



An
Bord
Pleanála

Inspector's Report ABP-300787-18

Question

'Whether the change of use of a bar and dining room at a race course, to use as a theatre during the summer months, is or is not development or is or is not exempted development'

Location

Ross Road, Killarney, Co. Kerry

Declaration

Planning Authority

Kerry County Council

Planning Authority Reg. Ref.

EX630.

Applicant for Declaration

Killarney Race Course Ltd.

Planning Authority Decision

Referral under Section 5(4) of the Planning and Development Act 2000.

Referral

Referred by

Kerry County Council

Owner/ Occupier

Killarney Race Company Ltd.

Observer(s)

None.

Date of Site Inspection

9th May 2018

Inspector

Fiona Fair.

1.0 Site Location and Description

- 1.1. The property known as Killarney Race Course, containing 32.64 ha is situated in the townland of Bunrower, south off Ross Rd, Scrahane, Killarney, Co. Kerry. The race course is located some 1.5 Km south west of Killarney town.
- 1.2. The theatre use, music / song / dance area, the subject of the referral is located within the enclosed ground floor of the open tiered viewing stand / grandstand, which faces west across the race course. The entrance is clearly marked with signage 'Celtic Steps The Show'. On the day of my site visit approx. mid-day on the 9th May 2018 the interior of the grandstand was laid out with rows of seating facing a stage area. The bar area was screened off. Toilet facilities and fire escape routes were clearly marked and the room was dimly lit.

2.0 The Question

- 2.1. Whether the change of use of a bar and dining room at a race course, to use as a theatre during the summer months, is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

A declaration under subsection Section 5 (2) (a) of the Planning and Development Act 2000 has not yet been issued. It is stated in the planning enforcement officers report on the file that Kerry County Council is seeking a declaration in the first instance from An Bord Pleanala.

3.2. Planning Authority Reports

3.2.1. Planning Enforcement Officer

The planning enforcement officers report, dated 11/12/2017 sets out the planning history pertaining to Killarney Race Course, as set out below. It considers that the most relevant planning application pertinent to the referral is A.18.(1884), whereby

permission was granted in 1979 for lounge bar and grand stand alterations at the racecourse, as the extension referred to is where the temporary theatre is now located. It is stated 'In general this building is used during race meetings only. As such it is unused for most of the time. During the tourist season it is converted into a theatre and stage performances, aimed at tourists, take place. These performances are advertised on <https://www.celticsteps.ie/> Tickets are currently available for performances from 1/04/2018 to the 18/10/2018'.

3.2.2. Other Technical Reports

None

4.0 Planning History

- 4.1. **A.18. (914):** Permission was granted on the 01/03/1979 for "Lounge Bar and Grand Stand Alterations at the Racecourse, Killamey." The Planning Notice read "to erect new reserve bar and alterations to grandstand."
- 4.2. **A.18. (1884):** Permission was granted by order dated the 24/02/1989 for "Alterations and extension to buildings." The development was described in the newspaper notice as "New Concourse area and Improvements at Killarney Racecourse". The Intended use was stated to be "Bar and Dining room facilities" The drawings show that the application also included a jockey weigh room and changing area.
- 4.3. **92/2312:** Permission was granted on the 06/04/1992 for "Lounge Extension at Race Course, Ross Road, Killarney." The Planning Notice read "to construct a new lounge extension onto existing stand at the Racecourse..."
- 4.4. **01/3800:** Permission was granted on by order dated the 29/01/2002 for the demolition of the existing tote betting shop and construction of tote betting shop and viewing stand.
- 4.5. **03/4016:** Permission was refused for a helipad on the site.
- 4.6. **04/4212:** Permission was granted on the 09/07/2004 to extend the existing clubhouse on both ground and first floor; make changes to existing front facade of

stands; demolish existing toilets and changing rooms and build new toilet block all at Killarney Race Course”

4.7. **08/4987:** Permission was granted on the 13/02/2009 for other developments on the site, principally stable blocks.

4.8. **Declarations of Interest**

4.8.1. A declaration was issued for lands at the M4 Interchange Park, Celbridge, County Kildare.

RL3309

A Section 5 declaration or an outdoor cinema “event” was determined to be development because of the placing of the cinema structures but exempted development because of compliance with Class 37 and the temporary nature of the use on the site.

4.8.2. A declaration was issued for lands at top floor (level 6) St. Stephens Green Shopping Centre, D2

RL3588

A section 5 declaration was determined that the proposed use of the top level (Level 6) at St. Stephen’s Green Shopping Centre Car Park for a temporary event as an outdoor movie theatre, with capacity for no more than 350 patrons per screening, together with associated facilities including the provision of a bar and food, being an event of recreational character, in which this property will not be used for this purpose either continuously for a period exceeding 15 days or occasionally for periods exceeding an aggregate 30 days in any year, is development and is not exempted development.

5.0 **Policy Context**

5.1. The Killarney Town Development 2009 – 2015 is the statutory Plan. I note the Draft Killarney Municipal District Development Plan 2018 - 2024

5.2. The Referral site is located within an area designated ‘Amenity Area of Special Control’ as per Land-use Phasing Map, Drg. K 09-01, of the Killarney Town Development Plan 2009 – 2015.

5.3. Referrer's Case

5.4. Kerry County Council request a declaration under Article 5 (4) of the Planning Act on the question stated below.

“Whether the change of use of a bar and dining room at a race course, to use as a theatre during the summer months, is or is not development or is or is not exempted development.”

5.5. The declaration to the Board sets out the planning history of the site and it is stated that: ‘In General this building is used during race meetings only. As such it is unused for most of the time. During the tourist season it is converted into a theatre and stage performances, aimed at tourists, take place. These performances are advertised on <https://www.celticsteps.ie/> Tickets are currently available for performances from 1/04/2018 to the 18/10/2018’.

The declaration request is accompanied with:

- A photograph of the theatre,
- A photograph of the front of the building / entrance with name plate stating ‘Celtic Steps The Show’.
- Two location maps.
- A letter to Killarney Race Company Ltd. dated 22.01.2018, stating that a declaration is being sought under Section 5 of the Planning and Development Acts 2000 -2017
- A letter to O’Connor, O’Shea Solicitors, dated 09.01.2018, stating that a declaration is being sought under Section 5 of the Planning and Development Acts 2000 -2017
- Planning application form dated 1988 in respect of bar and dining room facilities.
- Grant of planning permission in respect of A.18. (1884) ‘Alterations and extension to Buildings’ at Killarney Race Course.
- Floor Plan Drawing Scale 1:50

- History details of decisions affecting the site.

5.6. Planning Authority Response

The planning authority responded to a section 128 by The Board and submitted the following;

- Copies of decisions / details of planning applications relating to the Killarney Racecourse.
- It is stated that a declaration under subsection (2)(a) of section 5 of the 2000 Act has not yet been issued.
- Copy of Folio KY2093, the registered owner of the folio is Killarney Racecourse Company Ltd.
- Kerry County Council is not in a position to advise in relation to the occupiers of the lands in question other than to comment that it has been confirmed by Brian O'Connor, of O'Connor, O'Shea Solicitors (Solicitors for Killarney Racecourse Ltd) that Celtic Steps provide 'entertainment at the 'Jim Culloty Bar' a venue within the Racecourse complex.
- The name and address of all persons notified, namely: O'Connor, O'Shea Solicitors and Killarney Racecourse Ltd.
- Kerry County Council is seeking a declaration in the first instance from An Bord Pleanala and section 5 (2) of the 2000 Act is not applicable.

5.7. Owner/ occupier's response

The owner occupiers or representatives thereof have not responded.

6.0 Statutory Provisions

6.1. Planning and Development Act, 2000

Section 2, the following interpretation of "works":

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

Section 3 (1), states the following:

“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.”

Section 4 (1) set out what is exempted development for the purpose of the Act-

(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.

Section 4 (2) provides for the making of the Regulations, Planning and Development Regulations, 2001.

Section 5 (4) states the following:

“Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.”

6.2. Planning and Development Regulations, 2001

Article (6) (1) Exempted development, states the following:

“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.”

Article (9) (1) Development to which article 6 relates shall not be exempted development for the purposes of the Act-

- a) If the carrying out of the development would-
 - i) Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
 - iii) Endanger public safety by reason of traffic hazard or obstruction of road users.

Part 1 of Schedule 2 of Exempted Development of the Regulations, states the following:

CLASS 37

“Development consisting of the use of land for any fair, funfair, bazaar or circus or any local event of religious, cultural, educational, political, social, recreational or sporting character and the placing or maintenance of tents, vans or other temporary or moveable structures or objects on the land in connection with such use,

Conditions and Limitations

1. The land shall not be used for any such purposes either continuously for a period exceeding 15 days or occasionally for periods exceeding in aggregate 30 days in any year.
2. On the discontinuance of such use the land shall be reinstated save to such event as may be authorised or required by a permission under the Act.”

7.0 **Assessment**

The question to be addressed under this referral is as follows:

“Whether the change of use of a bar and dining room at a race course, to use as a theatre during the summer months, is or is not development or is or is not exempted development.”

7.1. **Is or is not development**

The development includes the ‘use’ of the ground floor of the viewing stand at Killarney Race Course, previously in use as a bar and dining room by Celtic Steps as a venue for performances incl. dancing, music and songs inter-alia a theatre use.

The use involves the provision of a stage and rows of seating facing the stage area. No information is given on numbers or the provision for the sale of food and drink. I note that seating layout at the time of my inspection could accommodate in excess of 350 people. The website states that 'all seating is unreserved and is allocated on a first come, first served basis. We recommend arriving between 7.45pm-8.00pm for seating in the theatre'. The show finishes at 11.00 pm.

Section 3 of the Act refers to "development" as 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. I consider the use as a theatre venue as opposed to use as a bar and dining area to serve the racecourse patrons is a material change and therefore would be deemed as development.

7.2. Is or is not exempted development

Section 4 (1) (h) of the Act, allows exempted development for 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.

The proposed development is located within the ground floor of the existing racecourse viewing stand, the external appearance of the structure has not been materially affected, save by the erection of signage. The alteration of the structure does not alter its appearance inconsistent with the character of the structure or of neighbouring structures.

No amendments to the external appearance of the structure save signage, therefore, the use does not materially alter the appearance of the building.

7.2.1. Class 37 of the Regulations.

Class 37 includes an exemption on development for the use of land for any fair, funfair, bazaar or circus or any local event of religious, cultural, educational, political, social, recreational or sporting character.

Therefore, based on the nature of the uses permitted within Class 37, I consider the temporary use of the ground floor of the grandstand at Killarney Race Course,

previously in use as a bar and dining room utilised by Killarney Racecourse, by Celtic Steps as a social recreational venue for performances incl. dancing, music and songs inter-alia a theatre use would be of a comparable nature, and therefore can be considered under Class 37. The question as to whether the event use, in question, is local in nature has to be addressed to come within the scope of Class 37 of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001, as amended.

I note that in the case of referral RL3588 (referred to above) The Board considered, in accordance with case law, that the onus of proof is on the party seeking the exemption, and not on the Planning Authority (or the Board) to disprove it. No response has been forthcoming from the owner / occupier in this case and I note that there is no evidence that the subject event is a local event. The website and blog associated with Celtic Steps The Show suggest that the event use may not be local in nature. Therefore, the proposed development would not be exempted development by reason of Class 37.

7.3. Restrictions on exempted development

The planning authority submits 'In general this building is used during race meetings only. As such it is unused for most of the time. During the tourist season it is converted into a theatre and stage performances, aimed at tourists, take place. These performances are advertised on <http://www.celticsteps.ie/> Tickets are currently available for performances from 1/04/2018 to the 18/10/2018'.

The Killarney Racecourse web site; Killarneyraces.ie states:

'Celtic Steps was born from an idea to showcase Ireland's traditional music, song & dance and to portray the music of Kerry and beyond, the songs of Ireland's history.

Rather than produce this, in a story, in chronological order down through years, Celtic Steps has mixed music, songs & dance in a unique blend to let you experience a spectacular journey through what is our Irish tradition.

The Show runs every Sunday, Monday, Tuesday, Wednesday & Thursday from April to Mid-October and seven nights weekly for June, July & August at the Killarney Racecourse'.

The restrictions and limitations of Class 37 include a time restriction on the use of the land either continuously for a period exceeding 15 days or occasionally for periods exceeding an aggregate 30 days in any year. I consider the proposed development does not comply with this limitation.

Other restrictions on exempted development, within the Regulations, include where a development materially contravenes a condition of a permission (Article 9 (1) (a) (i)) or where a proposed development may cause a traffic hazard (Article 9 (1) (a) (iii)). I note the permission pertinent to the subject referral premises, granted under A,18, (1884) 'for lounge bar and grand stand alterations', which dates to 1989 and conditions attached. There are no conditions pertaining to use. Therefore, I consider Article 9 (1) (a) (i) would not apply in this instance.

I also note the site is within the existing Killarney Racecourse site, which has a vehicular access and associated hard standing area for car parking. The proposal can accommodate approximately 350 patrons and will operate in the evening, not concurrently with race meetings. I consider the existing parking can accommodate the visitors and based on the proposed evening time operation, I consider there should be no conflict with the existing uses and it would not give rise to a traffic hazard. Therefore, I consider Article 9 (1) (a) (iii) would not apply in this instance.

Having regard to the proposed duration of the use, however, I do not consider the use as a theatre may be classified as exempted development.

8.0 Recommendation

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

WHEREAS a question has arisen as whether the change of use of a bar and dining room at a race course, to use as a theatre during the summer months, is or is not development or is or is not exempted development.

AND WHEREAS Kerry County Council requested a declaration on this question from An Bord Pleanála under Section 5 (4) of the Planning and

Development Act as amended:

AND WHEREAS Kerry County Council referred this declaration for review to An Bord Pleanála on the 26.01.2018:

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

- (a) Section 2 of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000, as amended,
- (c) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) Article 9 of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 3 of Schedule 2, with particular reference to Class 37 of Schedule 2, of the Planning and Development Regulations, 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that:

The change of use of a bar and dining room at a race course, to use as a theatre during the summer months, with shows run every Sunday, Monday, Tuesday, Wednesday & Thursday from April to Mid-October and seven nights weekly for June, July & August at the Killarney Racecourse, would by virtue of the said works constitute development, which would, under Section 4(1)(h) of the Planning and Development Act, 2000 – 2015 and Class 37 of the Planning and Development Regulations 2001, as amended, be development which is not exempted development, having regard to lack of evidence that the event is a local event and the duration of the use.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the change of use of use of a bar and dining room at a race course, to use as a theatre during the summer months, with shows run every Sunday, Monday, Tuesday, Wednesday & Thursday from April to Mid-October and seven nights weekly for June, July & August is development and is not exempted development.

Fiona Fair

Planning Inspector

13.06.2018