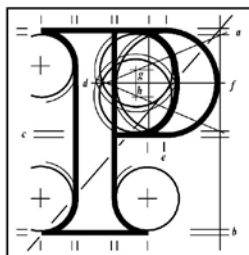


# An Bord Pleanála



## Inspector's Report

**Development:** Change of use from retail/commercial to licensed restaurant and performance venue/gallery use, with attendant internal alterations and alterations to existing shop front at 46 Drury Street (protected structure), Dublin 2.

### Application

Planning authority: Dublin City Council  
Planning application reg. no. 2354/15  
Applicant: Moonage Daydream Ltd  
Type of application: Permission  
Planning authority's decision: Grant, 15 conditions

### Appeal

Appellant: Paul Keaveny  
Type of appeal: First party v Decision  
Observers: None  
Date of site inspection: 8<sup>th</sup> January 2016  
Inspector: Hugh D. Morrison

## **Site**

The site is located on Drury Street, which runs on a roughly north/south axis between Exchequer Street and Stephen Street Lower. This site is located on the eastern side of the Street, just to the south of its junction with Castle Market and the eastern entrance to George's Street Arcade. It lies within an area of predominantly shops and eateries.

The site itself is rectangular in shape and it extends over an area of c. 180 sq m. This site accommodates a gable fronted building, which originally comprised two storeys over a basement and was used as a warehouse. (More recently, the interior has been modernised and the rear portion of the ground floor has been split into upper and lower portions and the first floor has been subdivided vertically to provide a second floor – total floorspace 399 sq m). It also accommodates a gated laneway along the northern extremity of the site, which serves the subject building and adjacent buildings at No. 45 Drury Street and Nos. 12 – 15 Castle Market (inclusive).

The principal elevation to the subject building is street-fronted and features a single arched opening at ground floor level with three matching arched headed windows above. This elevation is finished in red brick, which is complemented by darker brick that is incorporated within string courses and the said arched heads. The gable is raised and capped and a circular window is centrally placed within it.

The building abuts other buildings to the south and east (rear). The remaining northern side elevation abuts the aforementioned laneway. This elevation contains a doorway with a pair of doors within it, which is sited centrally, and windows at ground, first, and second floor levels, which are sited over the rear portion of this elevation.

At present the building is vacant. It was last used as a shop.

## **Proposal**

The proposal would entail a change of use from retail/commercial use to a licensed restaurant at ground floor level and a performance venue/gallery on the upper floors.

The aforementioned change of use would be facilitated by internal alterations, which would include the re-routing of the existing staircase, the addition of a new staircase at the rear of the subject building, the laying out of the lower ground floor as a kitchen with ancillary storage spaces and toilets, the installation of a disabled toilet on the ground floor, the provision of a dressing room and a stage at first floor with a void above it at second floor, and the provision of an office and toilets on the second floor.

The aforementioned change of use would also be facilitated by external alterations, which would include the enlargement of an existing ground floor window to form a doorway within which a door and screen would be installed. This door would serve the proposed new staircase.

(Although the description of the proposal refers to “alterations to existing shop front”, none are shown on the submitted plans).

### **Planning authority’s decision**

Following the receipt of further information, permission was granted subject to 15 conditions.

### **Technical reports**

- RPA: Section 49 Metro North Levy requested.
- Environmental Health: No objection, subject to conditions.
- Conservation: No objection.

### **Grounds of appeal**

- The appellant purchased the properties at Nos. 12 – 15 Castlemarket in 2012. He has submitted a map from the title deeds to the same, which shows the laneway to the side of the property at No. 46 Drury Lane lying within the area that he owns. There is no deed or other written document that grants a right of way along this laneway to No. 46.
- Attention is drawn to the current use of the laneway, which is gated with the appellant being the exclusive key holder. This use formerly entailed the open storage of waste materials from the aforementioned properties. It now entails the storage of such materials in cabinets. The width of the laneway has thus been reduced from 1.6 – 1.78m to 0.82 – 0.87m and so it would not be suitable for public use.
- Concern is expressed over the proposal with respect to the public access that is envisaged as occurring along the said laneway and the associated intensification in use of the same. Concern is also expressed over the inclusion of this laneway within the applicant’s site without the appellant’s consent and the absence of any notation denoting a wayleave along the same.
- Given that the proposal requires public and emergency access onto the laneway and, in the light of the submitted sworn affidavit, it is clear that the applicant has insufficient legal interest to undertake the proposed development.

- While the appellant does not contest the presence of windows and a doorway from No. 46 onto the laneway, he notes that the said affidavit restricts itself to factual information about this laneway rather than whether legally there is a right of way along it. Likewise, while the said items indicate that the laneway may have been used for refuse disposal, evidence of public use has not been furnished. The applicant may be relying upon an alleged right of way. If so, he has not registered the same under the Land and Conveyancing Law Reform Act, 2009, and so he has not clearly established sufficient legal interest.
- The proposed internal bin storage areas within No. 46 are critiqued on the basis there is no evidence of ventilation and waste would have to be removed through the kitchen and publically accessible spaces. Accordingly, it is envisaged that, in practise, waste would be stored on the laneway. Furthermore, in the absence of a formal smoking area, the likelihood exists that patrons would smoke in the laneway, leading to littering of the same.

### **Responses**

The planning authority have responded to the above grounds of appeal by stating that they have no further comments to make.

The applicant has responded to these grounds. They begin by stating that the appellant has laid claim to the laneway, that he has allegedly secured the gate to this laneway by means of a padlock to which he holds the key, and that he recently cleaned up waste materials from the same.

They proceed to respond to the grounds of appeal as follows:

- The applicant addressed the question of the laneway in their response to a request for information at the application stage. They stated that it had traditionally been used by adjoining landowners: the appellant's exclusive claim was thereby challenged. The dispute between them is of a legal nature and it is not one that the Board is empowered to arbitrate upon.
- Matters of the adequacy or otherwise of waste management arrangements and the scope for compliance with fire safety and smoking ban regulations are the subjects of other codes, which, likewise, fall outside the Board's remit.
- Given the above responses, the view is taken that the appeal lacks substance or foundation and that, despite the appellant's affirmation of a competitive and vibrant business environment, it may have been made with vexatious intent. The Board is thus requested to dismiss this appeal under Section 138(1)(a)(i) of the Planning and Development Act, 2000 – 2014.

## **Response to response**

The appellant has responded to the applicant's response by insisting that his appeal is not vexatious in nature, as the concerns raised therein are relevant, rational, and reasonable. Likewise, he has responded to the requested dismissal of his appeal under Section 138(1)(a)(i) by reiterating his grounds of appeal.

## **Planning history**

- 1670/99: New shop front to ground floor of list 2 building: Permitted.

## **Development Plan**

The Dublin City Development Plan 2011 – 2017 (CDP) shows the site as lying within an area that is zoned Z5, wherein the objective is “To consolidate and facilitate the development of the central area and to identify, reinforce and strengthen and protect the civic design, character and dignity of the area.” Restaurants and cultural/recreational uses are permissible in principle within this zone. The CDP also shows Drury Street as a Category 2 retail street, which lies within the South City Retail Quarter ACA, and it identifies No. 46 as a Protected Structure (ref. 2393) with the following description: “Business premises with ground floor shop.”

Sections 17.10.1, 17.30, and 17.34 relate, variously, to works to protected structures, restaurants, and night clubs/licensed premises.

Additionally, the site is subject to the Grafton Street Quarter Public Realm Plan

## **National planning guidelines**

- Development Management

## **Assessment**

The applicant has requested that the Board dismiss this appeal under Section 138(1)(a)(i) of the Planning and Development Act, 2000 – 2014, on the grounds that it is vexatious in nature. This request has been considered and the view has been taken that sufficient material planning considerations are raised in these grounds to justify the appeal proceeding in the normal manner.

I have reviewed the proposal in the light of the CDP, relevant planning history, and the submissions of the parties. Accordingly, I consider that this application/appeal should be assessed under the following headings:

- (i) Land use, planning history, and conservation,
- (ii) The laneway,
- (iii) Utility, and

(iv) AA.

**(i) Land use, planning history, and conservation**

- 1.1 The site lies within the CDP's Z5, city centre zone, within which both the last use of the subject building as a shop and the proposed uses of the same as a licensed restaurant at ground floor level and a performance venue/gallery on the upper floors would all be uses that are permissible in principle.
- 1.2 The planning history of the site indicates that it was the subject of a new shop front proposal in 1999, which was permitted and may have been subsequently implemented. The applicant has submitted a Conservation Report which states that the sub-division of the first floor into two may have occurred in the 1980s. This sub-division probably occurred at the same time as the overall modernisation of the interior. Externally, a modern stainless steel framed glazed system, which includes a glazed door, has been installed over the single arched opening on the principal elevation. This appears to have been installed more recently, probably since 1999.
- 1.3 The aforementioned Conservation Report states that the subject building dates from the late 1880's. In the current CDP and in its predecessors extending back to at least 1999, this building is identified as a protected structure/listed building. Given the extent of the internal alterations that have occurred, the remaining conservation interest pertains to the principal elevation, which notwithstanding the description of the proposal, would not be altered under the submitted plans.
- 1.5 I conclude that the proposed change of use would be appropriate in land use terms and that the conservation interest of the subject building relates to the front elevation of the subject building.

**(ii) The laneway**

- 2.1 The red edge of the appeal site includes within it the laneway that runs along the northern elevation of the subject building. Under the current proposal, the existing pair of doors in this elevation would be used as the entrance to the jazz club envisaged for the two upper floors and so the laneway would be the route by which patrons would access these doors. Furthermore, the proposed new staircase at the rear extremity of the building would be served by a new door in the said elevation, which would act as an emergency exit onto the laneway. Thus, as submitted, the laneway would be integral to the proposal for this building.
- 2.2 The appellant states that he purchased the properties at Nos. 12 – 15 Castlemarket in 2012, along with the laneway described above. He thus states that he is the owner of this laneway and he has submitted a plan from his title deeds to illustrate the same. As owner he has not given his consent to the

inclusion of the laneway within the appeal site and so the application may be invalid. Furthermore, the submitted application does not show any wayleave for the benefit of the subject building along the laneway. He thus questions the validity of this application.

- 2.3 The appellant acknowledges that there is an existing pair of doors and windows in the northern elevation of the subject building that open out over the laneway. He also acknowledges the sworn affidavit submitted by the applicant, which refers to the usage of the laneway in conjunction with the use of this building in the past. However, he draws attention to the absence of any documentation that would provide such usage with a legal standing and he objects to the proposed use as a means of access to the envisaged jazz club. In this respect, he also draws attention to the presence of timber boxes that have been recently installed on the laneway, which contain bins and which limit the available clearance distance.
- 2.4 The appellant's ownership claim was raised under a request for further information at the application stage. The applicant responded by submitting the aforementioned sworn affidavit, in which the current owner of the subject building testifies to the existence and usage of the pair of doors that lead onto the laneway in conjunction with the subject building over the last 25 years. He also states that, since his company began using this building 17 years ago he, his "servants, agents, assignees, licensees and/or invitees" have used this laneway without objection, complaint or concern.
- 2.5 During my site visit, I inspected the laneway and I can confirm the accuracy of the description set out above as to the said pair of doors, windows, and timber boxes. I noted that, in addition to the doors onto the laneway from each of the appellant's properties, a former door to the laneway from the rear of the property at No. 46 Drury Street has been partly blocked up and a window has been installed within the remainder of this opening. I also noted that, without prejudice to any legal considerations, the laneway has the appearance of one that was laid out to be shared by the adjoining properties that have/had access to it via doorways.
- 2.6 Clearly, there is a dispute between the parties over the use of the laneway. As this dispute is essentially a legal matter, its resolution lies beyond the remit of the Board. Section 5.13 of the Development Management Guidelines, addresses situations wherein there is such a dispute. If, following a request for further information, some doubt remains as to whether or not the applicant has sufficient legal interest in a site to undertake their proposal, then under Section 34(13) of the Planning and Development Act, 2000 – 2014, permission can be granted on the basis that "the developer must be certain under civil law that he/she has all rights in the land to execute the grant of permission."

2.7 I, therefore, conclude that, given the legal dispute over the laneway between the parties, any permission should be accompanied by a note that refers to Section 34(13) of the Planning and Development Act, 2000 – 2014.

### **(iii) Utility**

3.1 The proposal was the subject of a request for further information at the application stage, which resulted in the submitted plans being amended to include bin storage spaces in the lower ground floor and second floor levels. The appellant has critiqued the spaces thus identified on the basis that no ventilation arrangements are shown and their use would variously involve waste passing through the kitchen and publically accessible areas. He thus anticipates that recourse to the laneway would be inevitable for the storage of waste.

3.2 The applicant has responded to the aforementioned critique by stating that storage facilities would be subject to control under other codes, presumably environmental health ones. Thus, the opportunity to assess any ventilation arrangements and accessibility issues would arise under the same.

3.3 I anticipate that there would be scope within the subject building to provide the needed storage facilities and that it is therefore premature to conclude that reliance upon the laneway would be inevitable.

### **(iv) AA**

4.1 The current proposal is for essentially the conversion of the subject building, which is connected to existing mains services. This building does not lie within a Natura 2000 site and I am not aware of any source/pathway/receptor route between the said building and the nearest such sites in Dublin Bay. Accordingly, I do not consider that the use in question would have any significant effects upon the Conservation Objectives of the said sites.

4.2 Having regard to the nature and scale of the proposed development, the nature of the receiving environment, and proximity to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

### **Recommendation**

In the light of my assessment, I recommend that the proposed change of use from retail/commercial to licensed restaurant and performance venue/gallery use, with attendant internal alterations and alterations to existing shop front at 46 Drury Street (protected structure), Dublin 2, be permitted.



## Reasons and considerations

Having regard to the Dublin City Development Plan 2011 – 2017, it is considered that, subject to conditions, the proposed uses of the subject building would be permissible in principle under the Z5 (city centre) zoning of the site. This building, which is a protected structure, has been modernised internally and so the alterations proposed would not raise any conservation issues. There is scope within the same to accommodate ancillary utility facilities and to provide access to and egress from the upper floors via the laneway. The proposal would thus accord with the proper planning and sustainable development of the area.

## Conditions

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars submitted on the 20<sup>th</sup> day of August 2015, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

**Reason:** In the interest of clarity.

2. The developer shall control odour emissions from the premises in accordance with measures, including extract duct details, which shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development.

**Reason:** In the interest of public health and to protect the amenities of the area.

3. (a) Amplified music or other specific entertainment noise emissions from the premises shall not exceed the background noise level by more than 3 dB(A) during the period 08.00 to 22.00 hours and by more than 1 dB(A) at any other time, when measured at any external position adjoining an occupied dwelling in the vicinity. The background noise level shall be taken as  $L_{90}$  and the specific noise shall be measured at  $L_{Aeq,T}$ .

(b) The octave band centre frequencies of noise emissions at 63 Hz and at 125 Hz shall be the subject to the same locational and decibel exceedance criteria in relation to background noise levels as set out in (a) above. The background noise levels shall be measured at  $L_{Aeq,T}$ .

(c) The background noise levels shall be measured in the absence of the specific noise, on days and at times when the specific noise source would normally be operating; either

(i) During a temporary shutdown of the specific noise source, or

(ii) During a period immediately before or after the specific noise source operates.

(d) When measuring the specific noise, the time (T) shall be any 5 minute period during which the sound emission from the premises is at its maximum level.

(e) Any measuring instrument shall be precision grade.

Detailed plans and particulars indicating sound-proofing or other measures to ensure compliance with this condition shall be submitted to, and agreed in writing with, the planning authority prior to the proposed use of the premises. An acoustical analysis shall be included with this submission to the planning authority.

**Reason:** In order to protect the amenities of property in the vicinity having particular regard to the nuisance potential of low frequency sound emissions during night-time hours.

4. Details of all external signage shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development.

**Reason:** In the interest of visual amenity.

5. Water supply and drainage arrangements, including the disposal of surface water, shall comply with the requirements of the planning authority for such works and services.

**Reason:** In the interest of public health.

6. The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development, including hours of working, noise management measures and off-site disposal of construction/demolition waste.

**Reason:** In the interests of public safety and residential amenity.

7. All proposed works to the protected structure, shall be carried out under the supervision of a qualified professional with specialised conservation expertise.

**Reason:** To secure the authentic preservation of this protected structure and to ensure that the proposed works are carried out in accordance with best conservation practice.

8. The use hereby permitted for the ground floor is that of a restaurant only. Any subsequent proposal for a hot food takeaway shall require a further planning permission.

**Reason:** In order to afford the planning authority control over the use in the interest of amenity.

9. The developer shall pay to the planning authority a financial contribution of €3,400 (three thousand four hundred euro) in respect of Metro North in accordance with the terms of the Supplementary Development Contribution Scheme made by the planning authority under Section 49 of the Planning and Development Act 2000 – 2014. The contribution shall be paid prior to the commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. The application of any indexation required by this condition shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to the Board to determine.

**Reason:** It is a requirement of the Planning and Development Act 2000 – 2014 that a condition requiring a contribution in accordance with the Supplementary Development Contribution Scheme made under Section 49 of the Act be applied to the permission.

Hugh D. Morrison

Inspector

18<sup>th</sup> January 2016