



An
Bord
Pleanála

Inspector's Report PL29S.248876

Development Re-use of driveway as garden courtyard for use of shop customers including bench seating, fabric awning, bicycle parking, lighting art and associated landscaping.

Location 7 Sussex Mews, Sussex Terrace, Dublin 4

Planning Authority Dublin City Council

Planning Authority Reg. Ref. WEB1414/16

Applicant(s) 3FE Coffee Ltd

Type of Application Permission

Planning Authority Decision GRANT with 8no. conditions

Type of Appeal Third Party (5no.)

Appellant(s) Clióna Mangan; Kevin MacNicholas; Alan Wrafter; Sarah Fenton & Blain Long; David MacNicholas & Mary Brassil.

Observer(s) Michael Wall

Date of Site Inspection 08/09/17

Inspector John Desmond

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1.0 Site Location and Description

- 1.1. The application site is located on Sussex Road, c.55m south of the Grand Canal and c.40m east of Leeson Street Upper.
- 1.2. The application relates to the ground floor area of a 2-storey premises with a stated floor area of 152-sq.m (this would appear to exclude the first floor residential apartment). The site area is stated as 178-sq.m. The site abuts the public footway to Sussex Road to the east, old residential properties to the north and west and a mixed-use modern building to the south.
- 1.3. The ground floor of the building is in use as a retail unit selling coffee paraphernalia, with associated café use. There is a seating area and counter within the unit for customers to consume beverages and food. The application concerns the use (associated with the stated retail unit) of the existing street-fronting courtyard of c.25-sq.m on the northern side of the site, that is indicated as a car parking area. The area contained bench seating, bicycle parking, some minimal soft landscaping and lighting on the day of inspection.

2.0 Proposed Development

- 2.1. It is proposed to change the use of the existing driveway / parking area as a garden courtyard for private use of shop customers. Seat benching, fabric awning (3.5m X 5m), bicycle parking, low level lighting, art and associated landscaping is also proposed.

3.0 Planning Authority Decision

3.1. Decision

The Planning Authority decided **GRANT** permission subject to 8no. conditions. All conditions, bar condition no.3, are standard type conditions. Condition no.3 states:

No speaker announcements, amplified music or other audible material shall be played or broadcast in the external open-air area. Reason: In the interest of environmental amenity.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The first report of the Planning Officer (30/11/17) is consistent with the decision of the Planning Authority to seek further information on two points, concerning the location of parking spaces associated with the two first-floor residential units permitted under PL29/5/61365 (Reg.Ref.3042/82) and the opening hours of the retail unit.

The second report of the Planning Officer (15/06/07) is consistent with the decision of the Planning Authority to grant permission subject to 8no. conditions.

3.2.2. Other Technical Reports

Drainage Division - Report of 23/05/17 notes receipt of further information and indicates no change to its report of 15/11/16 (no objection subject to 2no. standard conditions).

3.3. Prescribed Bodies

None

3.4. Third Party Observations

11no. observations were received by third parties – Clióna Mangan, Roderick Bourke, Eileen Corry, ULSARA, Arun Dubal, Dr Siobhan Daly, Sarah Fenton & Blain Long, David MacNicholas, Kevin MacNicholas, David MacNicholas & Mary Brassil, and Alan Wrafter. The main points raised are repeated in the grounds of appeal, summarised below.

4.0 Planning History

Reg.Ref.0357/15 – Section 5 declaration determined that the change of use of the premises from sale and display of motor vehicles to use as a shop was exempt under Class 14(a) of Schedule 2 of Part 1 of the Planning and Development Regulations.

PL29/5/61365 / Reg.Ref.3043/82 – Permission was **GRANTED** by the Board, overturning the decision of the Planning Authority to refuse permission for the erection of a showroom with two flats above at 150 and 151 Upper Leeson Street and 7A Sussex Terrace. Condition no.1 stated:

Two car parking spaces shall be reserved for the occupants of the two flats in the proposed new development.

E0155/16 – Relates to a current (at time of the Authority's Planners Report) enforcement file opened (10/03/16) in respect of the alleged change of use to coffee shop.

5.0 Policy Context

5.1. Development Plan

Dublin City Development Plan 2016-2022

Zoning Objective Residential Neighbourhoods (Conservation Areas) Z2 – To protect and/or improve the amenities of residential conservation areas.

S.14.6 Non-Conforming Uses

S.14.8.2 Residential Neighbourhoods (Conservation Areas) – Zone Z2

S.16.38 Car Parking Standards

5.2. Natural Heritage Designations

South Dublin Bay and River Tolka Estuary SPA Site Code 004024 c.2.6km to the east.

South Dublin Bay SAC Site Code 000210 c.2.6km to the east.

6.0 The Appeal

6.1. Grounds of Appeal

- 6.1.1. The main grounds of appeal submitted by **Clíona Mangan of no.3 Sussex Terrace**, may be summarised as follows:

- A number of points raised in the observation were not considered by the Planning Authority.
- Opening hours not regulated by condition.
- Insufficient information provided in relation to '*associated landscaping*'.
- Function of the property is ambiguous and is not adequately described – wholesalers, takeaway coffee shop, confectionary retail shop, clothes retail shop and smoking terrace.
- Consequential nuisance – associated parking and temporary drop-offs block access to Stable Lane, red bollards (absent during the period of the application) cordon off part of the main road, litter (cups and cigarette butts) and uncertainty of opening hours.
- No traffic management measures.
- Not comparable to Forest Avenue eatery which does not occupy outdoor streetscape or seem to promote gatherings of groups in external spaces.
- The awning will encourage an increase in the numbers drinking, eating and smoking outdoors no matter the weather.
- Impact on neighbouring residential amenities.

6.1.2. The main grounds of appeal submitted by **Kevin MacNicholas of no.153 Upper Leeson Street** may be summarised as follows:

- Defective application as most of the application relates to works that has been carried out.
- The courtyard has been used for 2no. car parking spaces since construction, associated with the car-sales showrooms.
- To convert the former parking spaces to an outdoor café, with associated noise and smoking pollution (as has been since the business commenced) is seriously detrimental to the appellant's property (and to adjoining households) and would dis-incentivise the change of use of same from commercial to residential in accordance with Council policy at some point in the future.

- The attached conditions are of no effect as the development has been carried out over a year ago.

6.1.3. The main grounds of appeal submitted by **Alan Wrafter of no.4 Sussex Terrace Street** may be summarised as follows:

- The outdoor café smoking area is situated on the perimeter of rear gardens to thirteen houses with bedrooms facing onto a normally quiet enclosed area.
- Impact of noise on residential amenities.

6.1.4. The main grounds of appeal submitted by **Sarah Fenton and Blain Long of no.155 Upper Leeson Street** may be summarised as follows:

- The bedrooms to the appellant's property are opposite the courtyard and the noise from the area negatively affects the residential amenities.
- The appellant's property is a protected structure, subject to a strict restriction on double glazing to mitigate noise.
- Noise is amplified in the rear gardens to the appellant's and neighbouring properties due to enclosure of the said area by terraces.
- Parked vehicles block access to the laneway adjacent the site, preventing vehicular egress from their property.
- Overspill of patrons will block the footway.
- There is an indication that the applicant intends expanding opening hours into the evening, implying an intensification of use, possibly following a trend for 24-hour use as Ireland moves away from pub culture.
- Effectively an outdoor café.
- Will discourage the preservation of properties in the city centre for residential use through erosion of quality of life.

6.1.5. The main grounds of appeal submitted by **David MacNicholas and Mary Brassil of no.152 Upper Leeson Street**, c/o Kieran O'Malley & Co. Ltd, may be summarised as follows:

- Would result in an intensification of an unauthorised use within the Z2 residential conservation area.

- The applicant cannot rely on declaration EXPP 0357/15 as the change of use works detailed in that application (extract drawing no.2015.79.P002 refers) do not match the works subsequently carried out (Drg.No.205 Rev P00 refers), namely works to and use of the forecourt, that are not detailed in the declaration application, with specific reference to parking forecourt in the former.
- The works confirm that the change of use materially contravenes the planning condition attached to PL29/5/61365, requiring reserving of 2no. car parking spaces for the 2no. proposed residential units, and therefore, having regard to A.10(1)(b) of the Regulations 2001, the change of use that has already taken place is not exempt development.
- The applicant is operating a wholesale / business-to-business commercial enterprise (note large commercial coffee makers used in cafes or restaurants are for sale, as are commercial scale orders for coffee beans) and is not a class 1 retail shop. The PA has kept open its enforcement file concerning this site.
- The entire works on the appeal site are unauthorised and several parts of the proposed development, as described in the statutory notices, have already been completed and are therefore unauthorised development. Retention permission should be sought.
- The applicant's response to the further information request concerning car parking, failed to answer the question. The two spaces subject of condition (no.1) under permission PL29/5/61365, would have had to be provided within the site and the car parking forecourt dimensions are such as to accommodate 2no. parking spaces. Mr Fleming's use of the parking forecourt as part of the showrooms contravened the condition and its assigning to the applicant's lease does not address the compliance issue. This is a key planning consideration as to whether the change of use that has taken place is or is not exempted development.
- The Planning Authority erred in not requesting new notices, in the assessment of the car parking issue and in the consideration of the long term unauthorised use of the parking forecourt as a material consideration.

- The courtyard and smoking area is already in use, materially affecting neighbours through noise and disturbance, contrary to the zoning objective.
- The hours of operation should not be permitted before 10am and the planning officer failed to note the applicant's reference to extending hours to 7am through to 7pm.
- The canopy would facilitate use of the said area in all weather, further affecting the residential community.

6.2. Applicant Response

The main points of the response (15/08/17) of Colin Harmon, the owner / operator of 3fe Coffee, may be summarised as follows:

- Vast majority of sales are takeaway coffees, with the rest made up of coffee bean sales, coffee brewing equipment and other coffee paraphernalia, all being retail products.
- There is no kitchen or food prep area.
- Current operating hours are 7.30am to 4pm Monday to Friday and 9am to 4pm on weekends (for past year), with no plans to open later in the near future. They are agreeable to establishing a window of time during which to be open to the public that alleviates any concerns by neighbours.
- They are happy to refrain from amplifying music outside the premises.
- The proposed awning will aid in containing the emanation of noise.
- They are happy to make the courtyard a non-smoking zone.
- The ongoing problem with blocking the neighbouring entrance would exist regardless of the development, with the entrance badly placed and hidden from view from most road users. The applicant's staff have tried to police the situation such that it is a less common occurrence and the applicant erected temporary bollards to prevent same but were reported to the City Council.
- The applicant is happy to remove the bike-stand if needs be.

- All wholesale business is from Unit 74, Boyne Road, Dublin Industrial Estate where the roasting and equipment business is located, although the wholesale team often use space for meetings or for admin work at the premises, as they do at both of the other retail locations.
- There was no engagement with local residents' associations as the applicant was not aware of them until the complaints had been made and then it was felt appropriate not to contact them during due process. The concerns raised are reasonable and fixable and the applicant is happy to make promises regarding noise, smoking, opening hours, etc., that would put their fears at ease.
- The applicant feels that the development has made a positive contribution to the area in many ways.

6.3. Planning Authority Response

No comment further to the Planner's Report.

6.4. Observations

Upper Leeson Street Residents' Association c/o Michael Wall (11/08/17). The issues raised repeat those made in the grounds of appeal.

An Taisce (16/08/17) – Invalid (late).

6.5. Further Responses

Kevin MacNicholas (16/08/17). The party reiterates some of the points made by Kieran O'Malley & Co. Ltd (on behalf of David MacNicholas and Mary Brassil of no.152 Upper Leeson Street) to support the grounds of his appeal.

7.0 Assessment

The main issues arising under this appeal may be appropriate addressed under the following headings:

7.1 Principle / policy

- 7.2 Procedural
- 7.3 Parking and traffic
- 7.4 Residential amenities
- 7.5 Visual

7.1. Principle / policy

- 7.1.1. The proposed development is for the change of use of a driveway / parking area to use as a garden courtyard for private use of shop customers, with ancillary associated works (seat benching, fabric awning (3.5m X 5m), bicycle parking, low level lighting, art and landscaping). The ground floor premises was formerly a car sales showroom premises, with two residential apartments above (not subject of the application), which were permitted on appeal to the Board (PL29/5/61365 / Reg.Ref.3043/82) subject to a single condition concerning car parking provision (2no. spaces) for the residential units (location not stated in the condition).
- 7.1.2. Whilst the use of the premises does not form part of the application, it is clearly a relevant consideration as the courtyard use would be directly ancillary thereto and effectively expand the use there-into. A Section 5 Declaration issued from Dublin City Council to the effect that the change of use from sale and display of motor vehicles to use as a shop was declared exempt under Class 14(a) (Part 1 of Schedule 2 of the Regulations, 2001, as amended). According to the application cover letter the commercial unit *'is a classic shop that targets a limited and specific range and profile of customer. It is a shop with a complimentary take-away espresso facility – in the Italian style.'* It further indicates that pastries or small treats are sometimes provided (but not made on site) to accompany the coffee, again this is intended for take-away only. The response to the appeal suggests that the takeaway coffee element forms the majority of the business operations from the premises. It would therefore seem that the takeaway coffee use is not subsidiary to the main retail use (most particularly with regard to the number of sales and footfall to the premises) and the overall use may not therefore be consistent with the definition of 'shop' under A.2(d) of the Regulations:

'for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use [...].

and does not include:

'[...] the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies'.

Furthermore, it was evident on the day of inspection that customers may consume beverages and food within the commercial unit, with a counter (separate from the serving counter) and high stools provided there-within, albeit of relatively limited area. The use of the courtyard for customers, with under-cover seating, will provide for the consumption of beverages and other food on the premises. This unambiguously conflicts with the definition of 'shop' use under the Regulations.

7.1.3. Based on the information submitted by the applicant, I am satisfied that the premises is not a wholesale warehouse (as defined under article 5(1) of the Regulations) as has been submitted by the appellants.

7.1.4. The site is zoned objective Residential Neighbourhoods (Conservation Areas) Z2 *'To protect and/or improve the amenities of residential conservation areas'*. S.14.8.2 of the plan notes the principal land-use in residential conservation areas as housing but that it can include a limited range of other uses. Retail and restaurant / café use are neither permitted in principle nor open for consideration. As the pre-existing commercial use (use as a 'shop') was a non-conforming use within Zone Z2, s.14.6 (Non-Conforming Uses) of the Development Plan applies, which allows that extensions to or improvements of premises accommodating such uses shall be considered on their own merits where it does not adversely affect the amenities of premises in the vicinity. However, as the current recently installed use (which has not been in existence longer than 7 years) and intended expanded use materially depart from use of the premises as a 'shop' it constitutes a change of use that does not fall within the scope of s.14.6 of the Development Plan. The proposed development would therefore contravene the zoning objective for the site concerned.

7.2. Procedural

- 7.2.1. The grounds of appeal include that the application should be for retention permission as the development has already been carried out. The stated proposed associated works, comprising seat benching, bicycle parking, low level lighting, art and associated landscaping has been carried out and, indeed, are indicated as such on the 'Existing Ground Floor Plan' (Drg.205 P00). Although generally one might not consider such works to be material, within the context of the use of the premises and the fact that the provision of external seating would facilitate the consumption of beverages and food on the premises, I would regard the said works as material in this instance. The other work, comprising the provision of a fabric awning (3.5m X 5m), has not been carried out and is indicated only on the proposed plans and drawings.
- 7.2.2. It has been submitted by the appellants that the pre-existing use was an unauthorised development as it contravened condition no.1 attaching to the Board's decision to grant permission (PL29/5/61365) through the failure to provide 2no. car parking spaces for the residential units at first floor level. The previous commercial occupant, Chris Fleming, submitted a letter confirming that the subject courtyard was used (since July 1984) as the public entrance and parking area for his motor sales showroom, with no restrictions as per the conditions of his lease. In this regard, it is a function of the Planning Authority, not the Board, to determine whether the existing development constitutes unauthorised development (structure and/or use) by virtue of non-compliance with a condition on the relevant permission or otherwise.

7.3. Parking and traffic

- 7.3.1. The site is located within Zone 2 under the Council's Strategic Transport and Parking Area (Map J), where parking provision is restricted on account of the proximity to public transport. According to table 16.1 of the Development Plan, within Zone 2 a maximum of 1no. space is required per dwelling and a maximum of 1 per 100-sq.m GFA is required for 'retail' (other than supermarkets).
- 7.3.2. S.16.38 Car Parking Standards, under the Development Plan states 'Parking provision below the maximum may be permitted provided it does not impact negatively on the amenities of surrounding properties or areas and there is no potential negative impact on traffic safety'. Furthermore, it states 'the car parking

standards set out in Table 16.1 shall be generally regarded as the maximum parking provision'. Whilst the Development Plan also allows the Planning Authority discretion to decide the appropriate level of parking where the site is located on the boundary of two or more parking zones, the site is not located on the boundary but at a clear remove from same. The Planning Authority accepted the proposal which entailed the removal of all car parking from the site, as is provided for under the Development Plan. Within the context of the site I consider this to be reasonable.

- 7.3.3. Contrary to the assertions of the appellants, I do not consider specific traffic management measures need to be proposed by the applicant. There are double yellow lines outside the gated entrance adjacent the north of the site, which provides access to the rear of dwellings on the surrounding block. Illegal parking is a matter for enforcement by the relevant authorities.
- 7.3.4. The change of use of the courtyard from car parking area to an outdoor seating area for access by pedestrians and cyclists would obviate the need for vehicular access to the premises. In the interest of clarity concerning the use of the site, in the event of a grant of permission, a condition should be attached omitting the vehicular entrance to the site so that the loss of the two spaces may be compensated for by on-street public parking in the interest of the proper planning and sustainable development of the area. In the event of a decision to grant permission, a condition should be attached requiring provision of a permanent bollard or similar structure should be provided central to the courtyard street boundary entrance to prevent vehicular access (other than by bicycle) to the said area, the details of which should be agreed with the Planning Authority.

7.4. Residential amenities

- 7.4.1. The site is located within a predominantly, but not exclusively residential area. There is a substantial public house premises to the south, with another mixed used building (ground floor premises currently unoccupied) immediately adjacent the south of the application site. The use, including the consumption of coffee within the premises and courtyard, is a material change from the previous use of the premises as a 'shop', with a material change in terms nature of access to the site by patrons and the activity carried out within the site. That being said, I consider the altered use to be relatively innocuous within the comparatively busy edge-of-city-centre context,

particularly having regard to the intended operating hours, such that the impacts on neighbouring residential amenities from the proposed extended use would be relatively minor, subject to compliance with appropriate conditions.

- 7.4.2. The current hours of operation are stated as 7.30am to 4pm Monday to Friday and 9am to 5pm on weekends. In the event of a grant of permission, should the Board consider imposing restrictions on operating hours, I would advise the 7.30am to 6pm on weekdays and 9am to 6pm on weekends would be appropriate.
- 7.4.3. The operator of 3fe Coffee has indicated that they are agreeable to refrain from amplifying music outside the premises, which I would advise should be addressed by condition in order to protect the amenities of neighbouring residential properties. They are also agreeable to make the courtyard a non-smoking zone; however, I would not consider it necessary or appropriate to attach a condition to this effect as it would merely direct smokers onto the adjacent public footway.

7.5. Visual

- 7.5.1. The visual impact of the development would be minimal and generally acceptable within its context. I would note that signage does not form part of the proposed development and therefore a decision to grant permission should not be taken to authorise signage or advertising associated with this commercial operation or otherwise. Should permission be granted, a condition should be attached to this effect.

8.0 Recommendation

- 8.1. I recommend that permission be **REFUSED** for the reasons and considerations set out under section 9.0, below.

9.0 Reasons and Considerations

1. The proposed development would provide for the extension of a recently installed use that includes the consumption of beverages and food on the premises (internal to the existing unit and within the proposed covered courtyard), which falls outside the scope of definition for use as a 'shop' (class

1 use under of Part 4 of Schedule 2 of the Planning and Development Regulations, 2001, as amended), as defined under article 2 of the Regulations, and constitutes a material change in the use of the premises from the previous established use of the premises as a 'shop'. The application site is zoned objective Z2 Residential Neighbourhoods (Conservation Areas) – *To protect and/or improve the amenities of residential conservation areas*, within which zone the subject use is neither permitted in principle nor open for consideration and, as a recently installed change of use from use as a shop, does not fall within the scope of the Council's policy on non-conforming use under Section 14.6 of the Dublin City Development Plan 2016-2022. The proposed development would therefore contravene the development objective for the zoning of the land concerned, indicated in the Dublin City Development Plan 2016-2022, primarily for residential purposes.

John Desmond

Senior Planning Inspector

20th October 2017