Planning Guidelines definition in 2000, the permitted development at that time, given its scale and located within a large Retail Park, is not fundamentally a 'shop'. It is not reasonable to suggest that because the permitted 'retail warehouse' predated the Retail Planning Guidelines and an informed definition of a retail warehouse, that the structure is not a retail warehouse but is in fact a shop⁵³. (Emphasis Added)

⁵² Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 21.

⁵³ Inspector's Report dated 21st March 2017, Board Ref. RL3520, Para. 10.1.

144. Justice Frettier however, states that he does not believe that the Inspector was correct to effectively determine that only a "shop" as she saw it could sell non-bulky convenience goods and that a "retail warehouse" within the meaning of that term objectively construed in the 1998 permission precluded such type of retail use⁵⁴. Justice Frettier also noted that there was no condition attached to the parent permission restricting the type of goods which could be retailed from the retail warehouse.

145. The Inspector went on to consider and rely on the definition of "retail warehouse" in the Retail Planning Guidelines in order to determine the meaning of that term in the 1998 permission. Of this approach Justice Frettier found:

"The Inspector, in interpreting the permitted use of "retail warehouse" in the 1998 permission, sought to rely on a subsequently promulgated definition of retail warehouse which was not in place at the time of the grant of the 1998 permission and therefore not applicable to that permission⁵⁵."

146. Based on this incorrect interpretation of the planning history and status of the unit, the Inspector reformulated the question to the following:

"Whether change of use from a permitted retail warehouse to use as a discount store for the sale of non-bulky goods including the retail sale of convenience goods No. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 is or is not development or is or is not exempted development".

147. However, Justice Frettier is clear that the rationale that led to this reformulation was not correct stating:

"I am led to the conclusion that the Inspector fell into error when interpreting the scope of the use permitted by the 1998 permission by having regard to the content of the Retail Planning Guidelines 2000 which post-dated the 1998 permission. I also believe that the Inspector was in error in effectively construing the 1998 permitted "retail

⁵⁴ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 28.

⁵⁵ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 28.

warehouse" use as being confined to the retail sale of bulky goods when no such restriction was stipulated in the terms of the 1998 permission itself⁵⁶

148. Justice Frettier went on to find that the change of use analysis at conclusion (e) of the Board's decision "*started from a **flawed premise** (in conclusion (b)) and **doubled-down on this flawed premise** (in conclusion (d)) **in arriving at the Board's ultimate decision**⁵⁷*" (Emphasis added).
149. As the High Court ruling has established that the authorised use of unit no. 3 was unrestricted retail, a 'shop', and that subsequently adopted guidelines could not be applied retrospectively there is no basis for the Board when examining the Referral Request to draw a distinction between bulky and non-bulky goods as both can be retailed from a 'shop'. The reformulated question addresses a 'change of use' in the context of a 'retail warehouse' and the sale of 'non-bulky goods', however, in line with the Court's ruling this question is not applicable to unit no. 3. Instead it is more appropriate, and we request that, the Board revert back to the original question posed on behalf of our Client:

"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 and is or is not exempted development".

150. This question is appropriate as it was formulated based on the correct interpretation of the permitted use of unit no. 3, as upheld by the Court. In addition, on foot of the Court Judgement, this question is easily answered. Unit no. 3 has a permitted unrestricted retail use as a 'shop' as per the 1998 permission, which as set out in the Judgement, allows it to retail both bulky and non-bulky goods. Given both unit 3 and 3A continue to operate as 'shops' under the 1998 permission no change of use has occurred and therefore, no material change of use could occur.

⁵⁶ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 29.

⁵⁷ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 32.

151. While changes to the products being retailed may have occurred since unit no. 3 was permitted in 1998 the use of the unit as a 'shop' i.e. Class 1 of Part 4 of Schedule 2 has remained unchanged. Such changes within this use class are exempt under Article 10(1) which provides:
- "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."*
152. While works have been undertaken to accommodate the subdivision of unit no. 3 as set out above these were exempt. In relation to the contravention of a condition attached to a permission, we would again note that our Client has not enacted Reg. Ref. SD15A/0152 with the only relevant permission relating to unit no. 3 being the 1998 parent permission.
153. With regard to the Board's reference to Article 6(1) and 9(1) of the 2001 Regulations under the previous Referral, Justice Frettier has left it to the Board to address what it regards as the most relevant provisions of the applicable regulations when carrying out its fresh assessment following remittal. In this regard, and in light of the Court's ruling with regard to the permitted use of unit no. 3, Articles 6(1), which provides that *"subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1"*, is not relevant as column 1 of Part 1 of Schedule 2 addresses 'changes of use' that are exempt. As above no change of use has occurred at unit no. 3 from the permitted, unrestricted retail, 'shop' use. In turn Article 9(1) of the Regulations is also not relevant.

154. With regard to condition no. 2, while Reg. Ref. SD15A/0152 has not been enacted by our Client, it is worth noting again that the Court Judgement does not, nor was it asked to, address the enforceability of this condition in light of it's finding on the permitted retail use of unit no. 3. In this regard, Justice Frettier does state that:

"The Board erred in law in its conclusions (b) and (d)....Conclusion (b) (that "[the 2015 permission] to subdivide the unit did not alter the retail warehouse use of any element of the unit" was accordingly incorrect in so far as it sought to assume that the retail sale of non-bulky goods was impermissible under both the 1998 permission and the 2015 permission⁵⁸."

155. In addition, Justice Frettier does not accept the Board's view that if the Inspector and Board were wrong with regard to the permitted use of unit no. 3, that error was not material and not relevant to the ultimate analysis of the question of material change of use, which was governed by condition no. 2. In this regard, Justice Frettier does not uphold this contention instead stating that the *"Board may have been able to arrive at a similar conclusion in a lawful fashion⁵⁹"* (Emphasis added). The ability of the Board to relying on condition no. 2, or the lawfulness of same, is by no means taken as a given by the Court but the issue is not addressed further.

4.6 Narcanon Trust v. An Bord Pleanála

156. Finally, we note the reference in the Board's correspondence dated 2nd May 2024 in relation to the jurisdiction of the Board to make a Declaration under Section 5 of the 2000 Act having regard to the decision of the Court of Appeal in *Narcanon Trust v. An Bord Pleanála* [2021] IECA 307. As above, we are assuming that this reference is made due to the existence of a Section 5 Declaration on the subject lands by a Third Party (Reg. Ref. ED16/0025).
157. Firstly, we would note that the referenced Court of Appeal decision postdates the subject Section 5 Declaration and Referral being sought from the Board and that this current process is a remittal of that initial Referral Request made in 2016. However, the ruling of the High Court

⁵⁸ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 32.

⁵⁹ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 33.

took place after this and in this regard, Justice Frettier does review the Section 5 process stating:

"The section provides for a determination, initially, by the planning authority and, thereafter, on review by the Board⁶⁰."

158. Justice Frettier did not address this further, which given the facts of the *Narcanon Trust v. An Bord Pleanála* judgement is unsurprising as the facts of that case were different. In that instance the Section 5 applications were in substance the same and it was not contended that there had been any change in planning facts or circumstances in the interval and neither party was acting in the belief (mistaken or otherwise) that there were. In this regard, the trial judge certified one question to the Court of Appeal as follows:

*"Is it ultra vires the Board to determine a section 5 referral in **circumstances where a planning authority has previously determined the same or substantially the same question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination?**" (Emphasis added)*

159. In the *Narcanon Trust v. An Bord Pleanála* case the Court found that Board's interpretation of Section 5 (and the interaction or non-interaction with Section 50(2)) facilitates inconsistent Section 5 Declarations in respect of the same development on the same facts⁶¹. The conclusion of the Court of Appeal was as follows:

*"The Board was **precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination...**"⁶²*

⁶⁰ Judicial Review, PKB Partnership vs An Bord Pleanála, Record No. 2018/661JR, pg. 2.

⁶¹ *Narcanon Trust v. An Bord Pleanála* [2021] IECA 307, Par. 52.

⁶² *Narcanon Trust v. An Bord Pleanála* [2021] IECA 307, Par. 67.

160. It is clear from not just the finding of the Court of Appeal but the basis of the question certified to the Court of Appeal that the key issues in the Narcanon Trust v. An Bord Pleanála case was that the Section 5 Requests related to *"the same, or substantially the same, question"* and that the questions in respect of the same land *"where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination"*. None of these determining factors apply to the current Section 5 Referral before the Board.
161. In this regard, the Section 5 Declaration and subsequent Referral was made as our Client believed, and rightly so, that the wording of the Third Party Referral Request was leading and did not accurately reflect the planning status of unit no. 3. In addition, the assessment undertaken by the Planning Authority in making its Declaration did not address the planning status of the unit which should have been central to making the Declaration. As a result, the Section 5 Declaration Request made on behalf of our Client posed a completely different question, based on the planning history of the site and the actual permitted use of unit no. 3, as subsequently upheld by the High Court.
162. While the Board altered this question, based on a misinterpretation of the permitted use of unit no. 3, as above we are requesting that the Board revert to the original Section 5 Referral Request made by our Client, and the question posed by it. In this regard, the question posed on behalf of our Client is not the same, or substantially the same as that previously determined by the Planning Authority and therefore the Board can determine it.
163. In addition, to preclude the Board from making a determination there must also be no evidence that there has been a change in the planning facts and circumstances since the Planning Authority's determination. This is clearly not the case with regard to the subject Referral Request as our Client's Section 5 Declaration and Referral Requests brought to the Planning Authority's and the Board's attention that the permitted use of unit no. 3 under the 1998 permission was unrestricted retail. This was an entirely new 'planning circumstance' that was not addressed in the Third Party Referral either by the Third Party or by the Planning Authority. Notwithstanding the misinterpretation of the parent permission by both the Planning Authority and the Board, the unrestricted retail use permitted under the 1998 permission has been

confirmed by the Court Judgement and accordingly this is a new 'planning fact' which the Court has remitted to the Board to apply to the case.

164. It is clear that the determining factors which preclude the Board from determining a Section 5 Referral, as established in the Judgement of the Court of Appeal in relation to the Narcanon Trust v. An Bord Pleanála case, do not apply to the subject Referral. We therefore, cannot see any basis for the Board not determining the Referral.

5. Conclusion

165. As set out above, this Report has been prepared to inform the assessment of the Section 5 Declaration Request before the Board, as remitted by the High Court following Judicial Review. The main points of this Report, as set out in detail above, can be summarised as follows:

- In making his decision Justice Ferriter ruled on 2 no. items as follows:
 - That the 1998 permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the Retail Planning Guidelines.
 - Condition no. 2 of the 2015 permission is enforceable and effective and applies to both unit 3 and unit 3A.
- The Court did not, nor was it asked to, apply its findings in relation to the permitted use of unit no. 3 under the 1998 permission to the planning history of the unit, specifically the enforceability of condition no. 2 of Reg. Ref. SD15A/0152. The Court was also not asked to determine if Reg. Ref. SD15A/0152 was implemented.
- No application has ever been made to amend or alter the use of unit no. 3 as permitted under Reg. Ref. S97A/0791.
- Our Client undertook minor internal and external alterations to unit no. 3 under the exempt development provisions of the Act, namely Section 4(1)(h).

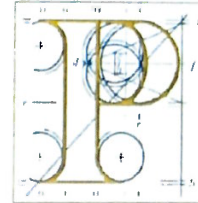
- Our Client did not implement Reg. Ref. SD15A/0152, thus the provisions of Condition no. 2 attached to same are not relevant to the Referral before the Board.
- The implications of the Court Judgement in relation to the permitted unrestricted retail use of unit no. 3 should not be viewed in isolation but must be considered in terms of the impact on the planning history of unit no. 3.
- Notwithstanding the fact that Reg. Ref. SD15A/0152 was not implemented, in light of the Court's determination on the permitted unrestricted retail use of unit no. 3 (Reg. Ref. S97A/0791), condition no. 2 of Reg. Ref. SD15A/0152 would be unenforceable as it fails to meet the requirements of the Development Management Guidelines and does not comply with the guidance from the OPR. In addition, Condition no. 2 is *ultra vires* and has been attached with the ulterior motive of restricting the use of unit nos. 3/3A via permission for minor interior and exterior works that made no reference to and sought no change to the permitted use. Further consideration of condition no. 2 as part of this process may leave it open to legal proceedings.
- The Court found that the Board erred in its previous assessment of the Referral (Board Ref. RL 3520). As all deliberations and decisions by the Planning Authority and Board to date have been based on the incorrect assumed permitted use, the Referral should be examined *de novo* by the Board in the context of the actual permitted unrestricted retail use and the fact that no application has ever sought to amend or alter this use.
- The Board's reformulation of the question posed in the Section 5 Referral Request is not appropriate in light of the Court's Judgement. The original question contained in the Section 5 Referral Request is more appropriate as it is based on the correct permitted use of unit no. 3. We ask that the Board assess this question in making the Declaration.
- Based on the deciding factors set out in *Narcanon Trust v. An Bord Pleanála*, the Board is not precluded from determining the Section 5 Referral.

166. While the Court Judgment is significant in informing the Board's assessment of this Section 5 Referral Request the Court did not, nor could it, address unforeseen consequences of determining the answers to the questions independently. As directed by the Court it is now up to the Board to apply the findings to the facts of case.
167. Our Client welcomes the invitation to participate in this process and is providing this Report to ensure that the relevant facts are available to the Board and to request that that Board review the file *de novo* having regard to these facts. We are confident that these facts clearly show that as Reg. Ref. SD15A/0152 was not implemented and only minor development which was exempt has taken place at unit no. 3, the permitted use as unrestricted retail still applies and therefore, the answer to the question actually posed on behalf of our Client is:
- Given that unit no. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 has a permitted unrestricted retailing use, 'shop', and no application has been made to alter this use, the retailing of different types of goods from the unit consists of a change of use within Class 1 of Part 4 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) and is therefore, exempt under Article 10(1) of the Regulations.
168. Our Client has always sought to have the actual unrestricted retail use of the unit acknowledged and considered in the Planning Authority's and Board's assessments of unit no. 3. We are confident that the clarification from the Court Judgment will ensure that this is achieved in the assessment of this Referral and that the Board when undertaking its assessment will acknowledge the significant impact that the past misinterpretation of the permitted use has had on the planning history of unit no. 3 and indeed our Client who has been subject to enforcement action due to this misinterpretation.

Appendix I – Correspondence from An Bord Pleanála dated 2nd May 2024

Our Case Number: ABP-318832-24

Planning Authority Reference Number: ED16/0045



**An
Bord
Pleanála**

PKB Partnership
Old Chapel Road
Athgoe South
Newcastle
Co. Dublin
D22 Y792

Date: 02 May 2024

Re: Whether a material change of use 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.
Unit no. 3 Fonthill Retail Park, Fonthill Road, Dublin 22.

Dear Sir / Madam,

I have been asked by An Bord Pleanála to refer to the above-mentioned referral.

An Bord Pleanála had previously made a decision on this referral by order dated 12th June, 2018 and under referral reference number RL3520. That decision was quashed by order of the High Court and the case was remitted by that Court back to An Bord Pleanála for a new decision. A copy of the High Court order and a copy of the referral are attached to this letter for your information.

The referral has now been reactivated.

Having regard to the High Court Order in this case, the quashing of the previous Board decision and the passage of time, the Board considers that it is appropriate in the interests of justice to now request you under section 131 of the Planning and Development Act 2000 to make any further general submissions/observations you may have on the referral.

In addition, the Board proposes to take into account the following:

- (i) **The request for a Declaration pursuant to section 5 of the Planning and Development Act, 2000 as amended as to 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.**
- (ii) **The proposed reformulation of the question so as to ask whether the use of a permitted retail warehouse unit to use as a discount store for the sale of small scale convenience goods at Unit Number 3, Fonthill Retail Park, Retail Road, Dublin is or is not development or is or is not exempted development.**
- (iii) **The jurisdiction of the Board to make a Declaration under section 5 of the 2000 Act having regard to the decision of the Court of Appeal in Narcanon Trust v. An Bord Pleanála [2021] IECA 307.**

Teil
Glaó Áitiúil
Facs
Láithreán Gréasáin
Riomphost

Tel (01) 858 8100
LoCall 1800 275 175
Fax (01) 872 2684
Website www.pleanala.ie
Email bord@pleanala.ie


64 Sráid Maoilbhríde
Baile Átha Cliath 1
D01 V902

64 Marlborough Street
Dublin 1
D01 V902

You are invited to submit any submission or observation that you may have in relation to the matter raised in this notice on or before **22nd May 2024**. Your submission in response to this notice must be received by the Board not later than 5.30 p.m. on the date specified above.

Any submission or observation received by the Board after the expiration of the specified period shall not, in accordance with section 131 of the 2000 Act, be considered by the Board.

Yours faithfully,



Mary Tucker
Executive Officer
Direct Line: 01-8737132

BPRL70

Teil
Glao Áitiúil
Facs
Láithreán Gréasáin
Riomhphost

Tel
LoCall
Fax
Website
Email

(01) 858 8100
1800 275 175
(01) 872 2684
www.pleanala.ie
bord@pleanala.ie

64 Sráid Maoibhride
Baile Átha Cliath 1
D01 V902

64 Marlborough Street
Dublin 1
D01 V902

RMLA.

Planning Consultants

RMLA Limited,
Unit 3B,
Santry Avenue Industrial Estate,
Santry Avenue,
Santry,
Dublin 9,
D09 PH04