



An
Bord
Pleanála

Inspector's Report ABP 304075-19

Question

Are the retention of parts of the original elevations and floor plans into the overall design (with minor modifications to same) considered exempted development under the Planning Act and are in substantial accordance with the Planning Permission granted under Planning Reg. Ref. No. 16/37131.

Location

9/10 Copley Street, Cork City

Declaration

Planning Authority

Cork City Council

Planning Authority Reg. Ref.

R496/18

Applicant for Declaration

Hatch Copley Ltd.

Planning Authority Decision

Is not exempted development

Referral

Referred by

Hatch Copley Ltd.

Owner/Occupier

Hatch Copley Ltd.

Observer(s)

None

Date of Site Inspection

25/06/19

Inspector

Pauline Fitzpatrick

1.0 Site Location and Description

The site in question is located at the southern end of Copley Street in Cork city centre and is bounded to the south and west by Stable Lane and to the east by Cotters Street. It comprises of two blocks on which conversion works are nearing completion from office to student accommodation use. The blocks are connected via a raised glazed corridor. The complex is served by an internal courtyard area.

2.0 The Question

The question as posed by the agent for the referrer is as follows:

Are the retention of parts of the original elevations and floor plans into the overall design (with minor modifications to same) considered exempted development under the Planning Act and are in substantial accordance with the Planning Permission granted under Planning Reg. Ref. No.16/37131

3.0 Planning Authority Declaration

A Section 5 declaration application was received by the planning authority on the 21/12/18 with further plans and details submitted 04/02/19 following a request for further information dated 28/01/19.

3.1. Declaration

Works described in the application form as retention of parts of the original elevations and floor plans into the overall design (with minor modifications to same) is development and is not exempted development.

Regard is had to:

- The non-implementation of planning permission T.P 16/37131 in full as required under Condition 1 of that permission;
- Restriction on exemption outlined in Article 9 (1) (a) (i), of Part 2 of the Planning and Development Regulations 2001 (as amended);
- The alteration in the size of windows and in the materials in the balcony area;

- Alterations to the ground floor layout; and
- Variation No.5 (Student Accommodation) of the Cork City Development Plan 2015-2021 in relation to the provision of private amenity space.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Senior Executive Planner in a report dated 23/01/19 notes that the developer has chosen not to implement permission TP 16/37131 in its entirety but to pick and choose between retaining some floorplans and elevations as existing and implementing part of the permission. In terms of bedroom numbers, the permitted layout under T.P. 15/37131 on the 4th floor allowed for 29 bedspaces while the existing (non-altered) layout contains 33 bedspaces. The central stairs and lift access as proposed in TP 16/37131 have also not been constructed. This would contravene condition 1 of the permission. Clarification is required on other alterations including the non-provision of the glazed balustrade to the roof garden area. Since the permission Variation 5 of the City Development Plan was adopted which sets out minimum standards for the provision of communal private open space per bed space. This variation would be a material consideration in the assessment of the additional bedrooms proposed to be retained on the 4th floor and given the possible loss of the 1st floor roof garden. It is also considered that the design of the windows suggests that there have been other alterations or elements of TP 16/37131 not implemented. A request for further information recommended including as constructed drawings.

The 2nd Planner's report following the receipt of further information notes that as discussed in the publication 'Irish Law and Practise' (in relation to multiple permissions) the single permission being implemented must be carried out in its entirety (unless subsequently amended). It is clear from the as constructed drawings that only part of TP 16/37131 has been implemented. The layout of the 4th floor of Block A has been retained 'as was'. The layout of the ground floor plan has also altered slightly to provide a separate entrance corridor to the common room which was reduced in size. A 2nd common room has been provided in lieu of the reception area. The warden's apartment is now shown as a standard apartment.

The retention of the existing 4th floor layout and the non-implementation of part of the permitted development would contravene condition 1 of the permission. Some of the alterations to the window design and the retention of the solid balustrade (as opposed to glass) to the 1st floor level roof area would also represent material alterations to the permitted development. The variation to the development plan on student accommodation would be a material consideration in the assessment of the development in light of the additional bedrooms which have been retained on the 4th floor. A decision that the works are development and not exempted development recommended.

3.2.2. Other Technical Reports

None

4.0 Planning History

The details of the planning history on the site are set out in the Planner's report on file and the submission made on behalf of the referrer.

A number of requests have been made to the planning authority for the said history files. To date the documentation is outstanding.

T.P. 16/37131 – permission granted for change of use of the ground, 1st, 2nd and 3rd floors of Block A from education to student accommodation, a warden's apartment, reception area and residents' common areas at ground floor, reconfiguration of the existing student accommodation on the 4th floor providing 29 no. bed spaces, change of use of the ground floor of Block B from offices to student accommodation and the conversion of ancillary floor space to provide equipment and refuse storage, residents' bicycle storage and laundry.

TP 07/32155 – permission granted for change of use of 1st, 2nd and north section of 3rd floor of existing office development permitted under TP 02/25985 and TP 02/26441 to an educational facility.

TP 04/29135 – permission granted for variations and alterations to permitted mixed use development for which previous planning permissions 02/25985 and 02/26441 were granted and consisting of total increased floor area of 1221 sqm. which

includes additional student apartments, extension to existing commercial area, additional shop unit and office/store and increased basement storage area.

TP 04/29119 – permission granted for change of elevational treatment for mixed use development for which permissions 02/25952 & 02/26441 were granted.

TP 02/26441 – permission granted for elevational changes, raised pedestrian access layout from Copley Street, relocation of main office entry from Copley Street to internal courtyard area and partial change of use from 38 no. apartments to 29 no. student housing apartments.

TP 02/25985 – permission granted to demolish building, erect new building and 38 no. apartments with ground floor commercial space and basement carpark.

5.0 Policy Context

5.1. Development Plan

The site is within an area zoned ZO 2 - City Centre Commercial Core Area in the Cork City Development Plan, the objective for which is to support the retention and expansion of a wide range of commercial, cultural, leisure and residential uses in the commercial core area.

Variation 5 of the Plan (Student Accommodation) was adopted in July 2018 setting out standards for same.

5.2. Natural Heritage Designations

None in the vicinity.

6.0 The Referral

6.1. Referrer's Case

The submission by Reddy Architecture and Urbanism on behalf of the referrer which is accompanied by supporting detail can be summarised as follows:

Overview

- Permission was granted in 2017 under 16/37131 for conversion of a former retail unit (block A) and office building (block B) into student accommodation.
- The works are nearing completion. As the works progressed it was decided that certain permitted changes to courtyard elevation windows were not necessary and the existing windows were retained. In addition, the proposed internal revisions to the 4th floor plan were not required (inclusion of additional bedrooms and provision of new lift). Therefore, these elements remain as permitted in the parent permission in 2005 under refs. 02/25985 and 04/29135.
- The works as complete are as follows:

Block A

- Retention of the existing internal floor plan at 4th floor level as previously permitted under ref. 04/29135.
- Retention of a number of original windows on the internal courtyard elevations and the blockwork walls to the edge of the landscape deck as previously permitted under ref. 04/29135.
- All other works comply with the permission granted under ref. 16/37131.

Response to Reasons given for Planning Authority's Declaration

Non-implementation of planning permission T.P. 16/37131 in full as required under condition 1 of that permission.

- The condition simply requires that any development carried out on foot of the permission shall be in accordance with the specified plans and particulars. It does not require that the permission be completed in full and does not preclude the retention of elements of the previous permission or the carrying out of further requested development under Section 4(a) of the Act.
- It is not reasonable to conclude that the proposed retention of certain minor original elements of the parent permission would substantially contravene condition 1. The development has been completed in substantial compliance.

- The alterations include size of windows and in the materials of the balcony area.
- The number of windows on the internal north and south courtyard have not changed. They differ slightly in size to that granted.
- There are 3 additional windows in the west elevation than that permitted. They were not removed/blocked up. The windows retained have permission under the parent permission.
- The 16/37131 decision permitted the demolition of the existing 1.1 block wall to the edge of the 1st floor communal terrace and its replacement with a new 1.1 metre high glass guarding. The wall has been retained. It does not impact on residents' amenity or enjoyment of the terrace area.
- Section 4 (1)(h) of the Act is relevant. The alterations do not render the appearance of the structure inconsistent with the character of the structure or of neighbouring buildings.

Restriction on exemption outlined in Article 9, (1)(a)(i) of Part 2 of the Regulations

- As above it is not reasonable to conclude that the proposed retention of minor original elements would substantially contravene condition 1 of the 16/37131.
- Article 9 only applies to exemptions under Article 6 of the regulations and does not apply to exemptions under Section 4 (i)(h) of the Act.

Alterations to the ground floor layout.

- There are no alterations to the ground floor layout.

Variation No.5 (student accommodation) of the Cork City Development Plan 2015-2021 in relation to the provision of private amenity space.

- The private amenity space as granted under 04/29135 has not been impacted by the works. The planning authority has no authority in applying a more recent variation to the Development Plan to an existing permission.

6.2. Planning Authority Response

None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Planning and Development Act 2000

Section 2 – works includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

Section 3 (1):-'development' means, except where the context otherwise requires, the carrying out of 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) the following shall be exempted development 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.

8.0 Assessment

8.1. Is or is not development

The elevational amendments and alterations to 4th level floor plans to which this referral specifically refers, are as a consequence of a permitted development changing the use of the building from education use to student accommodation. This involved the carrying out of works and is therefore development as defined in section 3 of the Planning and Development Act, 2000, as amended. Therefore, the question that falls to be determined is whether they constitute exempted development.

8.2. Is or is not exempted development

The planning history on the subject site is set out in the 1st Council Planner's report on file and dates back to 2002 in which permission was granted for an office building

and 38 apartments under ref. TP02/25985. Three subsequent permissions provided for elevational changes and modifications including change of use of the apartments to student accommodation in addition to additional floor space under refs.

TP02/26441, TP04/29119 and TP 04/29135. Permission was granted under ref. TP 07/32155 for change of use of the 1st, 2nd and north section of the 3rd floor from offices to an educational facility with the 4th floor retained in student accommodation which comprised of 33 bedspaces. Subsequently permission was granted under TP 16/37131 for change of use of the ground, 1st, 2nd and 3rd floor of Block A from education to student accommodation, warden's apartment, reception area and residents' common areas at ground floor and reconfiguration of existing student accommodation on the 4th floor providing 29 no. bedspaces. The permission also approved the change of use of the ground floor of Block B from office to student accommodation and ancillary development.

From the details on file the works which have been undertaken under the auspices of file ref. TP 16/37131 deviate from the approved plans with respect to Block A, only, and are as follows:

West Elevation to Internal Courtyard

- Retention of existing terrace parapet, namely that a glass balustrade as permitted has not been installed
- Retention of existing ground floor windows and doors. The permitted fenestration has not been constructed
- New windows at 1st, 2nd and 3rd floors.
- Retention of existing windows at 4th floor

North and South Elevations to Internal Courtyard

- Retention of existing glazing on 1st, 2nd, 3rd and 4th floors

4th Floor Plan

- Retention of floorplan ie. non-implementation of layout permitted under T.P. 16/37131. This entails the retention of the 33 bedspaces relative to the 29 bedspaces permitted and the omission of the approved stairwell and lift shaft.

I note the reference made in the planning authority's decision to alterations to the ground level floor plan however in the absence of details on the permitted floor plans I am not in a position to comment. The agent for the referrer states that no deviation from the floor plans has occurred. Notwithstanding, I note the changes to the fenestration as delineated on the drawings on file.

It is established in case law that a planning permission is indivisible, that it authorises the carrying out of the totality of the works for which approval has been granted and not some of them only, and that a developer cannot, at his election, implement part of a permission, only, as no approval is given for part as distinct from the whole.

Effectively the developer consequent to the permission under TP 16/37131 decided during the construction phase to carry out some of the permitted alterations/modifications but not others thereby retaining elements of the original building.

Whilst viewed individually the majority of the above alterations could be considered to be minor and 'de minimus'. However, in my view the sum of the revisions is such that the alterations, notably those pertaining to the 4th level layout plan are not immaterial deviations. In terms of the latter it is reasonable to assume that the planning authority, in assessing the change of use for which permission was being sought, would have had regard to the number of bedspaces being provided in totality and would have considered the acceptability of same against the parameters for such type development which applied at that time. As noted, since the permission was granted variation 5 of the City Development Plan which sets out standards for student accommodation was adopted. The effective increase in the number of bedspaces from 29 to 33 from that permitted and assessed under TP 16/37131 may give rise to further consideration of other planning and environmental requirements arising from same in the context of the referenced variation. Contrary to the view of the referrer the planning authority would not be retrospectively applying the standards to an existing permission. The relevant permission providing for 33 dates back to 2005 and has been superseded by the fact that the permission granted under reg.ref. T.P.16/37131 has been invoked. As noted above a developer cannot pick and choose between certain elements of different permissions.

On the basis of the above I submit that the proposed development has not been carried out and completed in accordance with the plans and particulars lodged with the application and therefore does not comply with condition 1 attached to the permission.

Whilst the individual deviations from the permitted development could be considered 'de minimus' the sum of the parts does render the elevations to the courtyard materially different from that as permitted. However, I would submit that the alterations, whilst materially affecting the external appearance of the structure, does not render the appearance to be inconsistent with the character of the structure. All the works pertain to elevations fronting onto an internal courtyard and are not visible from the public roads.

However, in accordance with the judgement of *Horne v Freeney* a development seeking exemption rights under Section 4((1)(h) must first have been completed in accordance with its permission. As discussed above this has not been done in this instance. The position, therefore, is that the applicant/developer cannot avail of the exemption under Section 4(1)(h) of the Planning and Development Act 2000, which does not apply to development in the course of construction being undertaken under the aegis of a planning permission.

The agent for the referrer is correct that Article 9 of the regulations which stipulates restrictions in terms of exempted development only refers to development to which article 6 relates. Article 6 states that subject to article 9 development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development provided that such development complies with applicable conditions and limitations. There is no class within Part 1 of Schedule 2 which is applicable to the works to which the referral pertains.

In view of the above assessment I consider that the question put to the Board would more appropriately be worded as follows:

Whether the as constructed building incorporating alterations to the elevations and changes in 4th level floor plans to that permitted under Cork City Council register reference number T.P. 16/37131 at 9/10 Copley Street, Cork is development and is 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 the as constructed building incorporating alterations to the elevations and changes in 4th level floor plans to that permitted under Cork City Council register reference number T.P. 16/37131 at 9/10 Copley Street, Cork is development and is not exempted development.

AND WHEREAS Reddy Architecture and Urbanism on behalf of Hatch Copley Ltd. requested a declaration from Cork City Council and the Council issued a declaration on the 4th day of March, 2019 stating that the matter was development and was not exempted development:

AND WHEREAS Reddy Architecture and Urbanism on behalf of Hatch Copley Ltd. referred this declaration for review to An Bord Pleanála on the 28th day of March, 2019:

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)(h) of the Planning and Development Act, 2000, as amended,
- (d) the planning history of the site,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The elevational changes and floor plans arise from a change of use of the building from office use to student accommodation which involved the carrying out of works, and is, therefore development as defined.
- (b) The development that has been carried out differs from that for which planning permission was granted under register reference number T.P. 16/37131 and the Board is satisfied that the deviations from the permitted development area, when taken cumulatively, are significant and material, and are not immaterial or de minimis, and are not, therefore, within the scope of the development that was approved under planning permission register reference number T.P. 16/37131.
- (c) There are no exemptions in the Planning and Development Act, 2000, as amended, or in the Planning and Development Regulations, 2001, as amended, whereby such material deviations would be 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 as constructed structure incorporating alterations to the elevations and change in 4th level floor plans to that permitted under Cork City Council register reference number T.P. 16/37131 at 9/10 Copley Street, Cork is development and is not exempted development.

Pauline Fitzpatrick
Senior Planning Inspector

July, 2019