



An
Bord
Pleanála

Inspector's Report

ABP-303471-19

Question	Whether the development at The Man Friday Restaurant is or not development or is or is not exempted development
Location	Man Friday, Scilly, Kinsale, Co. Cork.
Declaration	
Planning Authority	Cork County Council
Planning Authority Reg. Ref.	D/310/18
Applicant for Declaration	Philip and Josephine Horgan.
Planning Authority Decision	Is not exempted development
Referral	
Referred by	Philip and Josephine Horgan
Owner/ Occupier	Philip and Josephine Horgan
Observer(s)	None
Date of Site Inspection	9 th April 2019.
Inspector	Elaine Power

1.0 Site Location and Description

- 1.1. The site is located in Scilly which is an elevated peninsula within the Harbour of Kinsale. Scilly is a residential area characterised by narrow winding streets.
- 1.2. The site is approx. 0.17 ha and accommodates a restaurant with a gross floor area of approx. 315sqm. Due to the elevational differences, only the roof of the restaurant is visible from the public road and access to the restaurant is via steps. The site is also visible from Lower Road and Pier Road in Kinsale on the opposite sides of the Harbour.
- 1.3. The public road (Lower Road) outside the restaurant is approx. 4.5m in width with no footpath. There are double yellow lines located outside the restaurant boundary and unrestricted car parking is available on the opposite side of the road.

2.0 The Question

Whether the following are or are not development and are or are not exempted development.

- (a) A 55sqm covered pergola on a paved area to the west of the restaurant.
- (b) Painted lettering advertisement on the roof.
- (c) The erection of a statue of 'Liam Madden' along the southern boundary of the site.
- (d) A private paved area, the demolition of the existing wall and the construction of a stone wall not exceeding 1.2m in height.

3.0 Planning Authority Declaration

3.1. Declaration

A request for a Section 5 declaration relating to 13 no. items (a-m), which included the 4 no. items, which are the subject of this referral, was received by Cork County Council

from Liam Madden of Vitruvius Hibernicus, on behalf of Philip and Josephine Horgan. The 13 no. items are summarised below.

- a. Cutting and removing over-large tree in the centre of a paved terrace, and provision of planting in the area generally.
- b. Re-paving the disturbed terrace after tree-cutting
- c. Paving a ramped section of pathway with surface water channel at the top thereof
- d. Completion of pergola on a paved area as part of an ornamental garden
- e. Painted lettering advertisement on the roof
- f. Decorative wall and planting at the southern edge of the paved area
- g. Painting of external walls of Man Friday
- h. The (proposed) erection of an advertising flag above roof level on a vertical pole, following the removal of the roof painted advertisement
- i. Re-alignment of drains and new ANUA holding tank and pumping station
- j. Erection of a statue of Liam Madden as a roadside shrine in recognition of his genius
- k. The re-tarmacking and re-surfacing of a private pathway
- l. Temporary builders' accommodation for the purposes of carrying out permitted and / or exempted works on site.
- m. Private paved area and a stone wall not exceeding 1.2m in height.

The Planning Authority issued a declaration that 9 no. items were exempted development and that 4 no. items (d, e, j and m), the subject of this referral, are not exempted development.

3.2. Planning Authority Reports

3.2.1. *Planning Reports*

With regard to the 4 no. items which are the subject of this referral the Planner's report noted the following:

- The pergola structure and roof advertisement relate to an on-going Enforcement case Ref. 18/174.
- The pergola structure does not involve the maintenance or improvement of the existing structure. It is a new detached structure which enables the intensification of the outdoor terrace area. An email from the applicant's agent is on file accepting that permission is required for the structure.
- The painted lettering advertisement on the roof does not comply with the conditions and limitations due to the height of the advertising and the size of the lettering.
- The erection of a statue is not a roadside shrine.
- The paved area involves the formation of a parking area and the material widening of the public road.

3.2.2. *Other Technical Reports*

Environment Directorate (4th December 2018) raised concerns that the applicant connected to the public sewer and does not have a discharge licence. These issues can be dealt with outside of the planning process.

Enforcement Section (30th November 2018) stated that an enforcement file has been closed regarding the rising of ground levels and the construction of a ramp within the site.

4.0 **Planning History**

19/04071: Retention permission was granted on the 13th March 2019 for a roof advertisement / logo painted on the existing roof slope and an external gazebo structure on an existing terrace (55sqm) at Man Friday.

5.0 **Policy Context**

5.1. **Bandon Kinsale Municipal District Local Area Plan, 2015**

The subject site is located within the settlement boundary for Kinsale. However, it is located within Scilly, which is a small attractive peripheral coastal settlement outside of the town. The plan notes that Scilly contains a more refined architectural heritage and some attractive townscape elements.

5.2. **Cork County Development Plan 2015 -2021**

Policy TCR 13-1 provides guidance on shopfront signage.

5.3. **Natural Heritage Designations**

There are no relevant designations in the vicinity of the site.

6.0 **The Referral**

6.1. **Referrer's Case**

The applicant addressed each of the 4 no. items separately which are summarised below.

Pergola: The Planning Authority misinterpreted the meaning of maintenance and improvement as requiring that the structure must be physically attached to the existing building. The Planning Authority was also incorrect to assume that the pergola allows for the intensification of the use of the existing outdoor terrace area.

Advertising: The words Man and Friday should be assessed separately when applying the conditions and limitations of the Planning and Development Regulations, 2001 (as amended).

Statue: Additional details of the statue have been included in the referral which include a stone shrine and halo over the statue and are all within the 2m height restriction.

Paved Area: The paved area is not for parking. It is a private area and will not be an extension of the public road.

6.2. Planning Authority Response

The Planning Authority stated that an application was lodged (reg. ref. 19/4071) for the retention of the following:

- (1) The lightweight timber framed covered gazebo construction on an existing paved-dining terrace; and
- (2) A painted roof signage on the existing dining room roof.

6.3. Further Responses

The applicant noted that permission was granted under Reg. Ref. 19/4071 on 13th March 2019 for the retention of the following: -

- (1) The lightweight timber framed covered gazebo construction on an existing paved-dining terrace; and
- (2) A painted roof signage on the existing dining room roof.

It is requested that a determination still be made with regard to the referral.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

In **Section 2 (1)** of the Act “works” are interpreted as including “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”.

Part 1 – Preliminary and General defines **‘alteration’** as including: -

(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.

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 developments for the purposes of this 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’;

7.2. Planning and Development Regulations, 2001

Article 6(1) of the regulations states 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).

Schedule 2, Part 1 – Exempted Development – General

Sundry Works

Class 11 The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of -

- (a) any fence (not being a hoarding or sheet metal fence), or
- (b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete

Subject to the following conditions and limitations: -

1. The height of any new structure shall not exceed 1.2 metres, or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.
2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.

Class 13 The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.

Subject to the following conditions and limitations: -

The width of any such private footpath or paving shall not exceed 3 metres.

Development for Amenity or Recreational Purposes

Class 33 (a) Development consisting of the laying out and use of land as a park, private open space or ornamental garden.

There are no limitations or conditions attached.

Class 33(b) Development consisting of the laying out and use of land as a roadside shrine. –

Subject to the following conditions and limitations: - the area of any such shrine shall not exceed 2 meters above the centre of the road opposite the structure and it shall not be illuminated.

Schedule 2, Part 2 – Exempted Development - Advertisements

Class 1 Advertisements (other than those specified in classes 2, 3 or 5 of this Part of this Schedule) exhibited on business premises, wholly with reference to the business or other activity carried out on or the goods or services provided on those premises. Subject to the following conditions and limitations:-

1. The total area of such advertisements exhibited on or attached or affixed to the front of any building on the premises shall not exceed an area equal to 0.3 square metres for every metre length of such front, less the total area of any such advertisements exhibited on the premises but not exhibited on or attached or affixed to a building, and in any event shall not exceed 5 square metres.

2. The total area of such advertisements exhibited on or attached or affixed to any face of a building on the premises other than the front thereof shall not exceed 1.2 square metres and the total area of any such advertisements on such face which are illuminated shall not exceed 0.3 square metres.

3. The total area of such advertisement which are not exhibited on or attached or affixed to a building on the premises shall not exceed 3 square metres, of which not more than 1.5 square metres shall consist of advertisements which are illuminated.

4. (a) No part of any such advertisement which is not exhibited on or attached or affixed to a building on the premises, or of an advertisement structure on which it is exhibited, shall be more than 2.5 metres in height.

(b) No part of any such advertisement which is exhibited on or attached or affixed to a building on the premises shall be more than 4 metres in height above ground level.

5. Where any such advertisement projects more than 5 centimetres over any public road, the sign or other advertisement structure on which it is exhibited shall not be less than 2 metres above the level of such road and shall not project more than 1 metre over such road.

6. Where any such advertisement consists of a circular sign and projects more than 5 centimetres over any public road, the diameter of such sign shall not exceed 1 metre and no other such advertisement shall be exhibited on a sign or other advertisement structure projecting more than 5 centimetres over such road.

7. Where any one or more such advertisements are exhibited on a swinging or fixed sign or other advertisement structure (other than a circular sign) projecting more than 5 centimetres from any external face of a building, the total area of such advertisements shall not exceed 1.2 square metres and the area of any face of any such advertisement shall not exceed 0.4 square metres.

8. No such advertisement shall contain or consist of any symbol, emblem, model, logo or device exceeding 0.6 metres in height or any letter exceeding 0.3 metres in height.

9. No such advertisement shall cover any part of any window or door of any building on which the advertisement is exhibited or to which it is attached or affixed.

Article 9(1) provides that exempted development under Article 6 of the Regulations shall not be exempted development in certain specified circumstances. Of relevance is Article 9(1)(a)(iii):

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 such development would –

(iii) endanger public safety by reason of traffic hazard or obstruction of road users.

7.3. **Referrals**

RL 3430 – Painted advertising signage on the roof slope of a bar / restaurant, flagpole signage and 3 no banner signs.

The Board concluded that the signs came within the scope of Class 1 of Part 2 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) and did not comply with the limitations and conditions set out in 4(b) and 8 in relation to the overall height and height of lettering and therefore was not exempted development.

RL2792 – Smoking area structure (approx. 2.1m by 6.9m) and storage area.

The Board concluded that the creation of a smoking structure and storage area constituted a material change of use that did not come within the scope of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) and, therefore, was not exempted development.

8.0 **Assessment**

8.1. It should be noted that the purpose of a referral is not to determine the acceptability or otherwise of the proposed works in respect of the proper planning and sustainable development of the area, but rather to determine whether or not the matter in question constitutes development and if so falls within the scope of exempted development.

8.2. Is or is not development

- 8.2.1. The items at issue comprise the (a) retention of a covered 55sqm pergola, (b) the retention of advertising on the roof of the restaurant, (c) the erection of a statue and (d) the demolition of the existing boundary wall, the provision of a paved area and the construction of a 1.1m high stone wall within the grounds of a restaurant, adjoining the public road. Having regard to Section 2(1) and Section 3(1) of the Planning and Development Act, 2000 (as amended) these items constitute works, and, therefore, constitute development. The next question is whether the works carried out are or are not exempted development.
- 8.2.2. It is noted that the issue of material change of use is also raised in relation to item (a). This is discussed further below.

8.3. Is or is not exempted development

There are four elements to this referral. In the interest of clarity, I will assess each item separately.

8.3.1. *Pergola*

The pergola is covered and has a gross floor area of 55sqm. It is noted that permission was recently granted (13th March 2019) for the retention of the structure (Reg. Ref. 19/04071) and that it was previously subject to enforcement proceedings (EF 18/174).

The referrer stated that the pergola does not increase the capacity of the existing terrace and considers that the works consist of the laying out and use of land as an ornamental garden. Therefore, the pergola is exempted under Class 33(a). In my opinion the structure extends the commercial area of the restaurant and does not consist of the laying out of land as a park, private open space or ornamental garden. It is not, therefore, exempt under Class 33(a).

The pergola is located on a paved area adjoining the restaurant use. It is covered and accommodates tables and chairs, ancillary to the restaurant use. As the pergola provides shelter for an area that was previously open, it is my opinion that it would be

a material change of use from open space to a sheltered area for the consumption of tobacco and alcohol. Therefore, the works cannot be described as an improvement or alteration to the existing restaurant and as such do not fall within the scope of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended). In my opinion the pergola is more appropriately described as the erection of a new separate structure which would result in an intensification of the restaurant use and would, therefore, be a material change of use. As such, the pergola to be retained is development which is not exempted development.

8.3.2. Advertising

The painted advertising sign 'Man Friday' is located on the northern roof slope. It is noted that permission was recently granted (13th March 2019) for the retention of the advertising (Reg. Ref. 19/04071), which was previously subject to enforcement proceedings (EF 18/174). Scaled drawings have not been submitted with the referral. However, the drawings submitted show the advertising as being located between approx. 2.5m and approx. 4.5m above ground floor level. The dimensions of advertising area is shown as approx. 3.7m in width by approx. 1.8m in height. The total surface area of the advertising is indicated as 1.7sqm.

The referrer has requested that the words 'Man' and 'Friday' be assessed separately. In my opinion, the words should be assessed together as they are advertising for the restaurant and not stand-alone signage.

Class 1 of Schedule 2, Part 2 sets out a number of conditions and limitations relating to advertisements. Condition and limitation 2 requires that the total area of any advertising exhibited on a building, other than the front elevation, shall not exceed 1.2sqm. Having regard to the information submitted it is estimated that the roof advertising is approx. 1.7sqm. Therefore, condition and limitation 2 is exceeded.

Condition and limitation 8 requires that no advertisement shall contain any letter exceeding 0.3m in height. From the information submitted it is estimated that each of the individual letters are approx. 0.9m in height. Therefore, the advertising exceeds this limitation.

As such this element of the works is considered to be development which is not exempted development.

8.3.3. **Statue**

It is proposed to erect a statue of 'Liam Madden' as a roadside shrine. The statue is to be located within the site, adjacent to the public road. Additional details of the statue have been included in the referral, which indicate that the statue will be partly enclosed by a low marble wall and a halo will be placed above the statue. The overall structure will not exceed 2m in height. The applicant considers that the statue falls within the scope of Class 33(b) which relates to roadside shrines.

Planning legislation does not provide a definition of a shrine. The Oxford dictionary definition of a shrine is '*a place regarded as holy because of its associations with divinity or a sacred person or relic, marked by a building or other construction*'.

In my opinion, having regard to the character of the statue, which the referrers agent 'Liam Madden' has stated is based on himself, modelled on 'Nero', it cannot be considered a roadside shrine, as defined in the Oxford dictionary. Therefore, it is considered that the statue does not fall within the scope of Class 33(b).

As such this element of the works is considered to be development which is not exempted development.

8.3.4. **Paved Area**

These works comprise three distinct elements (a) the demolition of the existing boundary wall, which adjoins the public road, (b) the relocation and construction of a new 1.1m high wall, and (c) the provision of a paved area approx. 14m in length by 2.4m in depth.

Due to the level differences on site there is no connectivity between the proposed paved area and the restaurant.

Class 11 allows for the construction, erection, lowering, repair or replacement of any wall subject to the wall being appropriately rendered or plastered with a maximum height of 1.2m. Having regard to the provisions of Class 11 it is considered that the demolition of the existing boundary wall and the construction of a new 1.1m high boundary wall, relocated approx. 2.4m north from its current position would be exempted development.

Class 13 allows for the construction of any private footpath or paving. Conditions and limitations state that the width of any such private footpath or paving shall not exceed 3 meters. Having regard to the provisions of Class 13 it is considered that the provision of a private paved area, approx. 14m in length by 2.4m in depth, within the boundary of the restaurant, would be exempted development.

The Applicant has stated that the Planning Authority misinterpreted the intended use of the proposed works and clarified that it is not intended to use the proposed paved area for car parking. It is proposed that the paved area would be used as a private space associated with the restaurant. It is considered that the provision of a paved area within the boundary of the restaurant falls within the scope of Section 4(1)(H) of the Planning and Development Act, 2000 (as amended) and is therefore exempted development.

As such these elements of the works are considered to be development which is exempted development, subject to any restrictions on exempted development under Article 9 of the Planning and Development Regulations, 2001 (as amended).

8.4. Restrictions on exempted development

Paved Area

- 8.4.1. The works consist of the demolition of the existing wall, the construction of a new 1.1m high wall, located approx. 2.4m north of the existing wall and the paving of an area (33.6sqm) adjacent to the public road. The referrer stated that the paved area would remain in private ownership and would not form part of the public road or be used for car parking and suggested that the area may be used for benches associated the

restaurant, storage of wheelie bins or the provision of a bring centre. The section of the public road, that adjoins the paved area, is approx. 4.5m in width with no footpath and experiences parking congestion. In my opinion the alterations to the front boundary wall and the provision of a paved area at this location would result in additional pedestrian movements, in close proximity to a substandard road, which would endanger public safety.

8.4.2. Having regard to the proximity of the paved area to the public road (Lower Road), it is considered that the works would be de-exempted by reference to Article 9(1)(a)(iii) of the Planning and Development Regulations, 2001 (as amended), which restricts development that would endanger public safety by reason of traffic hazard.

8.4.3. I, therefore, conclude that the works to the front boundary wall and the provision of a paved area adjoining the public road are development which are not exempted development.

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

- A pergola on a paved area as part of an ornamental garden;
- Painted lettering advertisement on the roof;
- The erection of a statue of 'Liam Madden'
- A private paved area, the demolition of an existing boundary wall and the construction of a stone wall not exceeding 1.2m in height.

At Man Friday, Scilly, Kinsale, Co. Cork is or is not development and is or is not exempted development

AND WHEREAS Philip and Josephine Hogan requested a declaration on this question from Cork County Council and the Council issued a declaration on the 11th day of January, 2019 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 16 day of January, 2019:

AND WHEREAS Philip and Josephine Hogan An Bord Pleanála, in considering this referral, had regard particularly to –

- a. Section 2(1), 3(1) and 4(1)(h) of the Planning and Development Act, 2000, as amended,
- b. Article 6(1) and 9(1) and Parts 1 and 3 of Schedule 2 of the Planning and Development Regulations, 2001, (as amended),
- c. The planning history of the site.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the retention of a 55sqm pergola would constitute development, as it involves works. The change of use is considered a material change in use, as the area has been opened to use by patrons of the restaurant. This material change in use does not come within the scope of Section 4 (1) (h) of the Planning and Development Act, 2000, being of a material change in the use of land within the meaning of Section 3 of the said Act, and there are no other provisions of exempted development that would apply to the development:
- (b) The painted advertising lettering comprising 'Man Friday' on the roof slope does not fall within the scope of Class 1 of Part 2 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) as it does not comply with limitations and conditions 2 and 8 with

regard to the overall height of the advertising and height of the individual lettering in the advertising and therefore is not exempted development.

- (c) The erection of a statue, as proposed, does not fall within the scope of landscaping associated with a private ornamental garden as provided for in Class 33(b) of Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended) and is, therefore, is not exempted development.

- (d) The provision of a private paved area and the demolition of the wall and the construction of a new wall, approx. 1.1m in height, within the boundary of the site falls within the scope of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) and Classes 11 and 13 of Part 1, Schedule 2 of the Planning and Development Regulations, 2001 (as amended). However, the works do not comply with the restrictions on exemptions set out in Article 9(1)(a)(iii). The works would result in the provision of a paved area (sqm), which the referrer has stated could be used for a seating area associated with the restaurant use, adjacent to a substandard public road, which has no footpath and experiences parking congestion. Therefore, as the works would endanger public safety by reason of a traffic hazard they do not constitute 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 said works involving the retention of a pergola on a paved area, as part of an ornamental garden, the retention of painted lettering advertisement on the roof, the erection of a statue of 'Liam Madden' and the creation of a private paved area, the demolition of an existing boundary wall and the construction

of a stone wall not exceeding 1.2m in height at Man Friday, Scilly, Kinsale, Co. Cork are development and are not exempted development.

Elaine Power
Planning Inspector

20th May 2019