



An
Bord
Pleanála

Inspector's Report ABP-301388-18

Question

Whether the use of the first floor unit as residential and internal alterations at unit above Spar, Main Street, Shankill, Co. Dublin is, or is not, exempted development.

Location

Spar, Main Street, Shankill, Co. Dublin

Declaration

Planning Authority

Dun Laoghaire Rathdown County Council

Planning Authority Reg. Ref.

Ref 1618

Applicant for Declaration

Libratech Limited

Planning Authority Decision

Is not exempted development

Referral

Referred by

Libratech Limited

Owner

Libratech Limited

Observer(s)

No observers

Date of Site Inspection

15.08.2018

Inspector

Erika Casey

1.0 Site Location and Description

1.1. The subject site is located at Main Street, Shankhill and comprises a three storey building with a SPAR retail unit at ground floor level and 2 no. self contained apartments above at first and second floor level. The overall floor area of the development is 340 sq. metres. Development in the vicinity of primarily commercial and retail in character.

2.0 The Question

2.1. Whether the use of the first floor unit as a residential dwelling and associated internal alterations above SPAR, Main Street, Shankhill, Co. Dublin is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1 The use of the first floor unit as a residential dwelling and associated internal alterations is development and is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Report (09.03.2018)

- The development subject to this application consists of a change of use of the first floor of the property, which had previously been in use as a hair salon, to a residential use comprising a self-contained apartment. This change of use, which occurred in mid-2016, involved alterations to the interior of the property.
- Notwithstanding the fact that the previous hair salon use had been unauthorised, it is considered that this use, due to the length of time that it was exercised, being in excess of forty years, had become the established use of the first floor of the building and that the original residential use had been abandoned. It is considered, therefore, that development has occurred comprising a material change of use and works to the interior of the structure.

- As the hair salon use was unauthorised and the original residential use on the first floor of the property is considered to have been abandoned, the provisions of Article 10 (1) do not apply.
- Having regard to section 4 (1) (h) of the Planning and Development Act 2000 (as amended), the internal alterations to the first floor of the subject property might be considered exempted development.

3.2.2. Other Technical Reports

- No other technical reports.

4.0 Planning History

4.1 There is no recent planning history pertaining to the subject first floor unit. Previous applications relating to the SPAR unit include D15A/0811, D03A/0753, 88A/407 and 87A/1557.

5.0 Policy Context

5.1. Development Plan

5.1.1 The operative Development Plan is the Dun Laoghaire Rathdown County Development Plan 2016-2022. The site is zoned NC: *To protect, provide for and improve mixed use neighbourhood centre facilities*. Residential use is permitted in principle under this zoning objective.

5.2. Natural Heritage Designations

5.2.1 The nearest Natura 2000 site is the Rockabill to Dalkey Island SAC which is located c. 2.5 km to the east of the site.

6.0 The Referral

6.1. Referrer's Case

- Notes that the first floor of the building was used as a residential dwelling from 1940 to the early 1970's. From the early 1970's to 2015, the first floor was used as a hairdressing salon. No permission for this change of use was sought. From mid 2016 to present, the use of the first floor for residential purposes recommenced.
- Pursuant to Section 4 of the Planning and Development Regulations 2001, 'residential accommodation' is a Class 9 use and 'shop' is a Class 1 use. Given the two uses fall under different classes, the change of use does not constitute exempted development and a planning permit is required to change from use of the first floor as 'residential accommodation' to use as a 'shop'.
- The original change of use from 'residential' to use as a 'shop (hairdressing salon)', therefore, constitutes unauthorised development and reverting back to a 'residential' use does not require a planning permit.
- Dun Laoghaire Rathdown County Council express the view that the 'shop (hairdressing salon)' had become the established use and the original 'residential' use had been abandoned.
- Abandonment is a legal concept used to describe the circumstances in which the rights to resume a use which has been lawfully carried out in the past may lapse because the use has ceased. Relevant case law in this regard is Dublin County Council v. Tallaght Block Company Limited and Hartley v. Minister for Housing and Local Government.
- Abandonment, however, cannot be considered to have occurred in circumstances where a lawful use is replaced by an unlawful use. In this instance, the resumption of the former lawful use would not constitute development. States that this view was expressed in Young v Secretary of State for the Environment and subsequently adopted by Barron J. in Rehabilitation Institute v. Dublin Corporation.
- An established use may be lost if a planning permission inconsistent with that use is implemented on the site. In the absence of a planning approval for the

'shop (hairdressing salon use)', the established residential use cannot be considered extinguished.

- Notes that S.I No. 30 of 2018 recently amended Article 10 of the Principal Regulations to provide an exemption for the change of use, and any related works, of certain vacant commercial premises to residential use without the need for planning permission. Although this provision is not applicable in this instance as the works have taken place prior to the period of time set out, it is indicative of a shift to less rigid controls regarding shop conversions.

6.2. Planning Authority Response

- No further comment.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2 (1) of the Act provides the following definitions:

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

“alteration” includes –

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof,

That materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;

“unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;

“unauthorised use” means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

Section 3(1) of the Act states the following in respect of ‘development’:

“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) of the Act states that the following shall be exempted development for the purposes of this Act:

“(h) development consisting of the use 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)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

7.2. Planning and Development Regulations, 2001

Under **Article 5(1)**, the definition of ‘shop’ is as follows:

‘shop’ means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public –

(a) for the retail sale of goods,

(b) as a post office,

(c) for the sale of tickets or as a travel agency,

(d) 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 “wine” is defined as any intoxicating liquor which may be sold under a wine

retailer's off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,

(e) for hairdressing,

(f) for the display of goods for sale,

(g) for the hiring out of domestic or personal goods or articles,

(h) as a launderette or dry cleaners,

(i) for the reception of goods to be washed, cleaned or repaired,

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for 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;

Part 4 of the Second Schedule to the Regulations states as follows:-

Exempted Development – Classes of Use

Class 1: Use as a shop

Class 9: Use—

(a) for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose),

(b) as a hospital or nursing home,

(c) as a residential school, residential college or residential training centre.

Article 10(1) provides that any change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development provided that they do not:-

(a) involve the carrying out of any works other than works which are exempted development;

(b) contravene a condition attached to a permission under the Act;

(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned;

S.I. No. 30 of 2018 relates to certain change-of-use from e.g. shop or office use to residential use being exempted development.

Article 10 (6) of the Planning and Development Regulations 2001 to 2018 states *“this sub article relates to a proposed development, during the relevant period, that consists of a change of use to residential use from Class 1, 2, 3 or 6 of Part 4 to Schedule 1.”*

Article 10 (6) (a) defines the relevant period as *“the period from the making of these Regulations until 31 December 2021.”*

Article 10 (6) (c) states that *“notwithstanding sub article (1), where in respect of a proposed development referred to in paragraph (b) –*

- (i) The structure concerned was completed prior to the making of the Planning and Development (Amendment) (No. 2) Regulations 2018,*
- (ii) The structure concerned has at some time been used for the purpose of its current use class being Class 1, 2, 3, or 6 , and*
- (iii) The structure concerned, or so much of it that is the subject of the proposed development, has been vacant for a period of 2 years or more immediately prior to the commencement of the proposed development*
- (iv) Then the proposed development for residential use, and any related works shall be exempted development for the purposes of the Act, subject to the conditions and limitations set out in paragraph (d).”*

Article 10 (6) (d) (i) states *“the development is commenced and completed during the relevant period.”*

7.3 Relevant Case Law

Dublin County Council v. Tallaght Block Co. Ltd

7.3.1 This case determined that a use of land can be abandoned and that a change of use will occur when an abandoned use is recommenced. Hederman J in the Supreme Court stated:

“Where a previous use of land has been not merely suspended for a temporary period and determined period, but has ceased for a considerable time, with no evidenced intention of resuming it at any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so that the resumption constituted a material change of use.”

Cork County Council v. Ardfert Quarries Ltd.

7.3.2 In this case a site had been used as an animal food processing plant from 1953 – 1966, it had been vacant from 1966 to 1970 and it had been used to manufacture and store tyres from 1970 to 1974. The High Court held that the use of the premises as a general industrial building from 1953-1956 had been abandoned by its none use from 1966-1970. Murphy J stated:

“Having regard to the elapse of time and the absence of any satisfactory explanation therefore, I must conclude that the use as of the operative date was subsequently abandoned.”

Meath County Council v. Daly

7.3.3 The High Court held that the resumption of the use of premises which had been used for car repairs and petrol sales pre 1964, after that use had been abandoned since 1964 from time to time by the user of the premises for other purposes, and particularly by its user from 1969 for some years by a double glazing company, was a material change of use.

7.3.4 Based on case law some suggested tests of abandonment (Scannell, 1995) are:

- The intention of the owner and/or occupier to abandon or not abandon.
- The period during which the use was discontinued. The longer the period the more likely the use is to be abandoned.
- Whether or not there have been any intervening issues.
- The physical condition of the land or structure.

Rehabilitation Institution v Dublin Corporation

7.3.5 In this case, Barron J considered material changes of use in the context of premises in which a number of different uses are carried on. This case determined that where

an enforcement notice relating to an unauthorised change of use is served, it is permissible to revert to the preceding use if that use was lawful.

8.0 Assessment

8.1 Preliminary Matters

8.1.1 It is noted that the wording suggested by the referrer in their submission has been amended to:

“Whether the use of the first floor unit as a residential dwelling and associated internal alterations above SPAR, Main Street, Shankhill, Co. Dublin is or is not development and is or is not exempted development.”

8.1.2 It should be noted however, that the purpose of this referral is not to determine the acceptability or otherwise of the use of the first floor of the property for residential development but rather whether or not the matter in question constitutes development, and of so falls within the scope of exempted development.

8.1.3 In carrying out this assessment, the planning referrals data base was consulted. There have been a number of cases where the issue of abandonment was considered including RL2453, RL2487, RL2013, RL2191, RL2146 and RL2927.

8.1. Is or is not development

8.1.1. The proposed development comprises 2 different elements, namely the use of the first floor unit as a residential dwelling and internal alterations to facilitate same.

Works

8.1.2 It is not specified in the referral document what the nature of the internal alterations carried out are. However, having regard to the definition of works under Section 2 of the Act which includes *“any act or operation of alteration”*, it is considered that the internal alterations are likely to fall within this definition and thus constitute development.

Material Change of Use

8.1.3 The definition of development also refers to the making of any material change in the use of any structure or other land.

- 8.1.4 It is contended by the Planning Authority that a material change of use has occurred. It is detailed that the subject first floor unit was occupied by an unauthorised hairdresser (shop) use for the period dating from the mid 1970's to 2015. In this context, the original residential use of the unit has been abandoned and to recommence such a use constitutes a material change of use.
- 8.1.5 It has been confirmed by the referrer that the subject unit was in commercial use for a period of over 40 years. It is argued that the abandonment of the 'residential' use has not occurred as a planning permit was not granted for the 'shop (hairdressing salon)' use and it, therefore, constitutes an unlawful use.
- 8.1.6 The evidence is that the building's first floor was used for the purpose of residential accommodation up to the early 1970's and that this was the pre 1963 established use of the premises. The unit was then changed to a hairdresser in the mid 1970's. Having regard to the definition of 'shop' as set out in the Planning and Development Regulations, the use was, therefore, materially changed. Section 4 of the Regulations defines shop as being a Class 1 use. Residential accommodation is a Class 9 use. The change from one to the other, therefore, requires permission. No permission was sought for this change of use. The use of the unit as a shop (hairdressing salon), therefore, constituted a development which was not exempted development.
- 8.1.7 Residential use recommenced on the site in mid 2016. The key issue to determine in this case is whether the original residential use was abandoned due to the fact that that there was an intervening non exempted 'shop (hairdresser)' use.
- 8.1.8 Abandonment of use occurs where an established use of a premises has ceased: the result being that a planning permission will be required to resume any new use on the basis that a material change of use will have occurred. Discontinuance or abandonment of use is a rather complex area but a number of tests are generally applied and include:
- The physical condition of the premises.
 - The period of non use.
 - The nature or character of the intervening use if any.
 - There must be an intention not to resume the use.

- 8.1.9 Of these tests, the latter three are the most relevant. In this instance, the period of residential non use is extensive. Notwithstanding the assertion by the referrer that as the 'shop (hairdresser use) was unlawful, that the first floor residential use cannot be considered abandoned, I consider that a period in excess of 40 years in which the subject unit was not utilised for residential or domestic purposes is clear evidence that there was a factual termination of the residential use and it was thus abandoned.
- 8.1.10 Furthermore, as the 'shop' use was established for this considerable intervening period of time, I am satisfied that this is evidence that there was no intention to resume the residential activity. In the Meath v Daly case cited above in section 7.3, it was determined that where there are intervening uses, even if unauthorised, this serves to indicate that there is no intention to resume the former use and that, therefore, the resumption of the use is not exempted development.
- 8.1.11 The referrer makes reference to the case Rehabilitation Institute v Dublin Corporation. In this case, it was determined that where an enforcement notice is issued relating to an unauthorised change of use, it is permissible to revert to the preceding use, if that use was lawful. In this instance, however, the planning authority did not instigate enforcement proceedings against the unauthorised 'shop (hairdresser use)'. Furthermore, in this instance, it has been determined that the preceding use is now abandoned. I do not, therefore, consider this a relevant precedent.
- 8.1.12 I conclude that in this particular case, the residential use of the unit has ceased and is abandoned. In this context, having regard to section 3(1) of the Planning and Development Act 2000 (as amended), the resumption of residential use constitutes development as it is a material change of use.

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

- 8.2.1 With regard to the alterations carried out to facilitate the development, it is noted that the works undertaken are internal to the structure. It is evident that there are no material external elevational amendments arising from the internal alterations. In this regard, it is considered that the works are considered exempt under section 4 (1) (h) of the Act being works which affect only the interior of the structure.

8.2.2 Article 10(1) provides an exemption for development which consists of a change of use within anyone of the classes of use specified in Part 4 of Schedule 2. Shop is defined as a Class 1 use. Residential accommodation is considered a Class 9 use. The provisions of Article 10(1), therefore, do not apply.

8.2.3 It is noted that under S.I. No. 30 of 2018 there are certain exemptions for the change of use from shop to residential use. The subject residential use commenced in mid 2016. As the Planning and Development (Amendment) (No. 2) Regulations 2018 came into operation with effect from the 8th of February 2018, the provisions of Article 10 (6) of the Regulations do not apply.

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 the use of the first floor unit as a residential dwelling and associated internal alterations above SPAR, Main Street, Shankhill, Co. Dublin is or is not development or is or is not exempted development:

AND WHEREAS Libratech Limited requested a declaration on this question from Dun Laoghaire Rathdown County Council and the Council issued a declaration on the 9th day of March, 2018 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 5th day of April, 2018:

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

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,

- (b) Articles 5 and 10 of the Planning and Development Regulations, 2001, as amended,
- (c) Class 1 and 9 of Part 4 of the Second Schedule to the Planning and Development Regulations, 2001, as amended, :
- (d) The Supreme Court decision in Dublin County Council v. Tallaght Block Co. Ltd and the High Court decision in Meath County Council v. Daly
- (e) the report of the Inspector

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The internal works to facilitate the residential use of the first floor unit would constitute “works” that are “development” under Section 3 of the Planning and Development Act 2000 (as amended).
- (b) The internal works and alterations come within the scope of section 4 (1) (h) of the Act, being works which affect only the interior of the structure and are thus exempted development.
- (c) The use of the first floor unit for residential use ceased in the early 1970’s. Subsequently there was an intervening use as a shop (hairdressing salon) for a period in excess of 40 years. The residential use is, therefore, considered to be abandoned.
- (d) Having regard to section 3(1) of the Planning and Development Act 2000 (as amended), the resumption of residential use constitutes development as it is a material change of use.

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:

1. The internal alterations above SPAR, Main Street, Shankhill, Co. Dublin are development and are exempted development.
2. The use of the first floor unit as a residential dwelling is development and is not exempted development.

Erika Casey
Senior Planning Inspector

15th August 2018