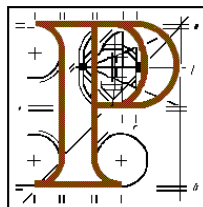


An Bord Pleanála



Inspectors Report

Development: Change of use of existing first floor level flat roof to landscaped roof garden and sun terrace, bar, servery and all associated works at Gibneys Public House, 5,6 & 7 New Street Malahide, Co. Dublin

Planning Application

Planning Authority: Fingal County Council
Planning Authority Reg. Ref. F15A/0148
Applicant: J.J. Gibney Ltd.
Type of Application: Permission
Planning Authority Decision: Grant

Planning Appeal

Appellant(s): J.J. Gibney Ltd
The Townyard House Management Company

Observers: Nuala Burke

Type of Appeal: First and Third Party

Date of Site Inspection: 05/08/2016

Inspector: Gillian Kane

1.0.0 SITE LOCATION AND DESCRIPTION

- 1.0.1 The subject site refers to three 2 storey buildings within a terrace of similar buildings located on the eastern side of New Street, in the north Dublin suburb of Malahide. The three buildings are in use as a public house and off-licence with residential use in the southern most building. New Street extends from the centre of Malahide Village (the Diamond) northwards towards Strand Road sloping gently from a high at the Diamond to the lower lying beachfront at the northern end of the street. New Street comprises a mix of cafes, restaurants, public houses, residential dwellings and newly constructed apartment blocks with retail at ground level, at the northern end.
- 1.0.2 The public house 'Gibney's' has been extended to the rear and side, resulting in a single storey building covering the rear of the overall site with two open area sections – one between the residential dwelling and the pub, with access directly off New Street and an external stair leading to a roofed area over the public house. The second open air area is also accessed directly off New Street and leads to an open-air courtyard that is in use as a beer garden and provides an alternative access to the Sport Bar to the rear of the site. To the rear of the site, along the eastern boundary wall a two storey stone faced 'store' building houses a single storey Sports Bar that is accessed via the main pub and also from the beer garden. An access gate along the eastern boundary of the subject site leads to a backland area that accommodates outbuildings of the subject site, car parking for the buildings facing New Street and no.s 1-3 Ross Cottages, a terrace of three single storey cottages. A laneway to the north of the subject site, also provides access to this area. Further north of the Ross Cottages is the Townyard House apartment development with retail at ground level.
- 1.0.3 The first floor flat roof area of the public area is accessed via two external staircases from the ground floor and also from the first floor of the public house and the associated residential dwelling. The first floor area provides informal storage, a fenced off area of open space outside the pub kitchen and a fenced off area accommodating ventilation and other service plant.
- 1.0.4 To the east of the south, off Townyard Lane is a two storey retail store with roof level car parking. A wall varying between 1.5 and 2m in height runs along the boundary between the two sites.

1.05 Photographs and maps in Appendix 1 serve to describe the site and location in further detail.

2.0.0 PROPOSED DEVELOPMENT

2.0.1 Permission was sought for the following:

- a change of use of the existing first floor flat roof to a landscaped roof garden and sun terrace (214sq.m.) with a dispense bar of 31sq.m. and servery,
 - perimeter screening along northern and southern elevations,
 - raised seating area at southern boundary with fixed awning,
 - retractable awning along eastern boundary,
 - 1.0m wide access stairs from existing side entrance,
 - 8-person lift from ground floor courtyard to first floor,
 - increase in eaves height of existing store building in the north-east corner of the courtyard and change of use of first floor level room (31sq.m.) from general storage to dispense bar and disabled / staff toilet,
 - alterations to rear of no. 5/6 New Street to form servery with access door from existing kitchen
 - lean-to canopy roof with slate finish along northern boundary wall of ground floor courtyard
- all on a site of 0.0245ha.

2.0.2 The application was accompanied by

- Environmental Noise Impact Assessment
- Flood Risk Assessment
- Letter of consent to the making of the planning application,
- Cover letter including planning history

2.0.3 Five objections to the proposed development were submitted to the Council.

2.1.0 Reports on File following submission of application

2.1.1 **Water Services Section:** No objection subject to two standard conditions.

2.1.2 **Irish Water:** No objection

2.1.3 **Conservation Office:** No substantial architectural conservation issues as no changes are proposed to the front elevation, no signage indicated on the drawings and any potential views from obtuse angles along New Street should have minimal visual impact. No particular comments or requirements.

- 2.1.4 **Transportation Planning:** No objection subject to condition requiring payment of financial contribution of €30,000 as per section 48(2)(c) of the Planning and Development Acts.
- 2.1.5 **Heritage Officer:** Does not require a full AA as due to the nature and location of the proposed development it will not have a significant effect on any Natura 2000 site.
- 2.1.6 **Environmental Health:** Acceptable subject to 10 no. conditions.
- 2.1.7 **Planning Report:** Proposal is acceptable in principle: proposed terrace will not be unduly obtrusive, no substantial architectural conservation issues, front elevation of proposed new level to store building is designed to match existing but proposed dormer windows should be omitted. Planning Authority question the need for a 1.5m high lean-to roof on top of the 4m high northern boundary wall. Planning Authority consider that the removal of the raised seating area would mitigate noise levels from proposed development. 6 no. car spaces required due to town centre location. Deficit to be addressed by financial contribution. Further information request recommended.

2.2.0 **Request for Further Information**

- 2.2.1 On the 29th May 2015, the applicant was requested to provide the following items of further information:
1. up to date Noise Impact Assessment
 2. boundary planting details
 3. further proposals for northern boundary wall as proposed 1.5m high pitched roof is considered visually obtrusive
 4. omission of proposed dormer windows to new level in store building and clarification of proposed use of new level
 5. detailed Noise Mitigation Plan, with 13 no. specific conditions as per report of EHO.

- 2.2.2 The Applicant requested an extension of time to respond to the FI request. This was granted to 04 March 2016.

2.3.0 **Response to FI request**

- 2.3.1 On the 3rd March 2016, the applicant responded to the FI request, submitted an up-to-date Noise Impact Assessment and a proposed landscaping plan. In relation to the request to omit the raised seating area, the applicant states that it is raised by only 450mm and will have no appreciable impact on noise levels. The applicant agrees that the proposed dormer windows can be omitted and replaced with conservation grade rooflights. Other items in the request are addressed in the noise impact assessment.

2.4.0 Reports on File following submission of FI

2.4.1 **EHO:** Acceptable subject to condition

2.4.2 **Parks Planning:** Proposed landscape scheme is acceptable in principle. Full details of management company to be submitted to Planning Authority.

2.4.3 **Planning Report:** Given results of noise survey and lack of objection from EHO, Planning Authority consider proposal reasonable. However, in light of objective UD07 which seeks to protect residential amenity, temporary permission of 3 no. years recommended and omission of dispense bar and servery. Noise monitoring should be conditioned. Recommendation to grant subject to conditions.

3.0.0 PLANNING AUTHORITY DECISION

3.0.1 By order dated 30/03/16 a notification of decision to **GRANT** permission subject to 13 no. conditions. Conditions of note are as follows:

2. The proposed development of a landscaped roof garden and sun terrace, excluding the dispense bar and server, shall be valid for a period of three years only, from the date of opening of the development, unless a prior grant of planning permission for its retention has been received from the Planning Authority or An Bord Pleanála on appeal. Reason: In order to enable the impact of the development to be assessed and protection of residential amenity of the area.

3. The proposed dispense bar and servery uses shall be omitted from the development. The proposed dormer elements to the store building shall be replaced with rooflights. Where the increase in height of the store building by 2m is no longer required given the omission of the dispense bar, then additional noise mitigation measures shall be proposed along this boundary of the landscaped roof garden sun terrace. All proposed modifications to the design and layout of the store building shall be subject to the written agreement of the Planning Authority. The proposed lift service shall be provided as part of this development unless otherwise agreed in writing with the Planning Authority. Reason: In order to enable the impact of the proposed development to be assessed and protection of the residential amenity of the area.

4. A suitable monitoring programme shall be submitted for the written agreement of the Planning Authority incorporating an annual review undertaken by a suitably qualified acoustic engineer at the nearest noise sensitive location, which shall then be submitted to the Planning Authority. The developer shall carry out any

amendments to the development required by the Planning Authority following this annual review. Reason: In the interest of the protection of residential amenity.

6. The requirements of the EHO shall be ascertained and fully complied with, in particular

(a) no music or amplified sound shall be played in the area of the landscaped roof garden and sun terrace

(b) no broadcast medium, including television, outdoor screen, radio loudspeakers or piped music shall be installed in these areas,

(c) noise due to the normal operation of the proposed development shall not cause a noise nuisance to nearby noise sensitive locations. Reason: In the interest of noise mitigation and residential amenity of the area.

10 The landscaped roof garden and sun terrace shall not be occupied by the public outside of the following hours: (a) 11.00 to 23.00 Thursdays to Sundays inclusive. 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 protect the residential amenities of property in the vicinity.

4.0.0 PLANNING HISTORY

4.0.1 The subject site has a significant planning history. Summarised details as follows:

- 92A/1694: planning permission refused for retention of alterations and completion of modifications to shop, for use as an off-licence
- 92A/0695: planning permission granted for retention of residential extension at first floor level at rear
- 92A/1902: planning permission refused to retain concrete roof over passageway
- F95A/0794: planning permission refused to retain steel frame structure and canopy as constructed at rear
- F96A/0441: planning permission granted for retention of an as-constructed small extension
- F96A/0442: planning permission granted for retention of existing use, alterations and extension of off-licence
- F97A/0964: planning permission granted for retention of 20m mast and TV aerials
- F02A/1173: planning permission granted for single storey extension of 18.5sq.m. and alterations to ground floor level, including integration of 2 no. covered areas.

- F03A/1670: planning permission granted for two storey store to rear to accommodate boiler house and new metal staircase to first floor level
- F11A/0040: planning permission refused for change of use of existing first floor level flat roof to landscaped roof garden and sun terrace. The reason for refusal referred to the proposed scale, design and proximity to noise sensitive areas which would constitute over development of the site and would result in a substantial intensification of the existing use which would have a detrimental impact on residential amenities in close proximity and therefore would be contrary to Objective UD07.

5.0.0 NATIONAL POLICY

5.1.0 Architectural Heritage Protection: Guidelines for Planning Authorities.

5.1.1 This guidance, which is a material consideration in the determination of applications, sets out comprehensive guidance upon development in conservation areas and affecting protected structures.

5.1.2 Chapter 3 deals with Architectural Conservation Areas. Section 3.10.1 outlines the process for proposals for new development in ACA's stating: Where there is an existing mixture of styles, a high standard of contemporary design that respects the character of the area should be encouraged. The scale of new structures should be appropriate to the general scale of the area and not its biggest buildings. The palette of materials and typical details for façades and other surfaces should generally reinforce the area's character. In certain circumstances, it may be appropriate to require a written assessment of the impact of the proposed structure on the character of the area.

6.0.0 LOCAL POLICY

6.1.0 Fingal County Development Plan 2011-2017

6.1.1 The adopted development plan for the subject area and therefore for the proposed development is the Fingal County Development Plan 2011 -2017.

6.1.2 Within the 2011 development plan (**Map no. 9**), the subject site is zoned **TC – Town and District Centre**, which has the stated objective *'to protect and enhance the special physical and social character of town and district centres and to provide and / or*

improve urban facilities'. The Vision for TC zoned areas is to maintain and build on the accessibility, vitality and viability of the existing Urban Centres in the County. Develop and consolidate these Centres with an appropriate mix of commercial, recreational, cultural, leisure and residential uses, and to enhance and develop the urban fabric of these Centres in accordance with the principles of urban design, conservation and sustainable development. Retail provision will be in accordance with the County Retail Strategy, enhance and develop the existing urban fabric, emphasise urban conservation, and ensure priority for public transport, pedestrians and cyclists while minimising the impact of private car based traffic.

- 6.1.3 Public house use is permitted in principle in TC's zones.
- 6.1.4 One of the strategic policies of the development plan (**section 1.3**) is to consolidate the development and protect the unique identities of the settlements of Malahide and other named urban settlements. The County's settlement strategy (**section 1.6**) identifies Malahide as a 'moderate sustainable growth town'. This accords with the designation of Malahide in the Regional Planning Guidelines. With regard to Urban development, the following policies are of note:
- **Objective UC02:** Maintain the future viability of the existing major towns in the County and develop them with an appropriate mix of commercial, recreational, civic, cultural, leisure and residential uses.
 - **Objective UC10:** Produce Urban Centre Strategies for Malahide, Sutton, Baldoyle and Skerries, and other urban centres where considered necessary.
- 6.1.5 The **development strategy** for Malahide is to: "promote the planned and sustainable consolidation of the existing urban form and retention of amenities. The need to upgrade and support the development of the core as a town centre will be balanced with the need to conserve its appearance as an attractive, historic village settlement and to retain the existing amenities of the area". Policies and objectives specific to the development of Malahide and of relevance to the subject proposal include:
- **Objective MALAHIDE 3** Retain the existing centre with its mixed use and varied architectural character as the heart and focal point of Malahide.
 - **Objective MALAHIDE 4** Develop the town as an important centre providing services both for the residential population and for tourists.

- **Objective MALAHIDE 5** Facilitate and encourage the provision of a broader base of retail and commercial development in Malahide in order to enhance its importance as a main centre in the County.
- **Objective MALAHIDE 6** Prepare an Urban Centre Strategy for the core of Malahide, to include urban design guidelines.

6.1.6 Policies and objectives of note and relevance to the subject proposal include:

Objective UD07 Ensure all applications for new or extensions of existing uses such as hot food takeaways, public houses and other licensed premises, nightclubs and amusement arcades protect residential and visual amenity. Prohibit an over predominance of these uses in urban areas.

Objective NP01 Require all developments to be designed and operated in a manner that will minimise and contain noise levels. Where appropriate, the Council will apply conditions on new developments/uses that may restrict noise emissions and hours of operation such that the development does not cause any significant increase in the background noise level of nearby existing noise sensitive property. Noise sensitive developments in noisy areas should incorporate measures to reduce the exposure to acceptable levels.

6.1.7 The subject site is located in the Malahide Historic core ACA. The **statement of character for the ACA** (prepared under the 2005 - 2011 development plan) refers to the location of New Street within the ACA and the historical growth of Malahide. The SoC states that the town centre still retains its functional independence and contains a variety of shops and services characteristic of a prosperous town with specialist retailers including boutiques, grocers, butchers, newsagents, pharmacies, hairdressers, etc. alongside a medium size supermarket, bank, cafés, restaurants, post office, churches, public library and Garda station, all contributing to the vitality of the town. A number of houses retain their original residential use in the town centre and there are several apartments and business premises located above the ground floor retail units. Regarding building types and materials, section 6.1.3 states that the majority of the buildings within the ACA were constructed between the late 18th century and late 19th century. They are typically rendered with slate pitched roofs and this homogeneity of materials is a distinctive attribute of Malahide. New Street is described as accommodating modest terraced two and three bay, two-storey 19th century houses. Section 7.0 of the

statement notes that the majority of the houses in the historic core are representative of the typical architecture of 18th and 19th century Irish towns and their value lies in their contextual grouping and the survival of early detailing.

6.1.8 In relation to the proposed development section 8.1.6 states that Canopies, awnings, enclosing ropes, canvas windbreaks, newspaper receptacles, vending machines, etc. can incrementally damage the special character of an ACA, and can only be accepted to a limited degree. Where canopies or awnings are deemed acceptable in the ACA, they should not be made of plastic but of heavy-duty cotton material with painted metal or timber hardware. Planning permission is required for external vending machines, ATMs, newspaper receptacles, storage bays, seating etc. Commercial premises should limit the clutter of temporary external retail furniture, such as external heaters, bins, menu-boards, etc. Such fittings are only acceptable where their design complements or enhances the character of the area. The subject site is identified as a series of “positive buildings” on the annotated map of the historic core (appended).

6.1.9 Chapter 4 and Chapter 7 provide detailed site development standards.

7.0.0 GROUNDS OF APPEAL

7.1.0 First Party Appeal

A first party appeal has been lodged by an Agent on behalf of the first party J.J. Gibney Ltd. The following conditions are appealed:

7.1.1 Condition no. 2

The proposed development of a landscaped roof garden and sun terrace, excluding the dispense bar and server, shall be valid for a period of three years only, from the date of opening of the development, unless a prior grant of planning permission for its retention has been received from the Planning Authority or An Bord Pleanála on appeal. Reason: In order to enable the impact of the development to be assessed and protection of residential amenity of the area.

The appellant states that the proposed development is intended to provide a quality outdoor dining experience which requires a significant level of investment. The appellant submits that the three year period is unduly restrictive given that all issues raised during the planning process were resolved. The appellant notes that the

Fingal County Council EHO has powers of enforcement to deal with all noise related matters.

7.1.2 Condition no. 3

The proposed dispense bar and servery uses shall be omitted from the development. The proposed dormer elements to the store building shall be replaced with rooflights. Where the increase in height of the store building by 2m is no longer required given the omission of the dispense bar, then additional noise mitigation measures shall be proposed along this boundary of the landscaped roof garden sun terrace. All proposed modifications to the design and layout of the store building shall be subject to the written agreement of the Planning Authority. The proposed lift service shall be provided as part of this development unless otherwise agreed in writing with the Planning Authority. Reason: In order to enable the impact of the proposed development to be assessed and protection of the residential amenity of the area.

The appellant states that the level of light and sunlight at first floor level is superior to that available at ground floor level for large parts of the day. The proposed development will meet demand for quality outdoor surroundings within the village. The appellant states that the increase in height of the store was to provide the proposed dispense bar, the location of which was suggested by the Council. The increase in height aids noise mitigation and facilitates the provision of disabled toilet facilities. It is submitted that the omission of the dispense bar will undermine the economic viability of the proposal.

7.1.3 Condition no. 4

A suitable monitoring programme shall be submitted for the written agreement of the Planning Authority incorporating an annual review undertaken by a suitably qualified acoustic engineer at the nearest noise sensitive location, which shall then be submitted to the Planning Authority. The developer shall carry out any amendments to the development required by the Planning Authority following this annual review. Reason: In the interest of the protection of residential amenity.

It is submitted that condition no. 4 places an unfair financial burden on the applicant. Other similar developments have not attracted such a condition. The appellant notes that the Fingal County Council EHO has powers of enforcement to deal with all noise related matters.

7.1.4 **Condition no. 6**

The requirements of the EHO shall be ascertained and fully complied with, in particular

(a) no music or amplified sound shall be played in the area of the landscaped roof garden and sun terrace

(b) no broadcast medium, including television, outdoor screen, radio loudspeakers or piped music shall be installed in these areas,

(c) noise due to the normal operation of the proposed development shall not cause a noise nuisance to nearby noise sensitive locations. Reason: In the interest of noise mitigation and residential amenity of the area.

The applicant has not sought permission to use the roof garden as a music venue but the inability to erect a plasma TV screen to view major sporting events places the premises at a disadvantage. Similar establishments in the area have no such restrictions. Sporting events are typically broadcast in afternoon / early evening.

7.1.5 **Condition no. 10**

10 The landscaped roof garden and sun terrace shall not be occupied by the public outside of the following hours: (a) 11.00 to 23.00 Thursdays to Sundays inclusive. 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 protect the residential amenities of property in the vicinity.

The applicants are experienced publicans with no history of unruly behaviour on the premises. The subject roof garden and sun terrace are proposed to open during normal trading hours: Mon-thurs 10.30 to 23.30, Fri-Sat 10.30 to 00.30, Sunday 12.00 to 23.00 with 30 mins. 'drinking-up' time after closing each day. The proposed sun terrace and roof garden are designed for a seating layout of 120 no. persons. The climate will provide natural limitations on use of the proposed development, therefore the conditioned hours are unduly restrictive. Similar establishments do not have such onerous conditions.

7.1.6 The Board is requested to uphold the appeal against the conditions.

7.2.0 Third Party Appeal

7.2.1 A third Party appeal has been lodged by an agent on behalf of the Townyard House Management Company. The grounds of the appeal can be summarised as follows:

- It is submitted that very little has changed from the previously refused application for a roof garden and sun terrace, that the measures to protect the appellants residential amenity are inadequate and that the proposed development is a significant intensification of use.
- It is submitted that the intensification of use moves from the front / public part of the bar to the rear / private part of the site. Given that the rear is populated with residential properties, the proposed 'bad neighbour' use is contrary to the development plan and the proper planning and sustainable development of the area.
- The preparation of the noise survey in February does not reflect the true nature of the proposed development in spring, summer and autumn. It is submitted that the proposed measures to protect the residential amenities of the appellant from further noise and nuisance are inadequate. The proposed large outdoor bar at first floor level will be an intensification of use as there is a large outdoor bar at ground floor level.
- It is submitted that the Board is precluded from considering the appeal as the planning application is deficient in the following ways:
 - The previous planning application stated the site area to be 0.1255ha and the proposed development to be 1381sq.m. The current planning application states the site area to be 0.03ha and the proposed development to be 305sq.m. The fee paid is incorrect as the proposed development is class 4, not class 13.
 - The public notices are misleading as they describe the proposed open air beer garden as a "landscaped roof garden and sun terrace"
 - The site notice contains incorrect hours of opening for the Planning Authority
 - The planning application form does not refer to existing and proposed floor areas
- The apartments at Townyard House are 21m from the subject site. All 17 no. apartments in the development overlook the proposed development.
- The proposed development of 212sq.m. has the capacity to accommodate 424 no. persons and therefore will generate

significant noise nuisance that cannot be mitigated with screening. To allow a further increase in noise over that generated by the unauthorised video screen and outdoor beer garden is unacceptable. This was accepted by the Planning Authority when they refused permission for the same development under F11A/0040.

- 103 no. car parking spaces are required, including 16 no. spaces for the proposed development. No spaces are provided or proposed on site. The proposed development is an unacceptable intensification of commercial activity that will create a significant traffic increase. The area is already congested as car parking is deficient. The proposed development will be seriously injurious to the area.
- The existing public house with a floor area of 1381sq.m. has a very large footprint in a low rise, small block plan urban area.
- The proposed 'bad neighbour' use has not considered the Pareto principle of internalising externalities. It is submitted that the proposed development in a transitional zone must give precedence to the more environmentally sensitive zone.
- It is submitted that the proposed development fails to comply with the development plan objectives for Malahide (Objective Malahide 3,4,5,6 and 8) and objectives UD04, UD05 and UD07. The proposed development is in an inappropriate location and represents a gross intensification of use. The intent of the development plan is that commercial developments should have regard to the amenities of adjoining residential properties. The proposed development is a material contravention of the development plan.
- It is submitted that a temporary permission is not the correct way to address the objections to the proposal, given the large financial investment required and the difficulties in enforcement conditions. The Board is referred to the guidance of the Development Management Guidelines on temporary permissions. It is submitted that due to the intensification of uses on the subject site and the clear negative impacts on surrounding uses, a temporary permission is not applicable and permission should have been refused.
- The Board is requested to refuse permission on the grounds that the proposed development is in a transitional zone and that the proposed development would seriously injure neighbouring residential properties.

8.0.0 OBSERVATIONS

8.1.0 Nuala Burke, 22 Townyard House, The Green, Malahide

8.1.1 The grounds of the observation can be summarised as follows:

- Notwithstanding the proposed mitigation measures, the residential amenity of nearby properties will be greatly affected by noise. The proposed development will add to the nuisance.
- A balance should be sought between the people living in the centre of the village and the adjoining commercial uses.
- The dates that the sounds assessment was undertaken are not reflective of the noise that will be generated by the proposed development during the summer months.
- The noise impact assessment refers to the unlikelihood of the worst case scenario occurring. It is submitted that with outdoor heaters and a rain canopy, outdoor spaces are often the preferred location.
- It is estimated that the proposed development will generate noise levels of 94dBA. The application refers to 52-58dBA noise levels at source and does not take account of the additional noise levels from the proposed development.
- At a distance of 65/70m from the proposed development, a sound level of 57dBA can be expected. This level of noise would not allow for an open window.
- None of the proposed noise mitigation measures address the core issue of increased noise that will be generated by the proposed development.
- The Board is requested to refuse permission.

9.0.0 RESPONSES

9.1.0 Planning Authority Response to the Appeal

9.1.1 The response of the Planning Authority can be summarised as follows:

- The application was assessed against the policies and objectives of the current development plan and existing government policy and guidelines.
- The Planning Authority remains of the view that the conditions attached to the decision are reasonable and necessary in the interest of protecting residential amenity in accordance with Objective UD07.
- The Planning Authority consider a temporary permission appropriate in order to allow the impact on the immediate environs to be reviewed.

- In the interests of protecting residential amenity, the Planning Authority consider it prudent to omit the dispense bar and servery for food and allow seating for 104 no. A temporary permission for three years and a noise monitoring programme will allow for an evidenced based approach to its continued use and potential intensification of use. The omission of all broadcast media and the limitations on opening hours are considered appropriate in the interest of noise mitigation and the protection of residential amenity.

9.2.0 First Party Response to the Third Part Appeal

9.2.1 The grounds of the first party response to the third party appeal can be summarised as follows:

- Townyard House apartments are 70m from the subject site, not 21m as stated by the appellant.
- The landscaped roof garden and sun terrace have been designed on the basis of 120 no. seated persons. Standing persons are not normally a feature of dining areas and so should not be taken into account.
- The noise impact assessment concludes that the proposed design will adequately control noise emissions. The wider area, including Ross Cottages has a large number of commercial premises including take-aways, commercial kitchens, restaurants and other licensed premises advertising regular live music. Predictions show that the proposed design will give rise to noise levels that are lower than the existing premises on a worst case scenario at the nearest noise sensitive receptor. The NIA shows that there will not be any appreciable increase in existing residual noise at the two locations surveyed.
- Gibneys public house has never had an issue with unruly behaviour and has never sought to develop a late licence. The temporary video screen is not part of this application.
- It is stated that the previous application was not for an intensification of the public bar use as stated by the appellant.
- No observation or appeal has been submitted by a resident of Ross Cottages, New Street or Fishermans Green.
- Pre-planning meetings and meetings held during the application were supportive of the proposed development. Suggestions made by the Council staff were incorporated into the proposed development.
- The subject site is located in the centre of the village and is well served by bus, taxi and dart. The clientele typically is local. As the proposed development is not an intensification of use, it will

not generate demand for additional car parking facilities. The net usable space of the proposed development is 189sq.m. excluding circulation areas and escape routes. Applying a 40% reduction for village centre location, the requirement for car parking is 7 no. spaces. In lieu of additional spaces a financial contribution is proposed. No objection to the proposal was raised by the Transportation dept.

- The pre '63 outdoor courtyard in Gibneys was 400sq.m. at the time the Townyard House apartments were built in 1990. The proposed first floor roof garden and roof terrace and the reduced size ground floor courtyard will accommodate fewer people than the original ground floor courtyard.
- The granting of permission for an external beer garden and smoking area at the Cock Tavern, Main Street Swords sets a precedent for development of this nature. The proposed development will improve facilities in Malahide village.
- Policy HP10 seeks to ensure that development in an ACA is not detrimental to the character of the ACA. There will be no visual impact from the proposed development, being to the rear of the two –storey terrace. A screen door at the top of the stairs will protect views from New Street. The increase in eaves height of the rear store building will block the visually unappealing concrete parapet wall of the supermarket.
- The proposed development complies with Objective Malahide 3, 4, 5 and 8.
- A number of the conditions attached to the decision of the Council place an undue burden on the Applicant.
- The Board is requested to reject the third party appeal.

9.3.0 Third Party Response to the First Party Appeal

9.3.1 The grounds of the third party response to the first party appeal can be summarised as follows:

- The conditions of the Council are an attempt to address the concerns of the third parties.
- A temporary condition is not an appropriate means to address the appellants concerns. The Board is referred to the guidance of the Development Management Guidelines on temporary permissions. It is submitted that due to the intensification of uses on the subject site and the clear negative impacts on surrounding uses, a temporary permission is not applicable and permission should have been refused.

- The applicants request to have condition no. 3 removed fails to understand the appellants concerns. Financial considerations should not be taken into account by the Board.
- Condition no. 4 is essential given the inadequacy of the submitted noise survey.
- Regarding the applicants request for the removal of condition no. 6, it is submitted that the applicants are not aware of what is required to protect residential amenity.
- It is submitted that the applicant maintain that the proposed development is a restaurant but in their request for the removal of condition no. 10, they request unrestricted opening hours for drinking customers.
- The subject public house has extended incrementally over the last twenty years to the extent that it is no longer a local small town centre facility. The board is requested to refuse permission.

10.0.0 ASSESSMENT

10.0.1 On reading of all documentation submitted with the appeal, I consider the issues to be:

- Principle of the Proposed Development
- Noise Impact Assessment
- Condition no. 2 and Condition no. 4
- Condition no. 3
- Condition no. 6
- Condition no. 10
- Other
- Appropriate Assessment

10.1.0 Principle of the Proposed Development

10.1.1 The subject site is located in the centre of Malahide village, in an area zoned TC- town and district centre. As noted in section 6 above, public house use is permitted in principle in such zones.

10.1.2 On inspection it appears that the village is operating very successfully, with little vacancy and a relatively large residential population co-existing with the varied commercial activities. The dual function of the village is recognised in the development plan with objectives seeking to protect and enhance both roles, namely Objective UD07, and Objectives Malahide3, Malahide4 and Malahide5 of the development plan. Further, the vision for TC zones is to 'develop and consolidate these Centres with an appropriate mix of commercial, recreational, cultural, leisure and

residential uses, and to enhance and develop the urban fabric of these Centres in accordance with the principles of urban design, conservation and sustainable development'. I am satisfied that the proposed development is in accordance with the zoning objective and the vision for the area and is in keeping with the pattern of development in the area. The principle of the proposed development is acceptable.

10.2.0 Noise Impact Assessment

10.2.1 As part of the request for further information, the applicant submitted a Noise Impact Assessment for the proposed development. The NIA identifies all noise sensitive locations within the immediate area (figure 7) and also all plant noise sources in the vicinity (figure 8). The NIA states that a noise survey was carried out on the 6th and 7th of February 2016 at locations A (Ross Cottages) and B (Townyard Apts) between the hours 14.00 to 02.00. The report identifies a number of sources of live music and plant noise in close proximity to both location A and B. The report details the proposed mitigation measures for the northern boundary wall and presents models of the noise levels based on increasing the wall by 1.5m and the proposed 1.5m roof canopy in addition to a 2m height increase in the store building. The NIA states that the second option (roof canopy plus increased height store) will be more effective at controlling noise from the proposed development. Table 7 of the NIA shows that the proposed mitigation measures result in a decrease in noise levels of 4.1dBA at location A and 5.6dBA at location B compared to a worst case scenario at the existing outdoor smoking area. The NIA states that these figures were arrived at based on full capacity but that seasonal changes will result in significantly lower noise impacts. The NIA notes that the proposed development requires no additional mechanical plant and that a compressor and limiting device that are controlled by management are in use for visiting musicians.

10.2.2 The appellants site, Townyard House development is located to the north and north-east of the subject site at a distance of between 50m to 55m measured from the shortest distance. Given the scale of commercial development surrounding the Townyard House development and the resulting noise that arises from late evening commercial uses, I am satisfied that a separation distance of at least 50m is sufficient to prevent any undue noise pollution at the rear elevation of the apartments in Townyard House. The urban location of the apartment block is such that a degree of late afternoon / evening noise is to be expected.

10.3.0 Condition no. 2 and condition no. 4

10.3.1 The first party appellant requests the Board to remove condition no 2 which states: *The proposed development of a landscaped roof garden and sun terrace, excluding the dispense bar and server, shall be valid for a period of three years only, from the date of opening of the development, unless a prior grant of planning permission for its retention has been received from the Planning Authority or An Bord Pleanála on appeal. Reason: In order to enable the impact of the development to be assessed and protection of residential amenity of the area.* In requesting the Board to remove condition no.2 the first party appellant submits that the three year period is unduly restrictive given that all issues raised during the planning process were resolved. Further the appellant notes that the Fingal County Council EHO has powers of enforcement to deal with all noise related matters.

10.3.2 The first party has also requested the Board to remove condition no. 4. Condition no. 4 states: *A suitable monitoring programme shall be submitted for the written agreement of the Planning Authority incorporating an annual review undertaken by a suitably qualified acoustic engineer at the nearest noise sensitive location, which shall then be submitted to the Planning Authority. The developer shall carry out any amendments to the development required by the Planning Authority following this annual review. Reason: In the interest of the protection of residential amenity.* In a similar argument to above, the first party appellant states that condition no. 4 places an unfair financial burden on the applicant. Other similar developments have not attracted such a condition. The appellant notes that the Fingal County Council EHO has powers of enforcement to deal with all noise related matters.

10.3.3 Section 7.5 of the development management guidelines refers to temporary permissions and states that three main factors should be taken into account, noting that the grant of a temporary permission is rarely justified where a development conforms with the provisions of the development plan. The second criteria refers to the permanency of a structure, which in this instance is not wholly germane as the permission largely refers to a change of use. The third factor the guidelines recommend be considered, is that regard must be had to material considerations that are not limited or made different by a decision to make the permission a temporary one. The reason for a temporary permission can never be that a time limit is necessary because of the adverse effect of the development on the amenities of the area. As concluded in section 10.1 above,

the proposed development is in accordance with the development plan for the area and is acceptable in principle.

- 10.3.4 In cases of possible 'bad neighbour' uses, as submitted by the third party appellant, the guidelines state that it may sometimes be appropriate to grant a temporary permission in order to enable the impact of the development to be assessed, provided that such a permission would be reasonable having regard to the expenditure necessary to carry out the development. The Planning Authority have indicated that they sought to impose a temporary permission for that very reason: in order to assess the impact of the proposed development on the more environmentally sensitive residential neighbours of the subject development.
- 10.3.5 There are two options for further / ongoing assessment of the proposed development open to the Planning Authority. They can seek to limit the life of the proposed development and re-assess the impact of same when the development seeks permission again or they can seek to monitor the impact of the proposed development on an on-going basis by way annual noise monitoring. As noted by the first party appellant, the environmental health office of the Planning Authority has a role in enforcing noise limits but as noted by the third party appellant, such a route is frequently difficult to navigate. I am minded to partially agree with the first party appellant, namely that the imposition of both options of noise monitoring is unduly onerous. Given the role of the EHO in aiding the monitoring of noise levels and compliance with imposed limits, it is reasonable to attach only one option for ongoing assessment. Noting the requirement of the development management guidelines to take expenditure into account and noting the submission of the first party that the expenditure required to undertake the proposed development is considerable and further noting that the principle of the proposed development is acceptable, it is considered reasonable to choose the route on ongoing yearly noise monitoring. This will also allow the Planning Authority to react more quickly should the impacts of the proposed development not accord with the predictions of the NIA.
- 10.3.6 Should the Board decide to grant permission, it is recommended that a temporary life should be not attached to the decision but that the developer be required to implement a suitable noise monitoring programme with annual reviews to be agreed with the Planning Authority.

10.4.0 **Condition no. 3**

The proposed dispense bar and servery uses shall be omitted from the development. The proposed dormer elements to the store building shall be replaced with rooflights. Where the increase in height of the store building by 2m is no longer required given the omission of the dispense bar, then additional noise mitigation measures shall be proposed along this boundary of the landscaped roof garden sun terrace. All proposed modifications to the design and layout of the store building shall be subject to the written agreement of the Planning Authority. The proposed lift service shall be provided as part of this development unless otherwise agreed in writing with the Planning Authority. Reason: In order to enable the impact of the proposed development to be assessed and protection of the residential amenity of the area.

10.4.2 In requesting the omission of condition no. 3, the appellant states that that the level of light and sunlight at first floor level is superior to that available at ground floor level for large parts of the day and that that the omission of the dispense bar will undermine the economic viability of the proposal. I note that section 7.5 of the NIA states that the noise modelling undertaken for the survey considered the seating area raised by 460mm at the southern end of the first floor roof garden and found no appreciable impact on the noise climate at the two identified noise sensitive receptors. The omission of the dispense bar and food servery is likely to reduce the numbers using the sun terrace and perhaps the length of time they stay outside but as shown in the NIA, its omission will not affect the impact of noise levels at the Townyard House or at Ross Cottages. Noting that the increase in height to facilitate the dispense bar is a noise mitigation measure, I see no reason why the bar should be omitted. Should the Board decide to grant permission, it is recommended that the dispense bar and server be included in the proposal.

10.4.3 The first party appellant has indicated a willingness to omit the proposed dormer windows on the southern elevation of the increased height store bar and replace them with conservation grade rooflights. This is considered reasonable and should the Board decide to grant permission, can be achieved by way of condition.

10.5.0 **Condition no. 6**

10.5.1 The first party has appealed the imposition of condition no. 6, stating that the inability to erect a plasma TV screen to view major sporting events places the premises at a disadvantage. The applicant notes that similar establishments in the area have no such restrictions. Sporting events are typically broadcast in afternoon / early evening. Condition no. 6 states as follows:

The requirements of the EHO shall be ascertained and fully complied with, in particular

(a) no music or amplified sound shall be played in the area of the landscaped roof garden and sun terrace

(b) no broadcast medium, including television, outdoor screen, radio loudspeakers or piped music shall be installed in these areas,

(c) noise due to the normal operation of the proposed development shall not cause a noise nuisance to nearby noise sensitive locations. Reason: In the interest of noise mitigation and residential amenity of the area.

10.5.2 I note that the erection of a large screen at ground level is the subject of enforcement proceedings and discussion with the Council. Should the Council decide to grant permission for such a screen, it is considered that the ground floor of the premises, in the existing open air courtyard is the most suitable location for same. I note section 6.1 of the NIA that states that "it is important that no music is provided on the roof garden / sun terrace, particularly in late evenings, since music in the open air, by both its character and level would be very likely to be very noticeable at the residential properties." I concur with these findings and see no reason for a screen at first floor level, notwithstanding the decision of the Council regarding the screen at ground level. Likewise, there is no compelling reason for amplified music at first floor level when the NIA for the proposed development has specifically recommended against same. I am satisfied that should the Board decide to grant permission, a condition prohibiting the use of screens, amplified or piped music at first floor level should be attached.

10.6.0 **Condition no. 10**

10.6.1 The first party appellant has requested the Board to remove condition no 10 which seeks to restrict the hours of operation of the proposed first floor sun terrace and landscaped roof garden as follows: *The landscaped roof garden and sun terrace shall not be occupied by the public outside of the following hours: (a) 11.00 to 23.00 Thursdays to Sundays inclusive. 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 protect the residential amenities of property in the vicinity. In their appeal, the applicants request that the roof garden and sun terrace be open at the same time as the remainder of the pub, namely: Mon-thurs 10.30 to 23.30, Fri-Sat 10.30 to 00.30, Sunday 12.00 to 23.00 with 30 minutes ‘drinking-up’ time after closing each day. The applicants state that weather conditions will naturally limit the usage of the area and that the conditioned hours are unduly restrictive.

10.6.2 The provision of a roof canopy and indoor seating area at the dispense bar will allow use of the sun terrace even during inclement weather. It must be expected that the proposed development will operate as a smoking area and as such will be in use at times when the weather is not optimal. Notwithstanding this and noting the conclusions of the NIA, I can see no reason to limit the use of the proposed development to certain days of the week. Should noise pollution arise, it would be just as objectionable on a Monday as it would be on a Thursday. The applicant has requested that the proposed sun terrace be allowed to open until 00.00 Mon to Thursday, 01.00 on Friday and Saturday and 23.30 on Sundays (including drinking up time of 30 minutes). Given that customers seating at the first floor will be able to purchase from the dispense bar and the ground floor bar, it is difficult to see how the premises could enforce different opening hours at ground and first floor. As noted above, the applicant should be requested to annually monitor the noise levels arising from the development. Should difficulties arise they can be resolved at that time.

10.7.0 Other

10.7.1 The third party appellant refers to the description of the development in the public notices and states that they are misleading. He states that the use of the term “landscaped roof garden and sun terrace” do not accurately describe the proposed development which he refers to as a beer garden. I note that the public notices refer to a dispense bar and server for customer use and refer to the fact that the proposed development will occur at an existing public house. I am satisfied that the description of the development in the public notices is sufficient to allow third parties to understand the nature of the proposed development in accordance with article 18(1)(d) of the Planning and Development Regulations which requires a brief description of the proposed

development. I note that 5 no. third parties submitted observations to the Council regarding the proposed development.

10.7.2 The third party appellant requests the Board to invalidate the application on the grounds that it fails to comply with the Planning and Development Regulations. The Board cannot invalidate a planning application under section 34 of the Planning and Development Acts as requested by the third party appellant.

10.7.3 The third party appellant states that the planning application form states that the site area is 0.03ha and notes that the previous planning application is 0.1255ha. I note drawing no. 01, 06, 05 and 10 submitted with the current application all refer to a site area of 0.1255ha.

10.8.0 Appropriate Assessment

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

11.0.0 RECOMMENDATION

11.0.1 I have read the submissions on file, visited the site, and have had due regard to the provisions of the Fingal County Development Plan 2011 -2017, to the provisions of the “Architectural Heritage Protection Guidelines for Planning Authorities” issued by the Department of the Environment, Heritage and Local Government in 2004, to the report of the Council’s Conservation Officer and the Council’s Environmental Health Officer, the site history and the planning history of the wider area. Having regard to the town centre zoning of the site in the current Development Plan, the established public house on the site, the pattern of development in the area and the design and scale of the proposed development, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of the area or of property in the vicinity, would not be prejudicial to public health and would, therefore, be in accordance with proper planning and sustainable development. I recommend permission be GRANTED subject to the following 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 03rd day of March 2016, 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 2 no. dormer windows proposed on the southern elevation of the store building, housing the dispense bar shall be omitted and replaced with conservation grade rooflights. Prior to the commencement of development the developer shall submit details of same to the Planning Authority, for written approval.
Reason: In the interest of protecting visual amenity in an Architectural Conservation Area.
3. No public address system, amplified music, TV's or bands shall be permitted within the first floor landscaped roof garden and sun terrace. No sound amplification shall be installed in the garden or terrace or projected into the first floor from other areas of the licence premises, nor shall any television screen, or similar, be installed therein.
Reason: To protect the amenities of adjoining properties.
4. A noise monitoring programme shall be agreed with the Planning Authority, to include an annual review undertaken by a qualified acoustic engineer at the nearest noise sensitive location, which shall be submitted to the Planning Authority. The developer shall carry out any amendments to the subject development requested by the Planning Authority subject to the review.
Reason: In the interest of protecting the amenity of the nearby residential properties.
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. Notwithstanding the provisions of the Planning and Development Regulations 2001, as amended, 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 buildings or within the curtilage of the site, unless authorised by a further grant of planning permission.

Reason: To protect the visual amenities of the area.

7. Prior to the commencement of development the developer shall pay to the Planning Authority a financial contribution in lieu of car parking, to be agreed in writing with the Planning Authority.

Reason: In the interest of protecting the village centre location of the subject development.

8. 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.

Gillian Kane
Planning Inspector
12/08/16