

### Small items, big problem



A written assurance from a local planning authority does not override the terms of a planning permission.

In *Treacy v. An Bord Pleanála* [2010] IEHC 13 two leading retailers, Mothercare and TK Maxx, took leases in Butlerstown Retail Park outside Waterford. The planning permission for the retail park limited the use of the premises to the sale of “bulky household goods”. TK Maxx received written assurances from the local Council (which is also the local planning authority) that TK Maxx could sell its merchandise.

Anyone may apply under Section 5 of the Planning and Development Act, 2000 for clarification of the scope of a planning permission. The local planning authority will give an answer within 4 weeks and an appeal to An Bord Pleanála will usually yield a decision within a further 18 weeks. TK Maxx did not use Section 5.

After the stores opened the operator of a nearby shopping centre triggered the Section 5 process and sought a declaration that some of goods being sold, particularly clothing, were outside the authorised use. The Council decided that the sale of these non-bulky items was in compliance with planning permission, but An Bord Pleanála (the appeal authority in planning matters in Ireland) came to the opposite conclusion. The owner of the retail park brought proceedings in the Commercial Court seeking to have this decision quashed.

MacMenamin J held that a letter from the Council could not alter the scope of a planning permission. The planning permission laid down clear limitations on the types of goods that could be sold, which An Bord Pleanála was entitled to interpret and enforce.

Where a retailer is uncertain as to what items it may sell under a planning permission, Section 5 provides an effective, if somewhat protracted, process. While this approach is more time consuming than obtaining an informal assurance, it is a safer approach over the long run, as this case makes clear.

Public authorities cannot fetter their statutory discretion by prejudging an issue in advance. In *Re Greendale Building* [1977] IR 256 a plea of estoppel failed where a local authority acted outside its powers. The applicant’s detrimental reliance on previous acts of the authority was deemed to be irrelevant: the fact that the local authority was acting outside its powers was decisive. In *Fairleigh Ltd. v Temple Bar Renewal Ltd* (Unreported, 18 December 1998) Morris P accepted that a planning authority could not fetter its discretion by applying guidelines without considering the particular circumstances.

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