



An
Bord
Pleanála

Inspector's Report PL29S.247104.

Development	Change of use of ground floor and basement from retail to café/restaurant, shop fascia signage on Pearse Street and Brunswick Place regularisation of extent of basement which is larger than permitted under P. A. Reg. Ref. 0881/03.
Location	130 Pearse Street, Dublin 2.
Planning Authority	Dublin City Council.
Planning Authority Reg. Ref.	2653/16.
Applicant	Brendan Garry, Canbe Limited.
Type of Application	Permission.
Planning Authority Decision	Grant Permission.
Type of Appeal	First Party against Condition No. 2
Appellant	Brendan Garry, Canbe Limited.
Observer	Anne Lumsden.
Date of Site Inspection	16 th November, 2016.
Inspector	Jane Dennehy.

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1.0 Site Location and Description.

- 1.1. The premises subject of the application is a ground floor unit of a four storey apartment block which was developed circa ten years ago on the former site the Scallan's public house at corner of Pearce Street and Brunswick Place. At ground floor level there is a vacant unit which the subject of the appeal and a separate entrance to the apartments above. A notice is displayed at the apartment residence indicating details of check in arrangements for the apartments. A vehicular entrance to the service yard is located on North Brunswick Place.
- 1.2. Terraced houses are located to the east side on Pearce Street. Development on Brunswick Place is primarily of a commercial or light industrial nature and there is a Lido Takeaway/restaurant at the street corner. Some of the terraced houses to the west side on Pearce Street would appear to be in a mix of uses. The Maldron Hotel and 'Winter-garden' is opposite the site along with a Centra Shop and an Apache Pizza outlet and a public house is a short distance further to the east.

2.0 The Planning Application.

- 2.1. The application lodged with the planning authority indicates proposals for change of use from retail to:
 - a café with foods and beverages for sale for consumption on or off the premises as a day time use and,
 - a pizzeria in evening/night time serving food for consumption on or off the premises and with a home delivery service.

Decision

- 2.2. By order dated, 21st July, 2016 the planning authority decided to grant permission subject to nine standard conditions. Condition No 2 excludes the proposed use as a takeaway in entirety and operation of the café after midnight. The remaining conditions are of a standard technical nature.

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2.3. The planning officer further to receipt of additional information was satisfied that permission could be granted subject to the inclusion of the requirements of Condition 2 along with the standard conditions. He noted:

- That the take away use was not permissible within areas subject to the zoning objective Z1: (residential use);
- The prior (SPAR) shop use,
- The proposed arrangements for air conditioning and waste storage,
- Confirmation that a roof terrace is located within the block,
- The willingness of the applicant to close business at the restaurant by midnight and,
- The proposed signage, which was regarded as an improvement on the former signage, subject to omission of a projecting sign.

Internal Technical Reports.

2.4. The internal reports of the Engineering Dept's Drainage Division, Transport Infrastructure Ireland, and DART Underground on file indicate no objection subject to conditions.

Third Parties

2.5. Objections were received from three residents of properties in the immediate vicinity in which concerns are raised about:

2.6. Noise and nuisance caused by the existing takeaway businesses in the vicinity and objection to further concentration of similar development in the area.

3.0 Planning History

3.1. P. A. Reg. Ref. 0881/03: This is the parent permission for the building in which the premises subject of the application is located. Permission was granted for the

demolition of a public house and for the erection of the four storey over basement building providing for some new licensed premises with access off Pearce Street and off license and eleven apartments with an access from Brunswick Place. The conditions attached include an archaeological monitoring condition and are generally of a standard nature.

- 3.2. P.A. Reg. Ref 1576/07: This application for modifications to the previously permitted development was declared Invalid.
- 3.3. P. A. Reg. Ref. 2412/16: Permission was granted for alterations to the front elevation of the building creating a new entrance and lobby in an existing window opening.

4.0 Development Plan

- 4.1. The current development plan was adopted in September 2016 and brought into effect in October, 2016 after the determination of the decision on the application by the planning authority.
- 4.2. The site is subject to the zoning objective Z1: *to protect, provide for and improve residential amenities*'. Restaurant use is 'open for consideration' and take-away use is 'not permissible'.
- 4.3. The lands on the opposite side of Pease Street are subject to the zoning objective Z4 *"to provide for and improve mixed service facilities"*.

5.0 The Appeal

- 5.1. An Appeal was received from Vincent Farry on behalf of the applicant on 17th August, 2016. The appeal is against Condition No 2 according to which take-away use is excluded from the grant of permission in entirety and there is a requirement that the restaurant be closed for business at midnight. The submission includes a detailed account and commentary on the planning background, context and the current proposal and is supplemented by photographs.
- 5.2. The appeal is solely against the exclusion of the proposed take-away use under the Condition. (It is confirmed that the applicant has no objection to the midnight closing time requirement.)

5.3. In brief, the appeal grounds can be outlined as follows:

- The condition was imposed because of the prohibition on takeaway use in Z1 zones. The planning officer did not query the ancillary nature of the proposed use even though a five item request for additional information was issued. The exclusion of an element of take away use at a location in Pearse Street eliminates a part of the target market of the proposed business, is an ancillary small scale element of the proposed business, is not necessary for the protection of residential amenity and is unwarranted. Permission has been granted for takeaway use in a residential zone by the Board under PL 243783 at St Mary's Road Ballsbridge.
- The current proposal primarily caters for sit down diners and home deliveries and catering for customers purchasing food to take away in day time and for purchase of pizzas to take away during the evening time.
- The exclusion of the take away use is inconsistent pre-existing land use (Widow Scallan Pub) and permitted replacement public house use and off license should be taken into consideration. (P. A. 881/03 refers.) The small scale take away use would be much less injurious to residential amenities.
- Change of use from a bar to a restaurant is exempt development and the former shop use (replacing the permitted bar use) would have included the sale of alcohol and entailed long opening hours. Given the other outlets including a Centra shop opposite the appeal site that operate in evening time, the omission of the takeaway use entails an unnecessary degree of control.
- Precedent: In support of the applicant's case, detailed commentaries are made and the circumstances of appeal cases and the observations of Inspectors on planning context and characteristics of the site location and environs in their reports relating to proposals for restaurant use with ancillary take away use at locations subject to the zoning objective Z1 elsewhere. (PL 241524, PL 206074, PL 239068 and 210891 refer.)
- The key test is whether the exclusion of the take away element is required to ensure consistency with the Z1 zoning objective. The takeaway element would have such a low impact on residential amenity that there would be no appreciable effect on residential amenity.

- Reference is made to *Tom Chawke Caravans Ltd v Limerick County Council* according to which a degree of flexibility is required of a planning authority in interpretation of zoning. The ancillary nature of the proposed takeaway use although reliant also on a home delivery service is involved; there is a distinction between a traditional hot food outlet and a takeaway service as identified in the inspector's report on an appeal case. (PL 223969 refers.) There is a distinction between primary and secondary uses. A small element of take away use as identified in inspector's reports has been permitted where there is apartment development on grounds of lack of impact on residential amenity. (PL 226994 and PL 223969 refer.) Nuisance is more likely to occur at outlets selling burgers and chips than items that are less manageable for on street eating such as pizzas.
- The inclusion of the condition with the requirement for omission of the take away use is not consistent with the guidance in the Development Management Guidelines, (section 28 guidance) according to which conditions must be necessary, relevant, precise and enforceable if they are to be attached.

Third Party Observers - Ann Lumsden

- 5.4. An observation was received from Ms Lumsden owner and occupant of an adjoining residential property at 129 Pearse Street, on 13th September, 2016. Photographs are included. According to Ms Lumsden;
- A measure of protection against bad neighbour developments is provide for in primarily residential areas according to s 14.4.1 of the development plan (2011-2017.) Take-away use is not permitted Z1 zones.
 - The area is well served by take away developments and the current proposal will engender anti-social activity as is already experienced in the area. An example is graffiti on the wall of the Apache Pizza premises
 - The argument that the negative impact that it is less intrusive than traffic on Pearse Street does not take into account the dramatic fall off in traffic in the evening time and at weekends.

- Ms Lumsden took a civil action against the owners of a public house in the area over noise and nuisance and Counsel for the public house tried to dilute the impact on residential amenity with a similar argument. According to the judgement city centre residents have no less entitlement to residential amenity when it comes to nuisances.
- It is not agreed that the proposed taken away is less injurious than an off license as previously permitted. As alcohol is available at low prices in supermarkets the footfall created would have been much smaller.
- If permission is given for a take away element, there is no constraint on the sale of other items such as burgers and chips and their inclusion is likely, to maintain profitability. The local Apache outlet sells burgers, chips chicken and tacos as well as pizzas.
- In spite of the other appeal cases referred to from which the applicant's agent argues gives precedent, every case is different and should be judged on local, community and residential aspect of the area. The planning officer in assessing the application rightly believed that refusal of permission for the proposed take away element within the Z1 area is self- evident.

Observations of the Planning Authority.

- 5.5. In a submission received on 25th August, 2016 the planning officer states that she fully considered the proposed day time and night time uses but applied the restriction on the take away use, having regard to the Z1 zoning to ensure that the premises could not be solely used as a takeaway.

6.0 Assessment.

- 6.1. Having reviewed the submissions made in connection with the application and appeal it has been concluded that *de novo* consideration, (that is as though the application had been made to An Bord Pleanala in the first instance) is unwarranted.

The appeal can be determined, as requested in accordance with the provisions of section 139 of the Planning and Development Act 2000 as amended.

- 6.2. The issue central to the determination of the appeal against Condition No 2 of the decision to grant permission is as to consistency of the proposed take away element with the zoning objective *to protect, provide for and improve residential amenities*. The building in which the premises is located and the adjoining residential development to the east side on Pearse Street are within an area subject to the zoning objective Z1: *to protect, provide for and improve residential amenities*. The environs which includes the hotel is characterised by a mix of uses of a commercial nature and correspondingly are within an area zoned Z4: (mixed services facilities.)
- 6.3. Although a take away business is not permissible in areas within the Z1 zone, it is agreed that careful consideration to the application of some flexibility, where warranted, should be given before fully implementing the restriction. The case for such an approach is considered to have been satisfactorily demonstrated in the appeal in which the assessments of several applications incorporating take away development which were subject to appeal are reviewed. While there is an onus to provide for the primary consideration of protection of residential amenities within an area subject to the Z1 zoning objective the lands within which the site is located are on a main city centre through route categorised as a Regional Route and are somewhat transitional, being surrounded by a mix of daytime and night time commercial uses. Furthermore, the authorised retail use of the premises which is a day and night time use is also a consideration. An expectation that the nature and extent of attainable residential amenity can match that which is characteristic in larger areas of suburban residential development would be unreasonable.
- 6.4. Bearing the foregoing in mind, it has been concluded that the exclusion of the proposed take away element from the grant of permission by condition can only be justified if it can be established that a significant diminution in residential amenity at adjoining residential properties is directly attributable to the proposed take away element.
- 6.5. The internal layout for servery and seating areas for the proposed development are indicative of a convenience food restaurant where patrons might be seated briefly at counters with seats on one side only while consuming pre-prepared food purchased

at the servery as opposed to a sit down restaurant with table and chairs and full service. It would therefore appear that a significant proportion of business could be made up of home deliveries and carry out of pre-packaged food by customers the greater proportion of the two being the home deliveries element.

- 6.6. On the other hand, the claim in the appeal that a pizza facility contrasts with a burger/fish and chips takeaway in that there is a greater likelihood that carry out pizzas would be taken away and consumed elsewhere instead of the street in the immediate vicinity of the premises is accepted. A fish/burger/chicken and chip outlet comprising the sale for consumption off the premises of hot fried foods has far greater potential for noise and nuisance, odours, littering with potential serious adverse implications for the amenities of the adjoining residential properties, not least the observer party's property at 129 Pearse Street.
- 6.7. Although no quantitative estimate as to the intensity of the take away element or as to the take away element combined with the home deliveries element can be arrived at and relied on, there is an insufficient, evidence based case to support the outright exclusion of the take away element. It is considered the sale of hot fried foods such as chicken, burgers, fish and chips are excluded from the take away element and is confined solely to pizzas and soft drinks the proposal would be acceptable. Negative impact on residential amenities of adjoining properties directly attributable to the proposed take away element would be negligible, especially when authorised home delivery component is taken into account.
- 6.8. It is recommended that the appeal be upheld and that Condition No 2 be revised to allow for the proposed take away element for pizzas and soft drinks only, up to midnight.

Appropriate Assessment.

- 6.9. Having regard to the scale and nature of the proposed development no Appropriate Assessment issues arise and it is not considered that the proposed development has a significant effect individually or in combination with other plans or projects on a European site.

7.0 Conclusion and Recommendation.

In view of the foregoing, it is recommended that the planning authority be directed to amend Condition No 2. A draft amended condition is set out overleaf.

Condition No 2.

The operation of the café and restaurant including the home deliveries and take away element shall cease and the premises shall be closed no later than midnight. Pizzas and soft drinks only may be sold on a take away basis to customers for consumption off the premises.

Reason: *In the interest of the protection of residential amenities of adjoining properties and the amenities of the area.*

Reasons and Considerations.

Having regard to the planning history, to the central city location and the provision of a home delivery element in conjunction with the proposed pizza restaurant use, it is considered that incorporation of a take away use, which is solely a pizza take away use would not be seriously injurious to the residential amenities of residential properties in the vicinity and would be in accordance with the proper planning and development of the area.

Jane Dennehy
Senior Planning Inspector,
17th November, 2016.