



An
Bord
Pleanála

Inspector's Report ABP-303520-19.

Development	Retention permission for the erection of a timber and Perspex roof over part of the bar yard and all associated site works.
Location	The Spinnaker Bar, Dunmore East, Co. Waterford.
Planning Authority	Waterford City & County Council.
Planning Authority Reg. Ref.	17/794.
Applicant(s)	Niall Edmondson.
Type of Application	Retention permission.
Planning Authority Decision	Grant subject to conditions.
Type of Appeal	Third Party.
Appellant(s)	Tom O'Regan.
Observer(s)	None.
Date of Site Inspection	2 nd May, 2019.
Inspector	A. Considine.

1.0 Introduction

- 1.1. This appeal relates to a re-activated case, ABP-300907-18 refers, following a High Court Order perfected on the 21st day of December, and the Boards Direction dated the 14th day of February, 2019.
- 1.2. Appeal reference ABP-300907-18 was quashed by the Courts and remitted back to the Board for a fresh determination as the submission of the applicants response to the third party appeal, dated the 5th day of March, 2018, had not been considered in the Inspectors report or the Boards decision. The Court noted that the Order of Certiorari was granted only on the basis of a breach of Section 129 of the Planning and Development Act, 2000, as amended and a breach of fair procedures.

2.0 Site Location and Description

- 2.1. Dunmore East is a fishing port village in Waterford Harbour and is a significant tourism offer in the south eastern area of the Ireland. Development in the village has extended from the traditional village centre towards the north and west.
- 2.2. The subject site is located to the northern end of Dunmore East village, and within the built up area of the village. The site is located approximately 100m from the sea with the public road located to the west of the building. The site is otherwise surrounded by residential properties.
- 2.3. The building is currently operating as The Spinnaker Bar and Restaurant and comprises a part single part two storey structure. The area associated with this application lies to the rear of the building. The site has a stated area of 0.07ha and the area the subject of this retention application has a stated floor area of 142m².

3.0 Proposed Development

- 3.1. Permission is sought to retain the erected timber and Perspex roof over part of the bar yard, and all associated site works all at The Spinnaker Bar, Dunmore East, Co. Waterford.
- 3.2. The structure encloses the rear area of the site and rises to approximately 2.5m in height. Access to the area is through the existing bar/restaurant area.

4.0 Planning Authority Decision

4.1. Decision

The Planning Authority decided to grant permission for the proposed development, subject to 1 condition.

4.2. Planning Authority Reports

4.2.1. Planning Reports

The planning report restricted its assessment to the retention of the structure as applied for and did not consider the inclusion of conditions relating to the use of the area or the hours of operation. The report considered the submissions made as well as policy requirements and formed the basis of the Planning Authority's decision to grant permission.

4.2.2. Other Technical Reports:

Environment Section: No objection subject to compliance with conditions.

4.2.3. Prescribed Bodies;

None.

4.2.4. Third Party Submissions:

There were 5 submissions from third parties in relation to the proposed development. The issues raised reflect those issues raised in the appeal and are summarised as follows:

- The site has been developed without the benefit of planning permission.
- Noise issues associated with live music.
- Impact on residential amenity
- Non-compliance with previous notices issued by the Council.
- Fire safety, public safety and accessibility issues raised.
- No proposals to reduce noise
- Level of usage of the area.

4.2.5. First Party Response:

The applicant submitted a response to the third party objections advising that the area the subject of this retention application was being used as an outdoor music venue and contained a partial roofed area prior to its purchase in 2005. In addition, it is submitted that the existing structures have been in place for many, many years. It is submitted that the photographs submitted with the objections would have been taken many years prior to 2006.

5.0 Planning History

The following is the relevant planning history pertaining to the subject site:

PA ref 05/1653: Permission granted to the current application for the refurbishment and extension of first floor accommodation together with elevational changes at first floor level together with all ancillary and associated site works for the Spinnaker Bar. This permission was not implemented.

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ABP ref ABP-300907-18 (PA ref 17/974): previous decision to grant quashed by the courts and returned to the Board for fresh determination.

Relevant Referrals:

ABP ref ABP-300268-17: This referral relates to the current proposed retention application questioning whether the development as constructed is or is not exempted development. The Board determined that the development was not exempted development. The quashed Board decision did not include this referral determination.

The Board will note that the applicant has sought to exclude the issue of 'use' from the subject retention application, with a specific focus on the 'works' – being the roof structure – only. In addition, I note from the information on the file, that the applicant had sought that the premises be considered as a single planning unit, all of which is a public house and restaurant. There have been a number of referrals which might

be considered relevant to this case, particularly in relation to the issue of 'use' and 'intensification'.

RL2792: relates to a smoking area to a bar in Kildare. A small new framed and roofed area was constructed and it was determined that the creation of the external smoking area and storage area constituted works and development that was a material change of use from the open, communal yard, which did not come within the scope of S4(1)(h) of the PDA, 2000.

RL2986: relates to a change of use of a former keg store to a smoking area. Again, the Board decided that the change of use was a material change of use as it involved the extension of the public area of the bar and involved intensification of the use.

Legal Cases:

In terms of legal cases, the Board will note that there have been a number of cases with the courts in relation to the issue of use, change of use and intensification.

6.0 Policy Context

6.1. Development Plan

The village of Dunmore East is included as a District Service Centre in the Waterford County Development Plan, 2011-2017 and is zoned C5 Tourism in the settlement plan, contained in Volume 2 of the Plan. It is the stated objective of this zoning 'to provide for sustainable tourism uses including the provision of accommodation and tourism related facilities'.

Chapter 10 of the Plan deals with Development Standards.

6.2. Natural Heritage Designations

The site is not located within any designated site. The site is located approximately 4km to the south of River Barrow and River Nore SAC, Site Code 002162.

In addition, the site is located approximately 6km to the east of Tramore Dunes & Backstrand SAC, Site Code 000671 and Tramore Back Strand SPA, Site Code

004027, and approximately 7km to the west of the Hook Head SAC, Site Code 000764.

The Dunmore East Cliffs pNHA, Site Code 000664, is located within 300m of the site to the South.

7.0 The Appeal

7.1. Grounds of Appeal

This is a third party appeal against the decision of the Planning Authority to grant permission for the proposed development. The grounds of appeal are similar to those raised with the Planning Authority and are summarised as follows:

- Planning history and enforcement issues associated with the site raised.
- The PA did not adequately consider the application and non-compliance with previous permissions referenced.
- Lack of assessment in terms of the extent or design of the structure to be retained.
- Residential amenity issues raised in relation to noise associated with the use of the area as a beer garden and music event venue and lack of any assessment of noise impact or mitigation measures to address noise.
- Intensification of the use of the site.
- Comments are made in relation to the concurrent referral which was with the Board in relation to the subject retention application.
- Issues raised in relation to the drawings submitted.

It is requested that in the event of planning permission being granted that conditions be included to protect residential amenity.

7.2. First Party Response

The applicant submitted a response to the third party appeal on the 5th day of March, 2018 The submission is summarised as follows:

- The third-party appeal raises irrelevant issues and the appeal letter has interfered with the Section 5 Referral process by making submissions which he had no right to do, potentially prejudicing the Boards consideration of the referral.
- In relation to enforcement, the appellant is not privy to the background to alleged unauthorised development or the responses to the allegations.
- The issue of use has already been dealt with and the Planning Authority has not pursued the matter any further. The retention application relates solely to the structure.
- In terms of the planning history and alleged non-compliance issues, it is submitted that the applicant has no issue in complying with the terms of the Section 107 Notice issued by the Council.
- The Planning Authority required that the roof over the smoking area / beer garden be addressed only and did not include the roof over the side storage area.
- The rear yard, which has been covered by the roof the subject of this retention application, was used for decades and the use has not changed. The Council has not challenged the use.
- The roof cover has not intensified the use or increased the number of music events held outdoors and most live music events are held indoors.
- It is noted that the appellants house is located at a distance of 110m from the site and lies closer to The Strand Inn, which is a larger bar/restaurant, with accommodation, than the Spinnaker Bar. It is noted that there have been no objections from immediate neighbours.
- Recent noise survey carried out by Waterford City & County Council confirms that no noise associated with the premises could be heard outside the appellants property.
- The application to the Council was validated and nobody's ability to engage was compromised.

- The S107 Notice was issued by the Council to regulate the hours of operation and the noise levels which provides the residential amenity safeguards sought by the appellant. The PA was correct not to impose further conditions due to the nature of the application. The Development Management Guidelines for Planning Authorities, DoEHLG 2007, advise against planning conditions that duplicate regulation provided and enforced under other codes.

The Board is requested to uphold the decision of the Planning Authority.

7.3. Planning Authority Response

The Planning Authority has not responded to this third party appeal.

7.4. Observations

None.

7.5. Other Submissions

Following the recent High Court Decision, the following submissions were made in relation to the subject appeal:

7.5.1. Third Party Appellant:

The third party submission re-submitted the grounds of appeal as originally submitted to the Board against the decision of the PA to grant permission for the proposed development. the submission summaries the grounds of appeal and requests that the conditions attached to the previous decision of the Board – as quashed by the Courts – be included in the event of a grant of planning permission in the interests of protecting the amenities of the area and safeguarding residential amenities.

In addition to the above, the submission submits details of the planning history of the site, citing the Section 5 Declaration Order of the Board dated 2nd August, 2018.

In response to the Applicants submission to the Board dated 5th March, 2018, the following is submitted:

- Contrary to the views of the applicant, it is considered that the planning history, including applications, enforcement proceedings and referrals, are not irrelevant matters.
- In relation to the enforcement background issues, it is noted that the applicant seeks to restrict the consideration to 'works' only. The construction of the roof change the nature of the use of the area, effectively being an extension of the public house.
- Although the development may achieve immunity from enforcement actions because of the 'seven-year rule', it remains unauthorised and no exempted development entitlements are available to the bar yard area for concert or live music activities.
- It is considered that the PA did not fully consider the proper planning and sustainable development of the area and that the impact of the material intensification of the use over time has resulted in noise pollution impacting on the wider residential area.
- It is submitted that a PA has the power to refuse permission for a development which it considers would be unacceptable on environmental grounds, including noise impacts.

7.5.2. First Party:

The submission received by the Board on the 2nd day of April, 2019, provides a background to the subject case and raises concerns in relation to the condition 2 imposed by the Board, under the quashed decision, on the basis that the noise is not being emitted by the structure the subject of the appeal, rather the use taking place within the structure. It is submitted that the use is an established and authorised use and is not subject to the retention planning application. It is submitted, however, that the recommended condition 2 proposed by the Boards Inspector, which restricts the amplification of music after 11.30pm on any night, is acceptable.

In terms of the most recent third party letter, the following is submitted:

- The use of the bar yard is established and authorised as determined by the PA.
- There has been no intensification of use as suggested.

- The validity of the application have been dealt with and the PA validated the application.

In light of the above, it is submitted that Condition 2 would be unlawful and inappropriate. The hours of operation and noise are dealt with under the Section 107 Notice.

- Issues raised in relation to condition 3.
- The referral, while unchallenged, was decided without the vital information with respect to the established and authorised use.
- The St. Patricks Day event referred to by the third party went off without incident, finishing at 10.45pm and was monitored by the Council.

It is requested that the Board reassess the application for retention of the timber and Perspex roof over part of the bar yard having regard to the findings of the PA in terms of the use being established and authorised.

8.0 **Assessment**

I consider that the main issues pertaining to the proposed development can be assessed under the following headings:

1. Principle of the development
2. Conditions & Residential Amenity issues
3. Appropriate Assessment
4. Environmental Impact Assessment

8.1. **Principle of the development:**

- 8.1.1. The subject site is located in the northern area of Dunmore East village, Co. Waterford and on lands zoned C5 Tourism in the settlement plan, contained in Volume 2 of the Plan. It is the stated objective of this zoning 'to provide for sustainable tourism uses including the provision of accommodation and tourism related facilities'.

8.1.2. Having regard to the established nature and use of the wider site as a bar and restaurant, I am generally satisfied that the retention of the timber and Perspex roof over the bar yard is acceptable in principle.

8.2. **Conditions & Residential Amenity Issues**

8.2.1. I note the submission of both parties in relation to the consideration of the detail of the retention application, and in particular, I note that the retention application relates only to the roof structure, and not the use of the yard beneath as a music venue and bar area. The applicant submits that the use has been accepted by the Planning Authority as being established and authorised on the basis of the longevity of the use of the area as such. In terms of an assessment in this regard, I would not agree with the applicant and I consider that in an effort to regularise the structure, it is entirely appropriate that the Board consider the use supported by the structure and the protection of general and residential amenities.

8.2.2. I have considered the planning history of the site and have not found any evidence of a grant of planning permission or authorisation for the use of the public house area to be extended to the rear yard. While I accept the fact that the yard area has been in use for many years, and is identified as the 'Dry Dock Bar', I also note the comments of the Board in terms of the Section 5 Declaration on the matter. Notwithstanding the number of years the yard area has been in use as an extension of the public house, it remains, in my opinion, a use which does not have the benefit of planning permission. I would note that issues of non-compliance and potential unauthorised development are a matter for the Planning Authority.

8.2.3. In addition to the above, I have considered the planning applications submitted by the applicant in 2005 and 2006 in relation to the subject site and note that there is no suggestion or reference at all to the use of the rear yard for the purposes of a music venue or bar area. In addition, the Board will note that the bar and counter area which has been constructed in the yard bar is omitted from the drawings submitted in support of those historical proposed developments at the site.

8.2.4. The Board has already determined, under Section 5 Declaration, ABP-300268-17, that:

‘the yard area that has been enclosed by the timber and Perspex roof, while part of the overall landholding, was not part of the structure that is the public house and the development that has taken place has involved the incorporation of this yard into the public area of the public house, and is, therefore, an extension of the existing structure. An extension of the existing structure does not come within the scope of S4(1)(h) of the Act, and having regard to the decision of the Supreme Court in the case of Cronin (Readymix) Limited v An Bord Pleanala and others’

In determining that the roof structure erected over the yard area comprises an extension of the public house, I would note that the roof is not fully enclosed in order that it can also be used as a smoking area. There are gaps between the Perspex roof and the walls to provide ventilation. However, I would consider the extensive roof structure has provided for a comfortable and covered seating area with a separate bar in the original yard area of the public house, indeed, with its’ own identity as the Dry Dock Bar. Therefore, I consider it reasonable to consider the retention of the roof in the context of the protection of existing general and residential amenities.

8.2.1. In light of the above, I would consider that the operation of the bar and music venue is a reasonable use within the village of Dunmore East. Dunmore East is a busy tourist destination as well as supporting a permanent local community. The provision of services such as public houses and restaurants contribute to the wider amenities and attractiveness of the village for both locals and tourists alike. As such, I have no objection in principle to the retention of the development as proposed. Given that the area the subject of this retention appeal is located to the rear of the building, there are no impacts arising in terms of visual amenity of the streetscape.

8.2.2. The Spinnaker Bar is however, located within a residential area with houses bounding all sides of the site. In this regard, the protection of residential amenities is important in the context of the sustainable development of the area. I also note the concerns of the Board in its determination of this appeal under ABP-300907-18, and the inclusion of condition 2 which stated ‘no amplified sound or live entertainment shall be carried out or take place in the bar yard area’ in the interests of the protection of the amenities of the area. In addition, the Board will note the requirements of the EPA Act, 1992, Section 107 Notice, served on the 16th

November, 2017, regulating the hours of amplified music from the site. In response to the retention application, I also note the report from the Environment Section to the Planning Authority, advising no objection to the proposed development, subject to conditions.

8.2.3. Having regard to the above, together with the retention appeal before the Board, I have no objection to the retention of the roof structure as described in the subject appeal, subject to the inclusion of appropriate conditions which restrict hours of amplified music in all outdoor areas, including the Dry Dock Bar area, between the hours of 23:30 and 10:00 daily. I further consider that the volume of music played or broadcast should not be at a level which interferes with normal speech levels at adjacent noise sensitive locations. In the interests of completeness, I would note that the Section 107 Notice is addressed to Scots Restaurant Limited, C/O The Spinnaker Bar and Restaurant, and not specifically to Mr. Niall Edmondson, the current applicant. In this regard, and to ensure clarity, I consider that a suitable condition requiring the applicant to submit and agree proposals with the Environment Section of the Planning Authority to prevent noise nuisance, in the interests of residential amenity and to prevent noise nuisance, is appropriate.

8.3. Appropriate Assessment

The site is not located within any designated site. Having regard to the location and nature of the subject site, I am satisfied that there is no potential for impact on any Natura 2000 site, warranting AA.

8.4. Environmental Impact Assessment

Having regard to the nature and scale of the proposed development, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

9.0 Recommendation

It is recommended that planning permission be granted for the proposed development for the following reasons and considerations.

10.0 Reasons and Considerations

Having regard to the nature of the subject development and its established use, the nature and pattern of uses in the vicinity, the provisions of the current plan for Dunmore East and the zoning of the site, it is considered that subject to compliance with the conditions set out below, the proposed development, for which retention is sought, would not seriously injure the residential amenities of property in the vicinity and would, therefore, be in accordance with the proper planning and sustainable development of the area.

11.0 Conditions

1. The grant of permission is for a retention of permission and to carry out works submitted accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interests of clarity

2.
 - a) No music shall be played or broadcast, by way of speakers, amplifiers or otherwise in any outdoor area, including the yard bar, between the hours 23.30 and 10:00 daily.
 - b) The music volume shall be limited so as not to interfere with normal speech levels at noise sensitive locations nearby.
 - c) Electronic noise limiters shall be fitted to control noise level of any amplification devises used.

Details of the above, including any mitigation measures to ensure compliance, shall be submitted for the written agreement of the Environment Section of the Planning Authority within 3 months of this permission.

Reason: In the interests of residential amenity and to prevent noise nuisance.

3. Within three months of the date of this order, the developer shall submit to, and agree in writing with, the planning authority a comprehensive management and mitigation plan in relation to noise, odour and other air emissions arising from the site. Details relating to ongoing monitoring and review of the agreed mitigation measures shall form part of this plan.

Reason: In the interest of the protection of the amenities of the area and safeguarding residential amenities.

4. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.

Reason: It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

A. Considine

Planning Inspector

8th May, 2019