



An  
Bord  
Pleanála

## Inspector's Report PL10.248661.

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<b>Development</b>	Retention permission at a public house for the use of an external courtyard as a bar area as part of a public house, the erection of a canopy and doors and change of use façade of the building and all associated works.
<b>Location</b>	The Vaults, 89 Kilkenny Street, Castlecomer, Co Kilkenny.
<b>Planning Authority</b>	Kilkenny County Council.
<b>Planning Authority Reg. Ref.</b>	16/582.
<b>Applicants</b>	Richard and Monica O'Shea
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Grant of planning permission with conditions.
<b>Type of Appeal</b>	Third Party
<b>Appellant</b>	Maria Cosgrave Lyons.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	13 <sup>th</sup> September 2017.
<b>Inspector</b>	Derek Daly.

## 1.0 Site Location and Description

- 1.1. The site is located in the town of Castlecomer in County Kilkenny. The site fronts onto the eastern side of Kilkenny in the centre of the town and form part of a terrace of two storied properties where the front elevation immediately adjoins the public footpath.
- 1.2. The centre of the town is typical of many small town centres with a mix of uses but is primarily commercial and retail uses.
- 1.3. The site is currently in use as a public house and there is an archway to the south of the premises opening into an open area used as part of the licenced premises. The open area is accessible from the licenced premises and directly under the archway from the street via a double rail gateway in the archway.
- 1.4. Above the arch is an upper floor section of property which based on the documentation submitted is part of the adjoining property, 88 Kilkenny Street, to the south. This property has a food outlet on the ground floor. There are windows on the elevation of the adjoining property to the south at ground and first floor level facing onto the open area between properties 88 and 89. The windows are blocked up at ground floor level.
- 1.5. The open area which I will refer to as the courtyard is covered by a canopy type structure affording protection from the elements.
- 1.6. The site has a stated area of 0.14 hectares.

## 2.0 Proposed Development

- 2.1. The proposed development as submitted to the planning authority on the 2<sup>nd</sup> of September 2016 was for
  - The retention at a public house for the use of an external courtyard as a bar area as part of a public house,
  - The erection of a metal canopy over the courtyard and the erection of doors to the courtyard;
  - The change of use façade of the building which provides for a new double door to replace the existing railing type double gateway and

- all associated works.
- In accompanying documentation, it is indicated that the courtyard has been in use as a bar for over ten years and was used for this purpose prior to the applicants' purchase of the property in 2005.
- Existing piped services in relation water and drainage will be used.

2.2. Further information was submitted on the 20<sup>th</sup> of April 2017 which included:

- Details relating to permanently inhabited primary residences within 100 metres of the appeal site.
- The premises is a licenced premises with a 7 day licence and provides live music in the courtyard.
- Issues relating to noise and other disturbance are addressed.
- There was no door from the adjoining property accessing the courtyard.
- The issues of windows facing onto the courtyard are also addressed.
- There is no right of way through the courtyard.
- The premises has operated as a public house since the 1940s and before.
- The objections are considered to be vexatious.

## 3.0 Planning Authority Decision

### 3.1. Decision

3.1.1. The planning authority granted planning permission subject to 6 conditions.

Conditions of note;

- Condition no. 2 refers to development contributions.
- Condition no. 3 limits the hours of use of the courtyard in relation to noise and live music.
- Condition no. 4 refers to the submission of a noise management and mitigation plan.

### 3.2. Planning Reports

3.2.1. The planning report dated the 26<sup>th</sup> of October 2016 refers

- Submissions received.
- Further information was recommended in relation to a number of matters relating to impact on adjoining properties.

The planning report dated the 15<sup>th</sup> of May 2017 in relation to the further information refers to the zoning of the site and the current land use of the site.

The proposal as submitted is considered acceptable and in relation to impact on residential amenities in particular impacts on windows the proposal is considered acceptable. Restrictions on the hours of operation in relation to music are recommended. The report recommends permission.

3.2.2. Other Technical Reports

The environment report dated the 24<sup>th</sup> of October 2016 recommend the submission of further information.

The environment report dated the 9<sup>th</sup> of May 2017 indicated no objections to the development and included recommended conditions.

The road design report dated the 25<sup>th</sup> of October 2016 indicated no objections and refers to the issue of parking.

3.3. Other submissions

HSE in a submission dated the 29<sup>th</sup> September 2016 have no objections subject to conditions.

Submissions were received by the residents of the area referring to the level of noise arising from the property on the appeal site, the adjoining property in relation to the proposed development referring to issues relating to land rights, rights of way and disturbance and that the courtyard was an empty laneway and issue relating to ownership of the party wall.

## 4.0 Planning History

4.1. No relevant planning history.

## 5.0 Policy Context

### 5.1. Development Plan

- 5.1.1. The current operative plan is the Castlecomer Local Area Plan 2009 2015, extended by resolution to the 15th February 2020.
- 5.1.2. The site is zoned general business.
- 5.1.3. The building is a protected structure, RPS no C501 Davy Buggy's Pub two bay two storey dwelling/public house, and the site is also located within the Architectural Conservation Area for Castlecomer which encompasses the central core of the town.

## 6.0 The Appeal

### 6.1. Grounds of Appeal

The appellants in a submission refers to:

- The appellant in the grounds of appeal refers to three issues, trespass, access and nuisance.
- The land registry ordinance survey map submitted by the applicant is not conclusive evidence as to boundaries of the property and one must refer to the original conveyance map of 1963 which was researched by the appellant in relation to this matter.
- In relation to the wall on the right hand side from the front of the archway;  
The 1963 map indicates ownership of the applicants only to the face of the wall and that the boundary wall is the appellant's property and the appellants do not own any part of the wall and therefore cannot place items on it.

The appellant objects to items being placed on the wall and the wall in question is not a party wall as indicated by the applicants and the applicants do not have any rights in relation to this wall.

- The wall on the left of beneath the archway is a party wall and rights of ownership extend to the centre of this wall.

- The appellant contends that in relation to ownership of the archway that the appellant owns the ceiling, the wall on the right hand side and the wall on the left supporting the room over the archway.
- The appellant has a right of access to effect necessary repairs.
- The appellant refers to the issue of noise and disregard of conditions limiting hours when music is permitted.
- There is also noise from a huge screen beneath bedroom windows.
- Nuisance arises from the chimney.
- There is an issue in relation to light for windows.
- In relation to other matters raised by the applicants;
- The property is in her ownership for 33 years and has been occupied for that period and has not been neglected or abandoned.
- The applicant has no right to touch windows.
- There was no replacement of conduits on the walls as previously there were no cables on the walls.
- In relation to the courtyard it is a private yard between two commercial properties and was never used as a courtyard and the applicants have gradually and incrementally added additional items in the area.
- There is no need to declare the existence of a right of way until another party takes that right away and a right of way is automatically implied in particular where not detailed in the deeds. There was no refusal of access and the yard was always open and the yard was accessed to repair and maintain.
- There are concerns in relation to fire access as the front gates are locked.
- The appellant has three roofs within the confines of the yard and there is an issue of access for maintenance. This access will be required into the future and how can this access and maintenance occur with the operation and use of the courtyard and unless there is agreement to permit this.
- There are a number of enclosures submitted in support of the grounds of appeal.

## 6.2. Planning Authority Response

The planning authority in a submission dated the 3<sup>rd</sup> of July 2017 indicate that they have no further comments.

## 6.3. First Party Response

The applicant in a response dated the 7<sup>th</sup> of July 2017 refers to:

- In relation to the matters raised in relation trespass and rights of way these relate to civil matters.
- Reference in this regard is made to section 5.13 of the Development Management Guidelines.
- The submission refers to the history of the ownership of the site and conveyance since 1963 that the title devolved pursuant to title deeds in 1963, 1994, 2002 and the purchase by the applicants in 2006.
- The deeds in 1994 and 2002 had no map both of which describe the property by reference to the map attached to the 1963 deed.
- There is nothing to suggest the walls on either side of the applicants' property are wholly belonged to the appellant and that the 2006 acquisition by their solicitor included a reply to objections and requisitions that the walls are party walls. Legal submissions in support of this are submitted as appendix 2 and 3 in support of this and also in relation to many of the issues relate to civil law and not planning law in particular appendix 2.
- The metal canopy is a standalone structure and no equipment or otherwise is fixed to the wall adjoining no 88.
- There is no right of way and there were doors leading from the courtyard to the road when they acquired the property. The doors were subsequently replaced by gates. There is no reference to a right of way in the deeds of the property and no burdens outlined.
- The appellant has only requested access on three occasions to carry out minor repairs and has acknowledged requiring permission to enter upon the courtyard and accordingly no right of way in her favour exists.

- Previous owners affirm the position in relation to right of way and these are included in the submission.
- In relation to the impact residential amenity the site is located in an area zoned general business, the site is part of an established public house and conforms with the provisions of the LAP.
- The applicants will comply with the condition limiting hours of operation of music as stated in condition no. 3 of the planning authority's decision to grant planning permission.
- In relation to the issue of smoke the canopy is designed to be bright airy and non-intrusive and is open to an alternative design solution of designing another smaller canopy below window level which would also address matters relating to noise and create a visual screen to the courtyard from the first floor window of the appellant's property.
- The television in the courtyard hangs independently from the canopy and is not affixed to a wall.
- The courtyard has been used since 2006 and old seating was replaced.
- The applicants have no objection to permitting access to the appellant for repairs provided permission is obtained.
- The courtyard is not a laneway and there was no blocking of windows.

## 7.0 Assessment

7.1. The application as submitted is for the retention at an existing public house for the use of an external courtyard as a bar area as part of the public house. The proposal also refers to the erection of a metal canopy over the courtyard and the erection of doors to the said courtyard and also for the change of use façade of the building.

7.2. Much of the content received in the appeal submissions relate to issues of ownership and rights in relation to property. I do not propose to address many of the issues raised and I would in this regard refer to section 5.13 of the department guidance on development management which refers to issues relating to title to land where it is indicated that "*the planning system is not designed as a mechanism for resolving*



*disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In this regard, it should be noted that, as section 34(13) of the Planning Act states, a person is not entitled solely by reason of a permission to carry out any development. Where appropriate, an advisory note to this effect should be added at the end of the planning decision”.*

- 7.3. In relation to making a planning application there is nothing definitively to cast doubt on the bona fides of any assertion by the applicant to make a planning application or that the applicant does not have sufficient legal interest or that the Board may if satisfied with matters relating to proper planning and development decide to grant permission. However, such a grant of permission would be subject to the provisions of section 34(13) of the Act, referred to above and would not negate any party rights in relation to civil law.
- 7.4. Specifically, in relation to the matters applied for in this application / appeal,
  - 7.4.1. In relation to the retention of the change of use of the courtyard area as a bar area as part of the public house, the site is located in the town centre and the site is zoned general business. The use is in principle acceptable.
  - 7.4.2. In relation to the erection of a metal canopy over the courtyard area, I would have no objection to this feature. Without addressing any ownership matter I would note that in the inspection of the site I observed that the upright supports of this canopy are not affixed to a wall. I would have no objection to the canopy.
  - 7.4.3. In relation to elevational change I do not have any objection to the proposed double doors. The drawing OS 16-04 appears to indicate some alteration above the archway with no details of the works. I consider that the elevational should be limited solely to the replacement of the gates.
  - 7.4.4. The building is a protected structure. The protected structure relates to the public house. I do not consider that the provision of a doorway would detract from the public house.
  - 7.4.5. In relation to issues of residential amenity the site is located in an area zoned general business and public houses are a permitted use. The site adjoining is currently in use as a food outlet with takeaway and delivery functions. The use of an open area for music and related activities can impact on residential amenities in the area but these activities are associated with the use on the site and the site is a long

established licenced premises. A condition limiting hours of operation and the mitigation measure as outlined in condition no. 4 of the planning authority's decision is I consider reasonable in the context of the site's location. A similar condition in relation to odour would also be reasonable.

## 8.0 Recommendation

- 8.1. In view of the above assessment permission for the proposed development is recommended. An advisory note stating the provisions of section 34(13) of the Planning Act should be added at the end of a decision to grant permission.

## 9.0 Reasons and Considerations

- 10.0 Having regard to the nature of the proposed development; its location within the town centre area, the historical use of the site, the nature and pattern of uses in the vicinity, the provisions of the current Castlecomer Local Area Plan, it is considered that subject to it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the residential amenities of property in the vicinity and would, therefore, be in accordance with the proper planning and sustainable development of the area.

## 11.0 Conditions

1. The grant of permission is for a retention of permission and to carry out works submitted accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars submitted on the 2<sup>nd</sup> of September 2016 and the 20<sup>th</sup> of April 2017, 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 interests of clarity

- 2 Amplified sound shall not be carried out or take place in the courtyard area after 11.00pm on any night.

**Reason:** In the interest of the protection of the amenities of the area.

- 3 Within 3 months of the date of this order the applicant shall submit to and agree with the planning authority a comprehensive management and mitigation plan in relation to noise, odour and other air emissions arising from the site. Details relating to ongoing monitoring and review of the agreed mitigation measures shall form part of this plan.

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

- 4 The elevational changes to the front façade shall be limited solely to the replacement of the gates to double doors. Details relating to the finishes of these doors shall be submitted to and agreed with the planning authority prior to the commencement of any works.

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

- 5 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, as amended. The contribution shall be paid prior to 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 An Bord Pleanála to determine the proper application of the terms of the Scheme.

**Reason:** It is a requirement of the Planning and Development Act 2000, as amended, 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.

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. Derek Daly  
Planning Inspector

18<sup>th</sup> September 2017