



An
Bord
Pleanála

Inspector's Report ABP-304108-19

Question

Whether the current use of the property constitutes a change of use from the use permitted under Reg. Ref. 0900/98.

Location

Crossfit 353, Shaws Lane, Bath Avenue, Dublin 4

Declaration

Planning Authority

Dublin City Council South

Planning Authority Reg. Ref.

0001/19

Applicant for Declaration

Peter Burke

Planning Authority Decision

Is not exempted development

Referral

Referred by

Peter Burke

Owner/ Occupier

Peter Burke

Observer(s)

None

Date of Site Inspection

28th June 2019

Inspector

Irené McCormack

1.0 Site Location and Description

- 1.1. The building is located to the rear of houses on the southern side of Bath Avenue and is accessed via Shaw's lane. Shaw's Lane is located to the east of the railway bridge and c. 100 metres to the east of the junction between Bath Avenue and Shelbourne Road.
- 1.2. The site has a stated area of 845 sq. metres and is bounded to the south by an access laneway from Shaw's Lane. The north of the site is also bounded by a laneway and beyond that by the rear gardens of Nos. 25-31 Bath Avenue. To the east the site is bounded by the rear garden of No.33 Bath Avenue and to the west the site is adjoined by a two-storey commercial development.
- 1.3. The site is currently occupied by a part single and part two storey commercial building. The building on site has a roof with a central apex which slopes down to the north and south. The building is currently occupied by a gym. The general vicinity of the site is characterised by a mixture of two and three storey buildings with two storey residential properties fronting onto Bath Avenue to the north of the site and a variety of building styles further to the south. These include a three-storey residential development located to the south west of the site in the vicinity of the railway line and two storey commercial developments along the western side of Shaw's Lane.
- 1.4. The site is located between the Lansdowne Road and Grand Canal Dock DART stations.

2.0 The Question

The question to the Board is:

- 2.1. Whether the current use of the property constitutes a change of use from the permitted use under Reg. Ref. 0900/98 and whether such a change of use constitutes a material change of use or is considered exempted development within the meaning of the Planning and Development Act, 2000 (as amended).
- 2.2. It would appear that the incorrect history file was referenced in the Section 5 referral. This is acknowledged by the applicant in the response to the further information requested by the planning authority. Accordingly, I have revised the question to the

Board to include the correct planning history file. The revised question to the Board is:

Whether the current use of the property constitutes a change of use from the permitted use under Reg. Ref. 0793/92 and whether such a change of use constitutes a material change of use or is considered exempted development within the meaning of the Planning and Development Act, 2000 (as amended).

3.0 Planning Authority Declaration

3.1. Declaration

The Declaration issued by the planning authority concluded

The current use of the property constitutes a change of use from workshop (light industrial) to gym (recreational) and such use is a new and separate class of use and constitutes a material change of use. The proposed change of use is therefore considered to be development within the meaning of section 3(1) of the Planning and Development Act, 2000 as amended; and

There are no exemptions in the Planning and Development Act 2000, as amended, or the Planning and Development Regulations 2001, as amended, that would apply to the change of use such that the proposed use is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

3.2.2. The initial report from the area planner requested further information in relation to the previous established use of the building, hours of operation, parking, use of the outdoor area etc and an outline of works undertaken to the building to enable the gym. The report notes that planning permission 0900/98 does not relate to the subject site or building. The final report reflects the declaration that the current use of the property constitutes a material change of use and is not exempted development. The following issues have been considered within the planners report and are summarised below:

- Planning permission 0900/98 granted permission for a 242sq.m light industrial workshop in a rectangular shaped, curved-roof building located to the west of the subject site. Planning permission 0900/98 does not relate to the subject site or building. The only recent planning permission relating to the subject site would appear to be PL 29S.247174 (2388/16) which has not been enacted to date.
- In response to further information, the applicant advised that the building was constructed pre-1963 and that it was previously used as a workshop. The planner's report sets out that the use of the building as a gym (recreational) which provides a service to the general public who visit is considered to be materially different to a workshop (light industrial).
- The current use of the property constitutes a change of use from workshop (light industrial) to gym (recreational) and such use is a new and separate class of use and constitutes a material change of use.

3.2.3. Other Technical Reports

None

4.0 Planning History

The following is of relevance

Site

PL 29S.247174 (2388/16) –Permission granted in 2016 for the demolition of the commercial building on site (858 square metres) and the provision of four, three-bed, three-storey, terraced units and associated works. No work has commenced to date.

DCC Ref. 0796/92 – Permission granted in 1992 for the retention of workshop extension, toilets and offices.

Adjoining

DCC Ref. 0900/98 – Permission granted for the demolition of the existing shed structures and erection of light industrial unit comprising workshop/studio.

This planning application does not relate to the subject site. The applicant has acknowledged same in the response to the further information submitted to the planning authority on the 21st February 2019.

Enforcement history

DCC Ref. E0638/18 –File opened 17th July 2018 for a change of use from commercial printing business to use as gymnasium without the benefit of planning permission. A Section 154 Order was issued on the 7th November 2018.

5.0 Policy Context

5.1. Development Plan

Dublin City Development Plan 2016-2022

The site is located on lands subject to 'Z1' zoning objective which seeks to protect, provide and improve residential amenities.

Cultural/recreational buildings and uses are permitted uses within this zoning.

Dublin City Development Plan 2016-2022 : Appendices

Land Use Definitions – Appendix 21

Cultural/Recreational Building

A building, or part thereof, used for purposes of a concert hall/music hall, theatre, conference centre, cinema, bingo hall, swimming pool, skating rink, gymnasium, squash centre, health studio, and most indoor sports facilities not involving the use of firearms or motorised vehicles. It also includes:

An art gallery (but not for the sale or hire of works of art)

A museum

A public library or public reading room

A public hall

An exhibition hall

A social centre, community centre, or non-residential club, but not a dance hall.

Industrial Building (light)

A light industrial building means an industrial building in which the processes carried on or the plant or machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

5.2. Natural Heritage Designations

- 5.2.1. The site is not located within or adjacent to a Natura 2000 site. Having regard to the nature and scale of the development, which relates to a use within a structure in an established and serviced area outside of and separated from any Natura 2000 sites, I am satisfied that no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site

6.0 The Referral

6.1. Referrer's Case

- It is set out that the planning ref. 0900/98 does not refer to the subject building but the one adjacent to the premises.
- A further planning history search revealed that ref. 0793/92 for the retention of the existing workshop relates to the subject site.
- Use as a gym is acceptable under zoning objectives for site.
- The uses as a gym comes within the definition of *Cultural/Recreational Use* as contained within Appendix 21 of volume 2 of the Dublin City Development Plan 2012-2022. Use as a Gym is acceptable under zoning objective for site.
- The change of use from a 'warehouse' to a 'gym' constitutes exempted development in so far as CrossFit 353 premises relates to professional and/or commercial services, which can consist of a 'business premises' under the Planning and Development Act , 2000 (as amended).
- The change of use from a 'workshop use' to gymnasium use' would not constitute a material change of use as both uses can be defined as a

Cultural/Recreational building within Appendix 21 of volume 2 of the Dublin City Development Plan 2012-2022.

- Any works carried out to accommodate the gym are minor in nature and do not materially alter the external appearance of the building.
- The use as a gym would qualify as a Class 11 use as – (e) “*a skating rink or gymnasium or for other indoor sports or recreation not involving the use of motor vehicles or firearms*”, and as such would be exempt under Part 4 Schedule 2 of the Planning Act.
- Reference is made to previous planning referrals to the Board.
- Operational details, building layout, car parking, class times etc. outlined

6.2. Planning Authority Response

None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1):

In this Act, except where the context otherwise requires –

“use”, in relation to land, does not include the use of the land by the carrying out of works thereon.

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

“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 this 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, or under land or the making of any material change in the use of any such structures or other land.

Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act. Section 4 (2) provides for the making of the Regulations.

Section 4 (1) (h) states - 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**

7.2.1. Part 2 – Exempted Development – Article 5 (1) includes the following definitions:

“light industrial building” means an industrial building in which the processes carried on or the plant or machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

‘business premises’ means –

- (a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons.

“excluded premises” means -

- (a) any premises used for purposes of a religious, educational, cultural recreational or medical character.

7.2.2. Article (10)

(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not –

- (a) involve the carrying out of any works other than works which are exempted development,
- (b) contravene a condition attached to a permission under the Act,
- (c) be inconsistent with any use specified or included in such a permission, or

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

Schedule 2

Part 4 Exempted Development- Classes of Use

CLASS 4

Use as a light industrial building

CLASS 11

Use as:

(a) a theatre

(b) a cinema

(c) a concert hall

(d) a bingo hall

(e) a skating rink or gymnasium or recreation not involving the use of motor vehicles or firearms.

7.3. Relevant Precedents

I have checked the Board database of referral files and I can find no previous referral decision relating directly to the change of use of workshop to a gym.

- 7.3.1. RL3507 - Whether the change of use of part of a school building for use as a fitness centre/gym is or is not a material change of use and is or is not development or is or is not exempted development at the former De La Salle School, Wicklow Town, County Wicklow.

The Board decided that the change of use of part of a school building for use as a fitness centre/gym is a material change of use and is development and is not exempted development.

- 7.3.2. RL 2936 - Whether the change of use of part of a light industrial unit for use as a shop for the display and sale of goods is or is not development or is or is not exempted development at Toughers Business Park, located off the Newbridge – Naas Road

The Board decided that the use of portion of the overall premises for ancillary purposes, comprising multi-purpose display, reception, storage and sale activities at Unit W1E, Tougher's Business Park, Ladytown, Naas, County Kildare is development and is not exempted development.

- 7.3.3. RL 2923 - Whether the change of use of an industrial premise to use as a retail discount store is or is not development or is or is not exempted development at Roxboro, Discount Store, Roxborough. Co. Roscommon.

The Board decided that the change of use of an industrial premise to a retail discount store at Roxborough, County Roscommon is development and is not exempted development

Case Law

- 7.3.4. The following case law is of relevance:

Referral reference PL29/8/279 was the subject of a High Court challenge, McMahon -v- Dublin Corporation 1997 1 ILRM 227, in which the Board's declaration was upheld. Barron J. held that:

"...in the absence of explicit reference in the planning permission to a permitted use, regard must be had to the use for which the structure was designed, i.e. the use which was objectively intended for the structure having regard to the relevant planning documentation..."

- 7.3.5. The question as to whether a change of use is a material one was addressed by Keane J. in the case of Monaghan County Council -v- Brogan. He stated that the issues of relevance to this question are:

"...the matters which the planning authority would take into account in the event of a planning application being made for the use. If these matters are materially different (from the original use), then the nature of the use must equally be materially different."

8.0 Assessment

- 8.1.1. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of this gym use at this location in respect to the proper planning and sustainable development of the area, but rather whether or not the

matter in question constitutes development, and if so falls within the scope of exempted development. Likewise, planning enforcement is a matter for the planning authority and does not fall within the jurisdiction of the Board.

8.1.2. The question posed is whether ‘the current use of the property constitutes a change of use from the permitted use under Reg. Ref. 0793/92 and whether such a change of use constitutes a material change of use or is considered exempted development within the meaning of the Planning and Development Act, 2000 (as amended)’.

8.2. Is or is not development

8.2.1. The first issue to be decided is whether or not a change of use has occurred and if any change of use is material and therefore development.

8.2.2. The subject of this referral relates to a change of use from light industrial (workshop) to use as a commercial gym. The definition of ‘development’ involves 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.

8.2.3. In terms of background information, I note the following:

- Planning ref. DCC 0793/92 was granted for the retention of a workshop extension, toilet and offices on site.
- The drawings submitted as part of planning reference DCC 0793/92 refer to Herberton Engineering Co. premises at Shaws Lane. The floor plans submitted reference “engineering works” taking place on site.
- The gym has been operating for a number of years. Some internal works have been carried out on site in order to accommodate the use as a gym.

8.2.4. In relation to the issue of works it should be noted that, on the basis of the information available, I am satisfied that these are likely to have constituted exempted development by reference to section 4(1)(h) of the Act. I also note that there is no dispute in the case in relation to this matter.

8.2.5. The permitted use on the site is light industrial use (workshop). The referrer argues there is no material difference in the use as a light industrial workshop and the use as a commercial gym. It is set out, incorrectly in my view that within the definition of *Cultural/Recreational Use* as contained within Appendix 21 of volume 2 of the Dublin

City Development Plan 2012-2022 and that the use as a gym is acceptable under the zoning objectives for site.

- 8.2.6. In terms of relevant case law, I note *Monaghan County Council-v- Brogan (1987)*, states thatmatters which the planning authority would take into account in the event of a *planning application being made for the use. If these matters are materially different (from the original use), then the nature of the use must be materially different.*
- 8.2.7. Having regard to the above, and notwithstanding the acceptability of a gym in principle under the zoning objective for the area, I consider the change of use to be material in nature given the difference between the use as a workshop and use as a gym. Furthermore, I note there are a number of residential units in the immediate vicinity of the site. The planning considerations relevant for a light industrial workshop use differ from those for a gym, specifically issues around hours of operation, frequency of visits, visitor turnover and traffic issues which arise. The gym operates 7 days a week opening Monday – Thursday from 05.45am – 08.30pm, Friday 05.45am to 08.30pm, Saturday 09.00am to 12.00pm and Sunday 10.00am to 11.00am. Light industrial workshop use, in general, revolves around standard operating hours 9 am – 6pm Monday to Friday. The use as a commercial gym, however, is an activity that is not limited to typical working hours.
- 8.2.8. As stated above, the scale and frequency of visiting members of the public would certainly lead to the intensification of use on the site, resultant noise, disturbance and impact on residential amenity would be assessed in a different manner, applying different planning criteria. Therefore, in light of the *Brogan* case, under a planning application scenario, I consider the standards and considerations of the planning authority would be substantially different when assessing a commercial gym as opposed to a light industrial unit (*Workshop*).
- 8.2.9. Having regard to the above, it is my opinion that the proposed change of use from light industrial use to use as a commercial gym would constitute a material change in the use of this structure such that it would comprise development.

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

- 8.3.1. There are no relevant exemptions provided for under Section 4 of the Act.

- 8.3.2. As indicated in paragraph 7.2.2 above Art. 10 (1) of the Regulations provides for changes of use (which must be interpreted as 'material changes of use') within any of the classes of use specified in Part 4, Schedule 2. However, the existing/established use of the building and the current use fall under different classes of use. The former equates to use as a light industrial building under class 4 while the latter use as a gym, belongs to class 11. The Art 10 (1) exemption, therefore does not apply.
- 8.3.3. The fact that both uses should be considered to constitute a business premises as defined in the regulations is not relevant as this, of itself, does not confer any exemption in the context of a change of use.
- 8.3.4. Accordingly, I conclude that the material change of use from workshop (light industrial) to a gym 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 or not the change of use from the permitted use under Reg.Ref. 0793/92 is not development and is or is not exempted development at Crossfit 353, Shaws Lane, Bath Avenue, Dublin 4.

AND WHEREAS Craze Athletics Limited requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 7th day of March, 2019 stating that the matter was development and was not exempted development:

AND WHEREAS the said question was referred to An Bord Pleanála by Downey Planning on behalf of Peter Burke on the 2nd day of April, 2019:

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

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

(b) Article 10 (1) and Schedule 2, Part 4 of the Planning and Development Regulations 2001, as amended;

c) the planning history of the site and the documentation submitted with the referral.

AND WHEREAS An Bord Pleanála has concluded that –

(a) Planning considerations relevant to the use as a gym differ materially from workshop (light industrial), specifically issues relating to hours of operation, frequency of visits, visitor turnover and traffic, and would give rise to materially different impacts on the amenities of property in the vicinity.

(b) The change of use from a workshop (light industrial) to gym, therefore constitutes a material change of use and is development.

(c) Neither the Planning and Development Act, 2000, as amended, nor the Planning and Development Regulations, 2001, as amended, provide for the said material change of use to be exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act (as amended), hereby decides that the change of use of a light industrial workshop to a gym at Shaws Lane, Bath Avenue, Dublin 4 constitutes development that is not exempted development.

Irené McCormack
Planning Inspector

30th August 2019