



An
Bord
Pleanála

Inspector's Report 300268-17

Question

Whether the erection of a timber and Perspex roof over part of the bar yard is or is not development and is or is not exempted development.

Location

The Spinnaker Bar, Dunmore East, County Waterford.

Declaration

Planning Authority

Waterford City and County Council

Planning Authority Reg. Ref.

D/52017/40.

Applicant for Declaration

Niall Edmondson.

Planning Authority Decision

Is not exempted development.

Referral

Referred by

Niall Edmondson.

Owner/ Occupier

Niall Edmondson.

Observer(s)

None.

Date of Site Inspection

27th March 2018.

Inspector

Derek Daly.

1.0 Site Location and Description

- 1.1. The appeal site is located in the built up area of Dunmore East approximately 100 metres north of the beach front. The site has frontage onto a public road which defines the site's western boundary. To the north, south and east of the site are residential properties.
- 1.2. On the site itself there is a licenced premises, the Spinnaker Bar which has frontage onto the local road.

2.0 The Question

- 2.1. Whether the erection of a timber and Perspex roof over part of the bar yard is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The declaration of the planning authority was that the erection of a timber and Perspex roof over part of the bar yard is development and is not exempted development at the Spinnaker Bar and Restaurant, Dunmore East.

3.2. Planning Authority Reports

3.2.1. Planning Report

The planning report dated the 14th of November 2017 refers to

- The submission of the owner and reference to section 4(1)(h) of the Planning and Development Act.
- Reference is made to relevant legislation including sections 2(1), 3(1) and 4(1) of the Planning and Development Act 2000 as amended.
- The construction was considered to be works as per section 3(1).

- In relation to whether the works were considered exempted development reference is made to the owner's submission and reference to structure and that the beer gardens and storage areas are part of the structure.
- Case law cited largely refers to intensification of use and change of use.
- It is not accepted by the planning authority that all of the buildings, beer gardens and storage buildings constitute a structure.
- There is a difference between works and material change of use.
- The development is works and constitutes development but does not come within the scope of section 4(1)(h) and is development and is not exempted development.

4.0 Planning History

ABP Ref. No. 300907-18

There is a current third appeal in relation to the retention of a timber and perspex roof over part of the barn yard and all associated works in which the planning authority has made a decision to grant planning permission.

The site has a history in relation to applications and permissions for extensions and refurbishments of the licenced premises and recent enforcement proceeding in relation to the structure which is the subject of this reference and concurrent planning application.

5.0 Policy Context

5.1. Development Plan

The site is located within an area zoned Tourism in the current plan for Dunmore East.

6.0 The Referral

6.1. Referrer's Case

The referrer submission c/o Peter Thomson Planning Solutions dated the 21st of November 2017 indicates

- The premises comprise a single planning unit and is considered comprises a structure.
- Reference is made to Carroll and Colley Brushfield Ltd the Clarence Hotel case where the judge ruled no material change of use had occurred because the whole hotel complex was a planning unit and the change of the garage to use as a bar did not alter the use of the planning unit as a hotel.
- Reference is made to Michael Cronin (Readymix Limited) v An Bord Pleanála and Others again with reference to the structure was an overall quarry operation.
- Reference is made to Wexford County Council v Daniel Hanley and Others which refers to the issue of intensification of use and to the caravan park as a planning unit.
- The entire bar and restaurant with a solid enclosure at the rear which comprises the bar yard area comprises the structure.
- Reference is made to section 4(1)(h) and that the erection of a roof over part of the bar area does not materially affect the appearance of the structure as to render the appearance inconsistent with the character of the structure.
- Reference is also made to Cairnduff v O'Connell in relation to the character test of section 4(1)(h) and that the issue of noise is not relevant.
- The development is exempted under primary legislation and the restrictions under Article 9 of the Planning and Development Regulations do not apply.

6.2. Planning Authority Response

No response received.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1. Section 2(1) In this Act, except where the context otherwise requires

“Exempted development” has the meaning specified in *section 4*; “structure” means any building, structure, excavation or other thing constructed or made on, in or under land, or any part of the structure so defined and (a) where the context so admits, includes the land on, in or under which the structure is situate”;

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

7.1.2. Section 3

Subsection (1) In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

7.1.3. Section 4 Subsection (1)

The following shall be exempted developments for the purposes of this Act –

Subsection (h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

Subsection (2) relates to regulations for any class of development to be exempted development for the purposes of this Act.

7.1.4. Section 5.

Section 5(1) relates to a question arising as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act.

7.1.5. Section 32

This section has a general obligation to obtain permission in respect of any development of land not being exempted development and in the case of development not authorised for the retention of unauthorised development.

7.2. **Planning and Development Regulations, 2001**

- 7.2.1. **Article 6(1)** of the said regulations provide that “Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1”.
- 7.2.2. **Article 9. (1)** Development to which article 6 relates shall not be exempted development for the purposes of the Act and outlines restrictions in relation to exempted development.

8.0 **Assessment**

8.1. **Is or is not development**

- 8.1.1. The initial question arises in relation to whether the construction as carried out is or is not development.
- 8.1.2. The works as carried out involves the erection of a timber and Perspex roof over part of the yard area to the rear of the existing bar. Section 3 defines development except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land. Works as defined in section 2 (1) includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. The works as carried out involve I consider the carrying out of any works on, and over or land and an extension to the premises and therefore constitutes development.

8.2. **Is or is not exempted development**

- 8.2.1. The main issue arises as to whether the development is or is not exempted development.

8.2.2. The owner contends the premises comprise a single planning unit and is considered comprises a structure.

8.2.3. In support of the view that the works as carried out are exempted development reference is made to a number of cases including;

- Carroll and Colley Brushfield Ltd the Clarence Hotel case where the judge ruled no material change of use had occurred because the whole hotel complex was a planning unit and the change of the garage to use as a bar did not alter the use of the planning unit as a hotel.
- Michael Cronin (Readymix Limited) v An Bord Pleanála and Others again with reference to the structure was an overall quarry operation.
- Wexford County Council v Daniel Hanley and Others which refers to the issue of intensification of use and to the caravan park as a planning unit.

8.2.4. It would the referrer contends be reasonable and consistent to determine that the bar and restaurant, the attached solid surrounding wall to the rear, which constitutes the bar yard over which the roof in question covers in part and other ancillary accommodation (storage etc.) comprises the structure. The entire bar and restaurant with a solid enclosure at the rear which comprises the bar yard area comprises the structure.

8.3. There is no dispute in relation to the issue of a planning unit but this does not necessarily infer that exempted development in all cases applies on the basis of works and development within a single planning unit.

There is equally no dispute that in **Section 3** Subsection (1) of the 2000 Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land and "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

8.4. The planning act and regulations recognise extensions to structures occur and in certain cases there is provision for exemption for extensions in floor areas as for example dwellings subject to limitations but there is no such specific stated provision for the exemption to a licenced premises which is the existing use on the subject site.

- 8.5. My initial observation is that the development is a form of physical extension of the floor area of licenced premises and is a material alteration of the yard area of a licenced premises. In relation to the Clarence Hotel case there was no physical addition to the building and the current referral differs in this regard and there is a change from an open yard to a covered yard to accommodate additional patronage and floor space. In effect there is an extension of the floor area of the licensed premises with consequent changes in relation to increased use intensification and this a material alteration in relation to the physical structure.
- 8.6. In relation to Michael Cronin (Readymix Limited) there was no change in relation to the use of the site and similarly the Wexford County Council v Daniel Hanley and Others the caravan park there was no change of use though the issue of intensification arose but these cases may not be directly comparable given in this referral there is physical addition to a structure.
- 8.7. I would refer the Board to referral reference RL2792. This referral related to a smoking area to the rear of a two storey public house in Kildare. The smoking area structure comprised an iron frame with perspex roof and walls and a sheet of plywood for the floor. The structure measured approximately 2.1m x 6.9m and adjoined the rear wall of the public house property within a shared backland com
The Board decided that the smoking structure and storage area was development and not exempted development. The creation of an external smoking structure and storage area constituted works and development that was a material change of use from the open, communal yard and that the material change in use did not come within the scope of Section 4 (1) (h) of PDA, 2000, being of a material change in the use of land within the meaning of Section 3 of the said Act, and there were no other provisions of exempted development that would apply to the development.
- 8.8. I would also refer to RL2986. This referral related to the conversion and use of a former keg store at the side and rear as a smoking area and to the installation of condensers and air handling equipment to the rear and side of a public house.
The Board decided that the use of part of the curtilage of the public house of an area that was formerly in use as a keg store and store room, as a sheltered smoking area, was a material change of use as it involved an extension of the footprint of the public area of the public house, and involved consequent intensification of use which had

material consequences in relation to the planning of the area. It was therefore development and not exempted development.

I consider the development in relation to the current referral is similar involving an extension of the footprint of the public area of the public house, and involves consequent intensification of use which had material consequences in relation to the planning of the area. It is therefore development and not exempted development. I would therefore agree with the view stated by the planning authority that there is a difference between works and material change of use.

8.9. In relation to section 4(1)(h) and that the erection of a roof over part of the bar area does not materially affect the appearance of the structure as to render the appearance inconsistent with the character of the structure. I note the reference to *Cairnduff v O'Connell* in relation to the character test of section 4(1)(h).

8.9.1. Section 4(1)(h) indicates the following shall be exempted developments for the purposes of this Act.

“development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures”

8.9.2. The development as constructed does not apply within the scope of Section 4(1)(h). The works in question are I consider an extension to the floor area of a premises which are external to the structure and are not works for the maintenance and improvement of the structure.

8.9.3. In *Ian and Maureen Cairnduff v Peter O'Connell* the judgement held that although the work materially affected the external appearance of the structure it was not inconsistent with the character of the house itself or adjoining houses. In reaching this judgement a number of matters were referred to including street appearance, and matters such as shape, colour, design and layout. In the *Ian and Maureen Cairnduff v Peter O'Connell* property some of the works were replacing previous works. In the current referral an extension rather than replacement was constructed to the structure and the matters raised in *Ian and Maureen Cairnduff v Peter O'Connell* are not material to the main issue of the subject site which is an extension

in floor area and a material change from a yard area to a covered area to be used as part of the activities of the licenced premises.

- 8.9.4. This does not necessarily infer a permission should not be granted for the development but I consider it is not exempted within the provisions of section 4(1)(h).

9.0 Recommendation

- 9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether an extension to rear and side is or is not development or is or is not exempted development:

AND WHEREAS Niall Edmondson requested a declaration on this question from Waterford City and County Council and the Council issued a declaration on the 14th of November 2017 stating that the matter was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 21st of November 2017:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The development as carried out constitutes development
- (b) The development as carried out is not exempted development

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the development as carried is development and not exempted development.

Derek Daly
Planning Inspector

3rd May 2018