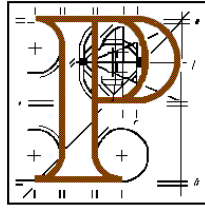


# An Bord Pleanála



## Inspector's Report

**PL 29S.245942**

**DEVELOPMENT:-**

**Change of use from ground floor retail shop to bar/restaurant with terrace and change of use from retail storage to a live music venue for the first floor with all associated site works at 5 Clarendon Market, Dublin 2.**

### PLANNING APPLICATION

**Planning Authority:** Dublin City Council  
**Planning Authority Reg. No.:** 3381/15  
**Applicant:** Width of a Circle Limited.  
**Application Type:** Permission  
**Planning Authority Decision:** Grant

### APPEAL

**Appellant(s):** Councillor Manix Flynn  
**Type of Appeal:** Third Party  
**Observers:** None  
**DATE OF SITE INSPECTION:** 23<sup>rd</sup> February 2016  
**INSPECTOR:** A. Dineen

## **1. SITE LOCATION AND DESCRIPTION**

The subject site is located on Clarendon Market, which is a pedestrian laneway that runs between Clarendon Row and Johnson Place/South William Street. The site contains a two storey mid terrace building, which opens onto Clarendon Market.

## **2. THE PROPOSED DEVELOPMENT**

Planning permission is sought for the change of use of the existing ground floor from retail shop to bar/restaurant with terrace (Note: terrace omitted under A.I.) and change of use from retail storage to a live music venue for the first floor with all associated site works.

## **3. THE PLANNING AUTHORITY'S DECISION**

The planning authority decided to grant planning permission for the proposed development on the 3<sup>rd</sup> December 2015.

Conditions were of a generic nature say except for condition number 7 in relation to Environmental Health, which referred that a test be carried out prior to the commencement of development with regard to the sound insulation scheme under the noise assessment report. This condition requires that the said sound insulation scheme be tested and implemented prior to its use and the results be submitted to Dublin City Council for approval.

The decision of the planning authority concurs with the planners report.

## **4. DEPARTMENTAL REPORTS**

### Drainage Division, Engineering Department.

No objections subject to conditions.

### Environmental Health Officer

No objections subject to measures in noise report being implemented.

## **5. PLANNING HISTORY**

Planning Register Reference No: 2769/12 pertains to the grant of planning permission for the change of use from existing commercial unit from retail to café use (106 sq. m), including new façade at ground floor level, a new window at first floor level and associated site works.

## 6. LOCAL POLICY

### Dublin City Development Plan, 2011-2017.

The appeal site is governed by the policies and provisions contained in the Dublin City Development Plan, 2011-2017, under which the site is zoned 'Z5 – City Centre'. The stated land use zoning objective for this land is: "to consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity".

With regard to Restaurants, under Section 17.30, the plan states:

The positive contribution of café and restaurant uses and the clusters of such uses to the vitality of the city is recognised.

The following will be taken into consideration:

*The effect of noise, general disturbance, hours of operation and fumes on the amenities of nearby residents, Traffic considerations, Waste storage facilities, The number/frequency of restaurants and other retail services in the area (where a proposal relates to a category 1 or 2 shopping street as defined in Figure 18 and Appendix 4), The need to safeguard the vitality and viability of shopping areas in the city and to maintain a suitable mix of retail uses.*

With regard to Nightclubs/Licensed Premises Section 17.34 refers that there is a need to strike an appropriate balance between the role of these entertainment uses in the economy of the city and the following:

The following will be taken into consideration:

*Maintenance of high quality retail functions on the primary city centre streets and ensure a balanced mix of uses, to protect the amenities of residents from an over-concentration of late night venues, noise emanating from and at the boundaries of these establishments are issues, which will need to be addressed in the submission of a planning application. Noise insulation and reduction measures, especially to any air-conditioning or ventilation plant and including entrance lobbies, will be required to be submitted with the planning application.*

## 7. GROUNDS OF APPEAL

The grounds of the appeal by the third party may be synthesised as follows:

- The description of the proposed development is misleading as it will essentially be a public house with live music venue.
- The area is at tipping point with retail uses reducing and creating more pressure for night time uses to the detriment of the desire of the City Council to maintain and strengthen the southern retail core.
- The site is not strictly located on a category 2 Street however it is in a core area of category 2 streets, which are displaying signs of substantial non-retail frontage. The proposal will finish Clarendon Market as a retail location in the southern retail core of Dublin City.

- Policy CHC023 of the Draft Dublin City Plan 2016 -2023 is cited and it is submitted that the proposal would be contrary to said policy with regard to residential amenity for local city residents.
- Information submitted under AI regarding restaurant use and storage area for waste is inadequate.
- The servicing/storage arrangements are inadequate and will impact on the amenity of the area.
- The proposal should have been invalidated regarding the inaccurate description of the terrace area.
- The full extent of the alteration to the façade was not accurately described in the notices.
- There will be a detrimental impact on the residential amenity of the area by virtue of additional noise, disturbance and anti-social behaviour.
- Noise levels will be exacerbated due to the enclosed nature of Clarendon Market.
- No smoking area is identified which will lead to patrons smoking on the adjoining Clarendon Market area, which will have a negative impact on appearance litter etc.
- The absence of detail in respect of ventilation indicates no real intent to operate a restaurant rather a substantially sized pub over two floors.
- With regard to planning history Ref. Reg. 2769/12 it considered that both operations are materially different in intensity and scale and cannot be relied upon as precedent for a much larger operation. The curfew of 2.30 AM as suggested by the first party is wholly unacceptable from a residential amenity perspective.
- The intensity of the previous use was much lower than the proposed as the first floor was to be used for storage.

## **8.0 FIRST PARTY RESPONSE TO APPEAL**

- Throughout the appeal, the appellant has confused/conflated a number of issues that are not within the remit of the planning code. Licencing is a matter for the Courts.
- Judgement of Tracey v An Bord Pleanála (HC 2009 405 & 406 JR) referred to where the Boards practices were upheld whereby a development must be specifically interpreted in the relation to the description of the development in the information submitted to the planning authority particularly in the public notices.
- Following AI the applicant responded by removing the ground floor outdoor terrace area, which could be addressed by obtaining a street licence under the relevant provisions.
- The first floor change of use sought would provide a small live music venue subject to proposals regarding noise and acoustic attenuation.
- It is submitted that the appellant has misinterpreted policy with respect of CHC023 as per the Draft City Plan. The proposal for a live music venue is precisely in line with the mix of cultural uses envisaged by the by Draft Development Plan to thwart the expansion and concentration of LPH – Large Public Houses.
- It is a policy of BIMM colleges that performance students go out from the college to perform and to test their performance technique and stage craft in small public

venues in front of a critical audience. The industry needs more small venues to develop the industry in Ireland.

- The subject site hosted Lack Lukeman (Jack L) and his band in their formative years, where the band held a residency.
- There is no requirement for a developer to demonstrate that there isn't an over concentration of late night venues in any area of the city let alone the city centre.
- The appellants' interpretation of retail planning policy is questioned and it is submitted that Clarendon Market is not a Category 2 Street, nor is it a retail location of any significance in the southern retail core. There are no restrictions on non-designated streets. Therefore the suggested reason for refusal has no basis in the statutory plans.
- With regard to the appellant's comments regarding 'Tipping the Balance', the recent grant of planning permission by the Board under 29S.245372 provides a large floor plate of higher order retail floor space as required by the Grafton Street Environs retail policy.
- With respect of the ground floor restaurant it has been submitted that the number of persons to be served will be less than 40, which is a modest size restaurant. All of the kitchen equipment, fittings and staffing will be subject of agreement with the Environmental Health Officer. The occupancy of the upper floor will be in the region of 80, which will be small intimate venue.
- Planning history referred to by the appellant is incorrect, which refers to different premises on Clarendon Market, No 3.
- The subject site had the benefit of planning permission for 'Extension of restaurant use from ground floor to first floor to include live music' under Reg. Ref. No. 2197/94. This permission was put into effect and operated as the DA Club and while the ground floor use was occupied by the Great Outdoors in late 2000, the first floor use was not altered. Therefore, the established use on the first floor is restaurant with live music. Therefore the continuance of use is not affected with respect of Section 40 (2) (b).

## **9.0 LOCAL AUTHORITY'S RESPONSE TO APPEAL**

The planning authority submits that the planners report deals fully with all of the issues and justifies its decision.

## **10.0 OBSERVATIONS**

No observations submitted.

## 11.0 ASSESSMENT

Having inspected the site, considered the file documentation, the prevailing local and national policies and assessed the proposal, I consider that the key planning issues arising from the proposed development are:-

- Principle of the Development
- Development Plan/Retail use issues
- Residential Amenity
- Other Issues – Ventilation/Waste Storage
- Site Notice
- Appropriate Assessment

### 11.1 Principle of Development

The site and its flanking properties are affected by the 'Z5' land use zoning category, under which the objective is *to consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity*". Under Section 15.10.5 of the plan, the use of a proposed 'bar/restaurant' is a permissible use in this area. While a 'live music venue' is not specifically listed under the zoning matrix, I concur with the local authority planner where it is referred that a 'nightclub' is listed and similar planning considerations apply. Accordingly, I am satisfied that the proposed use is appropriate subject to satisfaction of the relevant planning requirements.

### 11.2 Development Plan/Use/Retail Use Issues

The proposed development comprises a change of use from a retail use to bar and restaurant at ground floor level and from retail storage use to live music venue at first floor level. The appellant has raised a number of concerns regarding the proposal, one of which is the corrosion of the retail offer of this area of the southern city. The appellant concedes that while the street is not a designated Category 2 Street, as identified under the plan, he considers that it is nevertheless in a core Category 2 area. The first party appellant to the appeal submits that the street is clearly not a Category 2 street and infers that there is no room for ambiguity as either 'it is' or 'it isn't'. The appellant refers to policy cited within the Dublin City Development Plan 2011-2017 and the Draft Dublin City Plan, particularly policy CHC023 of the latter and considers that there is an over-concentration of late night venues and the subject development would conflict with such policy.

Having examined the appeal site and the uses in the area of the site, it is clear that the street, which serves the appeal site is in fact a pedestrian lane interconnecting both Johnson Place and Clarendon Row. The front façade of the subject premises is closed up and appears *underutilised*. Therefore it presently contributes little by way of vitality, vibrancy or viability to the street. There are 2 restaurants adjacent to the appeal site and there is also a restaurant and a bar at the end of the lane connecting with the junction of

Clarendon Market and South William Street. The local authority planner describes the area as 'a busy hub of night time activity', which I consider to be a fair description of this urban space.

It is apparent that a music venue previously existed at this location. The first party submission to the appeal contends that there was never a change of use of the first floor and that the established permitted use of the first floor is restaurant with live entertainment and that under the provisions of Article 10 (1) (d) it is exempted development to resume authorised use. In this context I consider that the development description of the subject proposal seeks '*change of use from retail storage to live music venue at first floor*', which is at odds with the current assertion under the appeal that the use has not been abandoned. In any event, I consider that the proposal as publicly advertised, including first floor use as a live music venue, is generally satisfactory in principle and with regard to relevant policy, subject to further analysis of other planning considerations.

In response to the appellant's submission regarding retail offer, I note the submission of the first party with regard to the recent grant of planning permission under PL29 S 245372 for a substantive retail envelope in very close proximity to the site, which increases the retail offer of this area of the city. Overall, I do not consider that given the size and scale of the proposal that to permit this change of use would represent a 'tipping point' regarding the loss of retail offer in this area of the city.

Furthermore I am of the viewpoint that this laneway is not a Category 2 Street therefore strictly speaking such provisions are not applicable. However, the proposed use for a bar/restaurant and an intimate live music venue on the first floor provides an alternative '*dynamic mix of uses*' or cultural offer, which is in line with development plan policy that refers broadly to such city centre areas whereby '*a dynamic mix of uses, which interact with each other, creates a sense of community and which sustains the vitality of the inner city both by day and night*' is desirable. I also concur with the first party appellant in that the proposed niche use; that of an intimate live music venue actually conforms to policy CHC023 of the Draft Dublin City Development Plan 2016- 2022.

Additionally, cognizant of the fact, that I do not consider that the retail offer of the area would be significantly compromised by the proposed development, I am of the viewpoint that that the proposed redevelopment of the subject site would bring an active use to a vacant or underutilised site. It would therefore comply with section 9.4.6 of the plan in relation to the matter of regeneration, which states that: '*the speedy redevelopment of extensive vacant/underutilised sites especially in the city centre zoned area is critical to sustainable development. Putting in place a critical mass of investment and development in the short-term is essential to break the negative cycle of underdevelopment and to overcome the barriers to progress that have existed*'.

### **11.3 Residential Amenity Issues**

The primary concern raised under the appeal with regard to residential amenity issues relates to noise pollution and consequent potential impacts on residents living proximate

to the appeal site. The appellant considers that the nature of the enclosed lane on Clarendon Market would also exacerbate the noise issue. It is acknowledged that given the central location of the appeal site that a certain level of activity is to be expected. I note that under the request for additional information the planning authority requested the applicant to submit a scheme for the mitigation and attenuation of noise from the live music venue. In response to this request a noise impact analysis was submitted.

This report found that the nearest residential development is located on the corner of Clarendon Row and Clarendon Market over a number of commercial units including Butlers Chocolates Café and Ladbrokes, which face onto Chatham Street. The noise report found that background noise levels in the area range between 59.3 dB and 64.1 dB with an average of 62dB. Night time noise levels would be expected to reduce to 45dB. The outcome of the site specific calculation is that the sound pressure level at the nearest sound sensitive location would be 52.5 dB during amplified music performances. The WHO recommends that such levels not exceed 35dB for L.night. Assuming that the nearest NSL (dwelling) should be able to open a window at night for ventilation, the maximum sound levels should not exceed 45 dB at its location. Accordingly given the discrepancy between predicted impacts of 52 dB and 45 dB, it is necessary to upgrade the sound insulation performance of the roof of the live music venue. A detailed specification for this roof upgrade is submitted under the AI response. Such measures will reduce noise break out from the premises to 30dB. Therefore given that the ambient noise levels in the vicinity would be 45dB any breakout noise would be effectively masked at the nearest NSL. I am satisfied with the proposal and deduce that there will not be any significant impacts on the residences in the area subject to the proposed measures being implemented. I concur with the condition number 7 (1) (2) and (3) as imposed by the planning authority in its decision to grant planning permission. I also note the submission of the Environmental Health Officer, which prohibits speakers being placed externally on the premises.

#### **11.4 Other Issues**

##### Ventilation

The appellant contends that as there are no specific details on the application regarding ventilation, that there is no real intention to provide restaurant facilities on this premises. However the first party appellant submits to the appeal that the application indicates a small scale restaurant/café bar with a limited menu and that the scale (storage/preparation area) of restaurant as described in the appeal are not required for the service intended. Moreover, it is submitted that such issues are a matter to be regulated under Public Health legislation. I note the contents of the first party submission and I also note the contents of the Environmental Health Officers report, which requires that a scheme be submitted detailing how cooking odours are to be controlled (Report date 27<sup>th</sup> November 2015). Notwithstanding the assertion by the first party regarding the small scale of food operations and limited menu, I concur that full details of ventilation system and associated odour control be submitted to the planning authority for approval prior to the commencement of development.

##### Waste Storage

With regard to waste storage/disposal, I note that under the appeal a store area is indicated on the ground floor plan, which I would assume pertains to dry food stuffs. An



additional storage space is indicated under the stairwell. However, I note that no area has been specifically indicated or demarcated for waste storage. While I concur that the EHO would address such issues under the relevant legislation, I consider that in the interest of clarity this detail should be submitted to the planning authority for approval prior to the commencement of development.

### **11.5 Site Notice**

The third party appellant considers that the site notice should have been invalidated by the Council due to inadequate description of the terrace area, which was not described in the notices. On examination of the public notices on file, I note that the word terrace is in fact clearly indicated on the site notice. I therefore consider that in applying *the reasonable person test* that the public notices appropriately describe the development proposed.

However on the subject of the proposed terrace, I note that the planning authority requested additional information regarding the said terrace and the response indicated that it was the intention of the applicant to omit the proposed terrace and apply for street furniture at a later date through the appropriate laid out legislative provisions for such. I consider this response to be reasonable. Given that this element, as a result of AI, is to be omitted, it is appropriate that this is expressly stipulated in the event of a grant of planning permission.

### **11.6 Appropriate Assessment**

The site is not proximate to or connected in any way with a Natura 2000 site. Given the scale of the proposed development, I do not consider it likely that it would have a significant impact on any such site in terms of its conservation objectives.

### **12.0 Conclusion**

I conclude that the principle of the proposed change of use is acceptable and I also consider that the proposed development would not have a negative impact on the visual and residential amenities of the properties in the vicinity or be contrary to the objectives of the development plan.

### **Recommendation**

Having regard to the documentation on file, the grounds of appeal, a site inspection and the assessment carried out above, I recommend that permission be granted for the proposed development for the following reasons and considerations and subject to conditions set out hereunder.

## REASONS AND CONSIDERATIONS

Having regard to proposed change of use, that is permissible on 'Z5 – City Centre' zoned land in the current Dublin City Development Plan, 2011-2017 it is considered that, subject to compliance with the conditions set out below, that the proposed development would be compatible with the provisions of the Dublin City Development Plan, 2011-2017. The proposed development would, therefore, be in accordance 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 4<sup>th</sup> day of November 2015, except as may otherwise be required in order to comply with the following conditions. Where such conditions require points of detail to be agreed with the planning authority, these matters shall be the subject of written agreement and shall be implemented in accordance with the agreed particulars.

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

2. A terrace area is not permitted under this permission without prejudice to a future proposal under the relevant provisions.

**Reason:** In the interests of orderly development.

3. Prior to the commencement of development a scheme for the effective control of fumes and odours generated in the premises shall be submitted to the planning authority for written approval.

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

4. Prior to the commencement of development a revised ground floor site layout shall be submitted to the planning authority for written approval demarcating an area for the storage of waste.

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

5. No awnings, canopies, roller shutters or additional external lighting shall be erected or displayed on the premises or within the curtilage of the site without a prior grant of planning permission.

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

6. No music speakers or sound amplification of any kind will be placed on the external walls or roof.

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

7. Notwithstanding the provisions of the Planning and Development Regulations 2001, or any statutory provision amending or replacing them, no advertisement signs (including any signs installed to be visible through the windows), advertisement structures, banners, canopies, flags, or other projecting elements shall be displayed or erected on the building or within the curtilage of the site, or attached to the glazing unless authorised by a further grant of planning permission.

**Reason:** To protect the visual amenities of the area.

8. Prior to the commencement of development the developer shall submit details regarding ventilation systems, ducting and route of pipework to discharge point for written agreement with the planning authority.

**Reason:** In order to safeguard the residential amenities of property in the vicinity.

9. Site development and building works shall be carried out only between the hours of 0700 to 1800 Mondays to Fridays inclusive, between 0800 to 1400 on Saturdays and not at all on Sundays and public holidays. Deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the planning authority.

**Reason:** In order to safeguard the residential amenities of property in the vicinity.

10. 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; measures to protect the structural stability of boundary walls; measures to prevent spillage on the public road network; noise management measures; and, off-site disposal of construction/demolition waste.

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

11. (a) During the construction phase, the proposed development shall comply with British Standard 5228 'Noise Control on Construction and open sites Part 1. Code of practice for basic information and procedures for noise control'
  - (b) Noise levels from the proposed development shall not be so loud, so continuous, so repeated, of such duration or pitch or occurring at such times to give reasonable cause for annoyance to a person in any premises in the neighbourhood or to a person lawfully using any public place. In particular the rated noise levels from the proposed development shall not constitute reasonable grounds for complaint as provided for in B.S. 4142 method for rating industrial noise affecting mixed residential and industrial areas.
  - (c) Before the use hereby permitted commences, a noise attenuation scheme shall be fully implemented as per Noise Report submitted on the 8<sup>th</sup> October 2015. Prior to first use of the development, the planning authority shall be notified and a noise trial

test shall be carried out under appropriate supervision and results/details of same shall be agreed the planning authority.

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

12. Water supply and drainage arrangements, including the attenuation and 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.

13. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000. 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. Details of the application of the terms of the Scheme 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 the proper application of the terms of the Scheme.

**Reason:** It is a requirement of the Planning and Development Act 2000 that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

14. The developer shall pay to the planning authority a financial contribution 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. 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 that a condition requiring a contribution in accordance with the Supplementary Development Contribution Scheme made under section 49 of the Act be

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Aisling Dineen  
Planning Inspector  
26<sup>th</sup>

February 2016.