



An
Bord
Pleanála

Inspector's Report ABP-303219-18

Question

Whether the replacement of a permitted structure at front of restaurant is or is not development and is or is not exempted development.

Location

58, Grand Canal Street Upper, Dublin
4

Declaration

Planning Authority

Dublin City Council South

Planning Authority Reg. Ref.

0430/18

Applicant for Declaration

Paul James & Barry McNerney.

Planning Authority Decision

Is not exempted development

Referral

Referred by

Paul James & Barry McNerney.

Owner/ Occupier

Lord Slazenger.

Date of Site Inspection

9th January 2020.

Inspector

Bríd Maxwell

1.0 Site Location and Description

- 1.1. The referral site relates to a commercial premises located at 58 Grand Canal Street Upper in Dublin 4. The site lies on the eastern side of Grand Canal Street Upper northeast of the busy signalised junction with Haddington Road, Shelbourne Road and South Lotts Road. The DART rail line runs c20m to the northeast of the site. The surrounding area is characterised by residential two storey period brick terraces. There are also a number of more recent three storey mixed use buildings incorporating neighbourhood commercial uses at ground floor level. The adjoining building to the northwest of the referral building is in residential use while the premises to the south east is in commercial use including a launderette at ground floor level.
- 1.2. No 58 comprises a 3 storey 2 bay at 1st and second floor level brick finished commercial building which houses *Paulie's Pizza* restaurant. Externally the building is setback from the public footpath by a raised concrete area incorporating seating area bounded by framed glazed structure with a parasol style roof. There are two trees planted to the front of the raised seating area within the concrete platform. A disabled ramp with metal railing provides access to the restaurant entrance along the eastern side of the front facade from the public footpath. To the western side is another door which serves as access to the upper levels of the building.

2.0 The Question

- 2.1 The question referred as follows:

Whether the replacement of a permitted structure on private land located to the front of No 58 Grand Canal Street Upper, comprising an umbrella type structure and glazed side panels is or is not development and is or is not exempted development.

Having reviewed the details of the case I propose that the question is more appropriately rephrased as follows:

Whether the provision of a framed, glazed and roofed structure to the front of no 58 Grand Canal Street Upper, is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

By order dated 16th November 2018, Dublin City Council issued notification of its decision as follows:

The proposed development is not exempt from the requirement to obtain planning permission under Section 32 of the Planning and Development Act 200-2013.

The reasons and considerations are set out as follows:

“The replacement of a cloth umbrella/awning and a metal beam permitted under PL29S239883(3256/11) with an umbrella type structure and glazed side panels is materially different to the permitted development and does not constitute development authorised by that permission.

The replacement of a permitted structure on private land located to the front of No 58 Grand Canal Street Upper, comprising an umbrella type structure and glazed side panels is development and is not exempted development insofar as the works would materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure.”

3.2. Planning Authority Reports

3.2.1. Planning Reports

4.2.1.1 The Planner's report note the planning history and asserts that the current structure in place is materially different to that permitted under PL29S239883 (3245/11) and does not retain the development in accordance with condition 1 of PL29S239883. In addition, the unauthorised outdoor seating area has been formalised and sheltered with the current enclosure and would contravene condition 3 of PL29S.239883 (3256/11). The replacement of the permitted structure with an umbrella type structure and glazed side panels is development and is not exempted development. The adjacent terrace has a defined front building line with low front boundary walls and railings. The replacment of a permitted retractable cloth umbrella / awning with a solid fixed roof enclosure with the glazed side walls would obscure the existing building and would be located forward of the established front building line. In this regard, it is considered that the development would materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of adjoining structures and as such, the development is not exempt under 4(1)(h) of the Planning and Development Act 2000 as amended.

3.2.2. Other Technical Reports

None

4.0 Planning History

3791/11 Permission granted for extension to exiting restaurant to comprise change of use of 1st and 2nd floor (134m²) to restaurant use with minor internal modifications at first floor and new internal door at ground floor level.

PL29S239883 (3256/11) Split Decision. Permission was granted for retention of a revised wheelchair ramp, railing and retractable umbrella. Refusal of permission for retention of the external front shutters on grounds of negative visual impact on streetscape. Condition 3 was as follows: "This permission does not grant permission for the use of the external area for the purposes of restaurant use. Reason: In the interest of clarity."

PL29S 235955 (4216/09) The Board granted permission for (a) change of use of the existing ground floor from shop to restaurant(b) erection of an extract fan and

associated duct work to the rear elevation oversailing part of the rear of 60 Grand Canal Street Upper also known as 2 South Lotts Road (c) a new shopfront at ground floor level with mounted awning over (d) wheelchair access from the pavement.

Condition 2 "The proposed awning on the front elevation shall be omitted and the developer shall submit full details in relation to the design and use of external materials for the proposed shopfront, signage and wheelchair access to the Planning Authority for the written agreement prior to commencement of development.

Reason: In the interest of visual and residential amenity and orderly development.

Condition 4. No external security shutter shall be erected on the premises unless authorised by a further grant of planning permission, Details of all internal shutters shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

Reason: In the interest of visual amenity.

3553/08 Permission refused for retention of development including retention of new Extractor fan and ducting at ground first and second floor level to rear and side return of no 68 and which will also oversail part of 2 South Lotts Road. Permission refused for works consisting of internal alterations on all floors and change of use of sandwich shop at ground floor level to restaurant kitchen and dining area 66sq.m change of use of offices to restaurant plus ancillary office (125sqm) at first and second floor level (192sq.m overall) and alteration of front façade to include new shopfront at ground floor and vertical flag signage 1.5sq.m at first floor level mounted awning plus wheelchair access ramp to the front and use of existing pedestrian access to building.

5710/07 Permission refused for retention of works consisting of erection of new extractor fan and ducting at ground first and second floor level to the rear and side return of no 58 Grand Canal Street Upper that will oversail part of rear of no 2 South Lotts Road.

27/83 Permission granted for reconstruction of the property in the form of offices overground floor shop and 3 storey extension to the rear of 58 Grand Canal Street Upper.

Planning Officer's report also outlines an extensive Enforcement History in relation to extractor fan and ducting, use of commercial kitchen and including

E004/18 Regarding alleged unauthorised structure affixed to front elevation.

5.0 Policy Context

5.1. Development Plan

The Dublin City Development Plan 2016-2022 Refers. The site is within Z3 zoning which seeks to provide for and improve neighbourhood facilities.

5.2. Natural Heritage Designations

None

6.0 The Referral

6.1. Referrer's Case

7.1.1 The referral is made by Simon Clear and Associates, Planning and Development Consultants on behalf of the first party Paul James and Barry McNerney, Paulie's Pizza. Grounds of referral are summarised as follows:

- The original umbrella structure was erected in June 2010 ahead of the opening of the restaurant in July 2010. The umbrella extended over plinth and side screens were also erected at that time. (Photos appended.)
- Over time since 2010 the permitted umbrella became damaged by weather and was replaced twice as exempted development under Section 4(1)(h) of the Planning and Development Act 2000, as amended.
- In 2016 the operators decided that a more durable and weather resistant structure was needed to maintain visual amenity of the property in the longer term. In 2017 the current structure was erected and carefully designed to retain the appearance of an umbrella. The side panels were also replaced.

- Photographic history of the premises shows that the current structure although external does 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 current structure is a significant improvement of the streetscape in comparison to previously permitted and replacement structures which became dilapidated and unsightly over time.
- Planning Officer's assessment is fundamentally flawed, as the Article 9 restrictions on exemption apply only to exemptions under Article 6 of the Regulations. No case has been made by the applicant for an exemption under Article 6. Article 9(1)(a)(i) is not relevant to the assessment.
- Claim for exemption arises under Section 4(1)(h) of the Primary legislation and is not subject to any restrictions on exemption in the regulations.
- Notwithstanding this it must be clarified that the replacement of the structure does not in any way contravene either condition 1 or condition 3. Condition 1 does not preclude all exempted development provisions. In condition 3 the Board did not refuse outdoor dining. It did not deal with it as it was not part of the application.
- Condition 3 did not control the use of the external area but rather is a type of clarifying condition that is commonly included by ABP where the scope of planning permission may be uncertain.
- A declaration was not sought from DCC regarding use and it is beyond the scope of this referral.
- In relation to 4(1)(h) the Planning Officer considers the development obscures the existing building and materially affects the external appearance of the structure so as to render the appearance inconsistent with the character of adjoining structures. It is submitted that the structure does not obscure the building any more than the original structure granted by An Bord Pleanála;
- The building is located at the commercial end of terrace of buildings and like the corner building next door it is a 3 storey and commercial while the rest of the terrace is 2 storey residential. Many of the commercial buildings in the district centre have sheltered external spaces. The subject structure is entirely consistent with the commercial character of the junction.

- Subject site never had an enclosed front garden and has always been different in scale and presentation to the street than the adjacent residential terrace.

6.2. Planning Authority Response

The Planning Authority did not respond to the referral.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1)

“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.

Works includes any act or operation of construction

The following statutory provisions are relevant in this case:

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

“works” includes any act or operation of construction, excavation, demolition.

Extension, alteration repair or renewal and in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.”

“Structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and (a) where the context so admits, includes the land on, in or under which the structure is situate,”

Section 3(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 structure or other land.

Section 4(1) Sets out developments that shall be exempted development for the purposes of the Act.

Section 5(1): If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of the Act, any person, may, on payment of the prescribed fee, request in writing from the relevant planning authority any information necessary to enable the authority to make its decision on the matter.

5.(1)(4) 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.”

7.2. Planning and Development Regulations, 2001

8.0 Article 6(1) of the Planning and Development Regulations, 2001 states that “Subject to Article 9 development of a class specified in Column 1 and part 1 of Schedule 2 shall be exempted development for the purpose of the Act.”

9.0 9(1)(a)(i) if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

10.0 Assessment

10.1. Is or is not development

10.1.1. The definition of works is broad as it covers any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. I am satisfied that the

erection of the replacement structure to the front of the restaurant was an act which would be described as works and is therefore development.

10.2. Is or is not exempted development

10.2.1. I note that the decision of Dublin City Council refers to Article 9 1(a)(i) of the Planning and Development Regulations which states

(1) Development to which Article 6 relates shall not be exempted for the purposes of the Act (a) if the carrying out of such 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.

I consider that the first party referrer is correct in the assertion that as Article 6 and 9, and their associated restrictions on exempted development rights, relate exclusively to the classes of development specified in Schedule 2 of the Planning and Development Regulations 2001 (as amended), they are not relevant to the development subject to the referral as it is not a class of development listed in Schedule 2 of the Planning and Development Regulations 2001 as amended.

10.2.2. The first party sets out that case for consideration of the development being exempted development under Section 4(1)(h) of the Planning and development Act 2000 as amended, which reads:

“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.”

The first party contends that the structure is a replacement for a permitted structure, in reference to permission PL29S239883 which was a split permission in which the Board granted permission for “retention of a revised wheelchair ramp, railing and retractable umbrella and to refuse permission or retention of the external front shutters. I note that the retractable umbrella subject of that application comprised a

retractable umbrella or awning which was fixed to the ground in front of the restaurant by way of a metal beam.

10.2.3 Having reviewed the details and terms of the Permission PL29S239883 I note that the Board in its direction noted that

“In deciding not to accept the Inspector’s recommendation to refuse permission for the retractable umbrella, the Board considered there was a pattern of awnings in the vicinity and the umbrella did not unduly detract from the visual amenities of the area when open. The Board noted in regard to residential amenities that the hours of operation was limited by condition under PL29S234955 and that the development for retention represented an orderly way of dealing with restaurant customers who smoke.”

I note that the permission was subject to 4 conditions including condition 4. “This permission does not grant permission for the use of the external area for the purposes of restaurant use.

Reason: In the interest of clarity.”

10.2.4 I note that the previous application (PL29S239883) did not seek to authorise the change the use of the area to the front of the restaurant and it was on this basis, expressly outlined by both the City Planner and the Board’s reporting Inspector, considered that a justification for retention of the awning had not been provided. However, the Board deemed the awning to be appropriate however clarified that the permission did not authorise the use of the external area for restaurant use. It is evident from the photographic plates submitted with the referral that the area now enclosed by the glazed panels has evolved and formalised into a seating area as an extension of the restaurant use. In terms of consideration of the materiality of the change of use in the context of case law the question to address relates to the matters which the planning authority would take into account in the event of a planning application being made for the use and if these matters are materially different (from the original use), then the nature of the use must equally be materially different.

10.2.5 On the basis of the foregoing I consider that area now enclosed by the structure represents an unauthorised encroachment of the restaurant expanding its planning unit and constitutes development and a material change of use for which there is no exemption as set out in the relevant exempted development provision of the Act or Regulations. Clearly the enlargement of the overall premises gives rise to increased commercial activity which would have material consequences in terms of the proper planning and sustainable development of the area

10.2.6 In considering the test of Section 4(1)(h) with regard to whether the structure materially affects the external appearance of the building and whether this renders its appearance inconsistent with the character of the structure or of neighbouring structures, I consider that the provision of this more permanent enclosure materially affects the appearance of the structure giving rise to a materially different character of the development in terms of its presentation to the street. It is therefore concluded that the works are not exempted development by virtue of Section 4(1)(h) of the 2000 Act, as amended. The works could not in my view be construed as falling within the definition of “works for the maintenance, improvement or other alteration of any structure” in accordance with Section 4(1)(h) of the Act as they constitute the erection of a new structure.

11.0 Recommendation

11.1. 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 provision of a framed, glazed and roofed structure to the front of no 58 Grand Canal Street Upper*, is or is not development or is or is not exempted development:

AND WHEREAS Simon Clear & Associates Planning and Development Consultants on behalf of the Mr Paul James and Mr Barry McNerney requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 19th day of November 2018 stating that the matter was development and was not exempted development:

AND WHEREAS Simon Clear and Associates on behalf of Mr Paul James and Mr Barry McNerney referred this declaration for review to An Bord Pleanála on the 13th day of December 2018:

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)(a) 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,
- (e) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the layout of the premises as now constituted:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The enclosure of the and use of the area to the front of the restaurant as an extension of the restaurant would constitute development, being the making of a material change in the use of

land within the meaning of section 3 of the Planning and Development Act 2000.

- (b) The glazed roofed structure does not fall within the scope of Section 4(1) (h) of the Planning and Development Act 2000, and is, therefore, considered to be development, which is not exempted development.
- (c) The replacement of the former external retractable umbrella with a glazed roofed structure comprises works that constitute development which is not exempted development
- (d) The said use of the area enclosed by the structure has material consequences in terms of the proper planning and sustainable development of the area.
- (e) The said use of the area constitutes a material change of use being an extension of the net floorspace of the restaurant and consequently an intensification of use of the land.

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 works involving the erection of a glazed and roofed structure to the front of the restaurant is development and is not exempted development.

Bríd Maxwell
Planning Inspector

23 January 2020