



An  
Bord  
Pleanála

## Inspector's Report ABP-304824-19

### Question

Whether the use of covered area to the west of the hotel as a bistro bar / sports bar and external area set out being used as a beer garden is or is not development or is or is not exempted development

### Location

12th Lock Hotel, Old Navan Road, Castleknock, Dublin 15

### Declaration

Planning Authority

Fingal County Council

Planning Authority Reg. Ref.

FS5W/12/19

Applicant for Declaration

Myles Meagher

Planning Authority Decision

None made

### Referral

Referred by

Fingal County Council

Owner/ Occupier

Gossm Investments Limited

Date of Site Inspection

22<sup>nd</sup> October 2019

Inspector

Dolores McCague

## 1.0 Site Location and Description

- 1.1.1. The site is located at the 12th Lock Hotel, Old Navan Road, Castleknock, Dublin 15. This area is a short distance south of Blanchardstown village, close to the major M50/N3 interchange. The former route of the N3 Navan Road was severed in the construction of the interchange and continues under the interchange as a pedestrian route only. The subject site is accessed from the northern section of the old Navan Road at the crossing of the Royal Canal. The subject site is long and narrow with the short axis fronting the road and the long axis running between the canal bank to the north and the Dublin / Sligo railway line to the south.
- 1.1.2. The site is occupied by a two storey building with a lower ground level, at the level of the car park the only access is at the south western end of the building, a service entrance. The main entrance is located at the upper ground floor towpath level directly from the towpath via a bridge and users of the car park have to climb steps to the towpath to access the hotel. Inside the entrance there is a small reception area to the left (east) and to the right (west) a bar with two pairs of double doors in the western gable, which access a large area with a stone flag floor, laid out with tables and chairs and a bar counter. There are dispensing facilities and a counter for the sale of ice cream set against the southern end, which has a wall made of timber sheeting. The northern and western walls of this area comprise transparent sheeting supported by steel columns and include doors in the western end. A large TV hangs on the southern wall.
- 1.1.3. West of the building there is an enclosed area, part of which is surfaced in stone-like slabs, and part of which is grassed. This area is set out in its entirety with picnic style tables with integrated seating. Along the southern boundary a small building, appears to be that referred to in the 2017 application/appeal as dispensing ice cream. Timber sheeting extends along the southern boundary to its western end. There are a number of birch trees along this boundary. The western and northern boundaries are formed by a hedge. Notices within the enclosure request users to wait to be seated. Direct access from the canal towpath is via a gate which was locked on the date of inspection.
- 1.1.4. The canal towpath rises from east to west and this level change accommodates a lock. The ground level of the subject site is at car park level at the eastern end of the

building and at towpath level at the western end. The planning history of the subject site indicates that the ground level at the western end has been modified structure at the western end was formerly supported by stilts.

## 2.0 The Question

- 2.1.1. The question put to the planning authority is whether the use of covered area to the west of the hotel, shown coloured on an attached drawing, as a bistro bar is or is not development or is or is not exempted development and whether the use of an external area shown coloured on an attached drawing, being used as an open beer garden, is or is not development or is or is not exempted development, and whether the direct access from this area to the canal towpath is or is not development.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

- 3.1.1. The planning authority referred the question to the Board as: whether the use of covered area to the west of the hotel, as a bistro bar / sports bar is or is not development or is or is not exempted development and whether the use of an external area set out being used as a beer garden is or is not development or is or is not exempted development.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

There is no planning report on the file. The letter of referral sets out the planning history of the site together with the name and address of the owner, the names and addresses of all persons to be notified (which notification was given), and the date the decision was due, 1<sup>st</sup> July 2019.

## 4.0 Planning History

**06F.248506, PA reg. ref. FW 17A/0070** - in an application for retention of shed, advertising signs, bicycle rack and perspex shelter, new structure to veranda and all

associated works, the planning authority made a split decision in respect of the proposed development: deciding to grant retention for the covered storage area to the east of the hotel building, bike shelter and bike rack at rear, bike rack at front, granite stairs and associated landscaping; and (b) to refuse retention for the covered area, ice cream/coffee area and signage.

The Board granted permission for retention of (a) new wooden effect, steel clad recycling and bin storage shed to the eastern end of the building at lower ground floor (car park) level, (d) the bicycle rack and perspex shelter in the car parking area adjacent to the eastern end of the building, (e) the bike rack along the northern elevation of the hotel at upper ground floor (canal) level, (g) replacement of old awning and clear perspex side walling with new awning and perspex side walling to include a larger footprint of this covered outdoor space (18.5 square metres), (h) new granite steps and handrail from the western end of the carpark up to the canal bank path, and (i) all associated landscaping and site improvement works in accordance with the said plans and particulars based on the reasons and considerations marked (1) under and subject to the conditions set out below.

#### Reasons and Considerations (1)

Having regard to the nature, location, modest scale and detailed design of the proposed development, it is considered that, subject to compliance with the conditions set out below, these elements of the proposed development would comply with the provisions of the Fingal County Development Plan 2017 to 2023 in respect of non-conforming land uses, would be acceptable in terms of traffic safety and would not seriously injure the amenities of the area or the residential amenity of properties in the vicinity. These elements of the proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

#### Conditions:

1 These elements of the development shall be retained and completed in 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 and the development shall be retained and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

2 Within three months of the date of this order, revised plans and particulars shall be submitted to the planning authority for written agreement indicating:

(a) The covered storage area to the east of the hotel building aligned with the existing walls of the hotel building immediately to the west, such that the northern end of the storage building aligns with the existing northern wall of the hotel building.

(b) Revised details in respect of the external finish of the storage area, to compliment the adjoining hotel wall.

(c) Landscaping of the area to the west of the hotel building and covered area, to include (a) a modest smoking area, and (b) controlled public access to the remaining open space area.

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

3 No external lighting or illumination be attached to or erected on the covered area without a prior grant of permission.

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

4 All service cables associated with the proposed development (such as electrical, telecommunications and communal television) shall be located underground.

Reason: In the interest of visual and residential amenity.

5 Site development and building works shall be carried out only between the hours of 0800 to 1900 Mondays to Fridays inclusive, between 0800 to 1400 hours on Saturdays and not at all on Sundays and public holidays. Deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the planning authority.

Reason: In order to safeguard the residential amenities of property in the vicinity.

6 Construction and demolition waste shall be managed in accordance with a construction waste and demolition management plan, which shall be submitted to, and agreed in writing with, the planning authority with three months of the date of this order. This plan shall be prepared in accordance with the "Best Practice Guidelines on the Preparation of Waste Management Plans for Construction and Demolition

Projects”, published by the Department of the Environment, Heritage and Local Government in July 2006.

Reason: In the interest of sustainable waste management.

7 All necessary measures shall be taken to prevent the spillage or deposit of clay, rubble or other debris on adjoining roads during the course of works on the subject site.

Reason: In the interest of traffic safety and visual amenity.

8 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 within three months of the date of this order 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.

The Board refused permission for retention of (b) two-sided advertising sign of the main vehicular entrance driveway to the car parking area to the eastern end of the site, (c) single sided advertising sign in the car park area to the east side of the building at ground floor (car park) level, and (f) the new wooden effect, steel clad structure, used to dispense ice cream and coffee to the west of the veranda of the building at upper ground floor (canal) level, based on the reasons and considerations marked (2) under.

Reasons and Considerations (2)

1 Having regard to the zoning of the site, the objective of which is to preserve and provide open space and recreational amenities, and the nature of the proposed development which includes the structure for dispensing ice creams/coffee, it is considered that these elements of the proposed development, would constitute an unreasonable intensification of the non-conforming use and therefore, contravene materially the said zoning objective and be contrary to the proper planning and sustainable development of the area.

2 Having regard to the location of the site adjoining the Royal Canal and to the policies of the Fingal County Development Plan 2017 to 2023 which seek to protect and enhance the built and natural heritage of the Royal Canal and ensure that development within its vicinity is sensitively designed, it is considered that the large double sided entrance sign and single sided sign at the entrance to the hotel are of a scale and form that is visually detrimental to the character of the area and the canal side setting. The retention of these elements of the development would, therefore, conflict with policies of the development plan and be contrary to the proper planning and sustainable development of the area.

**PA ref. FW09A/0045** – Planning permission was granted for external stairs connecting the car park to the hotel entrance (on the Canal side of the building). Notably the development excluded any external decked/veranda area. This permission was extended under PA ref. FW09A/0045/E1.

**PA ref. FA08A/0474** – Planning permission was refused by the planning authority for external stairs connecting the car park, at lower ground level, to the main entrance to the Hotel, at ground floor level, and a decking area that wrapped around part of the east facing and part of the north facing elevation, to provide a veranda area level with the canal towpath. The development was a refused permission on the grounds that the development would (1) seriously injure the amenity and character of the ‘semi-rural’ canal bank and as such contravene the zoning objective for the area (open space) and contravene policy of the development plan to strictly control development in the vicinity of the Royal Canal, and (2) the intensification of the permitted ‘public/dining’ activities would injure residential and visual amenity of the area by way of additional on-street car parking and nuisance noise.

**PA ref. F06A/0946** – Permission was granted for a new acoustic sound barrier (c.12.6m long by 2.8m high) along the southern perimeter of the existing veranda, with the relocation of the existing hardwood barrier moved further west along the southern boundary.

**PL06F.213758, PA reg. ref. F05A/0760**– Retention was granted by the Board for a projecting retractable canvas awning, covering c.60sqm over the veranda/deck area along the western elevation of the Hotel. Retention was subject to one condition, that no external lighting, illumination or further signage be attached to or erected on the awning structure or veranda.

**PL06F.206924, PA reg. ref. F04A/0172** – Retention was granted by the Board for the structure underneath the landscaped area to the west of the veranda (to the west of the hotel building), the use of the void underneath the veranda for cold storage and bottle store, the revised internal floor layout of all floor levels, and external steel staircase to the south elevation and signage for the building, all pursuant to PA ref. PL06F.107201/F98A/0300. (Car parking spaces are set back from the eastern elevation of the hotel building to as per condition no. 8 of PL06F.107201). The permission was subject to a number of conditions, including the following:

- No. 3 – Access to the landscaped void from the veranda adjoining the western gable of the hotel was restricted to emergency use only (to minimise noise, disturbance and activity in close proximity to residential property and protect residential amenity).
- No. 4 – Landscaping was required around the perimeter of the veranda (in the interest of visual amenity).

**PL06F.202858, PA ref. F03A/0213** Veranda/terrace at ground floor level to the east elevation and part of the north elevation with railings and associated supports to the veranda, together with the existing two number windows at ground floor level on east elevation to be replaced with two number double doors for access to the veranda (further to permission previously granted under planning register reference number F98A/0300), all at the 12<sup>th</sup> Lock Hotel, The 12<sup>th</sup> Lock, The Royal Canal, Navan Road, Castleknock, Dublin, on foot of the planning authority's decision to refuse, the Board refused permission for the reason:



Having regard to the terms of the planning permission granted by the planning authority under planning register reference number F98A/0300 appeal reference number PL 06F.107201, it is considered that the development as substantially carried out is unauthorised and the Board is, therefore, precluded from considering a grant of permission for the extension to an unauthorised development

**PL06F.126725, PA ref. F01A/0256** – Permission for the alteration of approved plans for a 10 bedroom hotel, to include changes to position of building and increased ridge height was refused by the Board on the grounds that (1) the development would lead to a short fall in parking provision and would give rise to on-street car parking and consequently traffic hazard, and (2) would seriously injure the amenity and character of the semi-rural canal bank by reason of visual obtrusiveness and encroachment onto the canal towpath.

**PL06F.107201, PA ref. 98A/300** – Planning permission for a 10 no. bedroom hotel, (as previous permission had expired), was granted by the Board in December 1998.

## 5.0 Policy Context

### 5.1. Development Plan

- 5.1.1. Fingal County Development Plan 2017-2023 is the operative plan, relevant provisions include:

Zoned 'OS – Open Space', the objective of the zoning is to *'Preserve and provide open space and recreational amenities'*.

### 5.2. Natural Heritage Designations

- 5.2.1. The nearest Natura sites are Rye Water Valley/Cartron SAC site code 001398, located almost 9km (west), straight line distance, from the subject site and South Dublin Bay and River Tolka Esturay SPA site code 004024 and South Dublin Bay SAC site code 000210 located 10km (east), straight line distance, from the subject site.

## 6.0 The Referral

### 6.1. Referrer's Case

- 6.1.1. Keenan Lynch Architects submitted the question to the planning authority on behalf of Myles Meagher. The question referred to planning permission 06F.248506, PA Reg Ref FW17A/0020.

Their letter includes: the veranda area to the west of the building on the upper ground floor had been primarily used as an external smoking area, it was not an extension to the existing permitted bar area at that level, there were some seats/ wooden benches located in the area for customer convenience only. The point of sale for beverages / food was not located in this area but in the adjacent bar. It was primarily an external veranda used for smoking.

Accompanying drawings identify a shaded area marked 'x' and a shaded area marked 'y'.

The area marked 'x' corresponds to the covered area; they state that the operators/owner have indicated that this area is a Bistro Bar, can the planning authorities confirm whether this is a permitted use?

The area marked 'y' corresponds to the uncovered area; they state that the area is currently in use as an open beer garden and is annotated on the drawing as a terrace bistro dining area, can the planning authorities confirm whether this is a permitted use? And whether the beer garden is a permitted use? They also query whether the access from the canal towpath is a permitted access?

They refer to planning history F98A/0300 and F04A/0172.

Under F98A/0300 a veranda was permitted to be attached to the western side of the building at ground/canal level suspended on stilts. There was an additional area to the west of this veranda at the lower level and a steep slope leading back to the canal towpath.

Under F04A/0172 this area was filled in and a concrete slab and wall structure installed which was covered in earth and grassed over to give the appearance of a grassed area along the canal to the west of the veranda. There were concerns at the time that this new grassed area would be used to expand the veranda area and that

customers would spill out onto the grassed area as an overflow. The planner's recommended refusal. Other refusals F96A/0389, F01A/0256 and F03A/0213 are listed. Under F04A/0172, to ensure maintenance of the veranda and the removal of the overspill possibility, it was considered necessary to reinforce the boundaries of this area 'the veranda was to be entirely enclosed, with access to same from the public bar area of the hotel only. The height of the railings around were to be increased to a minimum of 1.3m. No gate access or entrance was permitted either to the towpath or the adjoining landscaped areas.

Under condition 5 the area to the west was not to be used for any purpose but was to be sealed off.

At no stage in any applications have the lands in orange ever been described as anything other than a veranda in the planning advertisements (including FW17A/0200) and at no stage has any applicant sought to change the use from an external smoking veranda to an enclosed bistro bar/ sports bar. They seek clarification as to whether this use is permitted.

They contend that the area marked yellow, re question 2, is zoned for open space and its use as a beer garden is unauthorised. An Bord Pleanála noted that access to this landscaped void from the veranda adjoining the western gable to the hotel shall be restricted to emergency use only. They query the use and the access from the towpath.

## **6.2. Owner / occupier's response**

Simon Clear & Associates Planning and Development Consultants have submitted a response on behalf of Gossm Investments Limited (the developer), which includes:

The submission to the planning authority raised matters of interpretations of planning permissions, not whether development was exempted development or not, as is required for a valid request for declaration

- Quoting S 127(2)(a) they state that neither the letter nor accompanying documentation state the grounds for the referral nor the reasons, considerations and arguments upon which it was based.
- S 127(1)(d) compliance was considered by the High Court in *Heatons Limited & Offaly Co Co* (2013) IEHC 261. The judge quashed the reference for non-compliance with S 127(1)(d), the judgement states ‘one could perhaps infer from both the terms of the letter and the accompanying documentation what issues actually subtended the reference, but even this would require some degree of supposition on the part of the Board’, and the omissions were prejudicial to Heatons who ‘might well have been placed at a disadvantage in dealing with such a laconic and uninformative reference.’
- The documents submitted by FCC would require both ABP and his client to rely on inference and supposition, does not comply with S 127(1)(d), and is therefore invalid under S 127(2)(a).
- Permission exists on the land, subject to a condition 2(c) of 248506. The interpretation of the condition is subject to compliance under the provisions of the permission. A submission for compliance was submitted by architects acting on behalf of the land owner and compliance was rejected by Fingal Co Co. That particular condition is subject to a default of agreement, whereby the procedures under the Act allow for the matter to be referred to the Board for determination.
- There are fundamental errors in procedure and in the question posed by Fingal Co Co. The issues to be addressed relate to the interpretation of a planning permission and, if there is unauthorised development, to enforcement proceedings that are available under the provisions of the Act: S34(5) or S152.
- The PA has misused S5. An Bord Pleanála has no jurisdiction or function to determine the matter placed before it unless requested in a S34(5) context.
- The relationship between enforcement and S5 was considered by the Courts in the *Heatons* case and also in *Roadstone Provinces Ltd. V An Bord Pleanála* (2008) IEHC 210. Justice Finlay Geoghegan said:

The respondent has no jurisdiction on a reference under S5(4) of the Act to determine what is or is not 'unauthorised development'. It may only determine what is or is not 'development'. Hence, a planning authority, such as the notice party, cannot refer a question under S5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not 'unauthorised development' will most likely be determined by the courts where a dispute arises on an application under s.160 of the Act.'

- 248506 – the entire hotel curtilage was outlined in red and the plans showed the open space west of the buildings as terraced bistro dining. The plans were approved by ABP subject to condition 1 development to be retained and completed in accordance with the plans and particulars submitted. Condition 2 (c) which permits 'controlled public access' to the remainder of the open space area and for it to be landscaped, with details to be agreed with the PA.
- The order was to confirm permission for controlled public access to the western open space subject only to the agreement of landscaping details.
- The architect for the hotel owner (8<sup>th</sup> February 2018) submitted details to Fingal Co Co (FCC) in compliance with the requirements of condition 2(c). The planner's report referred to both the previous planner's report and the report of ABP inspector but not the Board's order, the condition of which differs in terms from the inspector's recommendation. FCC deemed the architect's submission not to be in compliance with condition 2(c) as it was deemed to allow for patron/public access to the landscaped area. An issue of interpretation has arisen.
- It is this finding that can be referred to ABP for interpretation and determination under S34(5). However rather than refer the matter to ABP, FCC has instead facilitated S5 declarations, which have been subject to challenge by their client and due to legal proceedings the opportunity to avail of S34(5) has not arisen. It is their submission that there has been a misunderstanding by FCC in the assessment of condition 2(c).
- Condition 2(c) refers to the existing lawn terrace area at the upper ground level adjacent to the towpath /amenity pedestrian /cycle route. The condition

regulates for controlled public access to this landscaped area, which is used in conjunction with the hotel permission for the lands. This area is currently in lawn with a managed perimeter hedge, providing an external space for hotel patrons with a wayside respite to passers-by on the canal corridor/towpath. This area is not a beer garden, it is a landscaped area with occasional al fresco dining available to guests and patrons of the hotel restaurant when weather permits. The benches facilitate sitting out in fine weather and or smoking area for patrons.

- The inspector's report and Board order on 248506 are referred to in relation to the contribution the hotel makes, and reasonable intensification. The use of the term 'controlled' access the Board Order, in preference to the inspector's term 'restrict public access' is stated to be proactive and to show that public access was clearly intended. This didn't mean to refuse or eliminate access to the terrace lawn at ground level, or to limit it to emergency access.
- FCC in dealing with the compliance relied on the inspector's report and not the Order. The developer is anxious to clear up this misinterpretation through its statutory remedies (S34(5), before going down the route of judicial review proceedings again.
- They state that there is hotel use throughout the grounds, condition 2(c) stated that control on access is to be imposed within the hotel grounds. The grant of permission did not indicate that any incidental or ancillary use is not permitted, or that controlled access for the public is to be subject to separate permission.
- FCC non compliance determination considered the use of land within the hotel grounds to the west of the Bistro Bar not to have the benefit of planning permission for public use in connection with the hotel/restaurant services; that controlled public access would imply very limited access to the open area, for example for emergency use. That misinterpretation suggests that the Board intended two elements of control (a) as to quantity and (b) as to type of user. There is no basis for this. User is controlled by the general and ancillary uses of the hotel. Where conditions restrict the type of use, the use is stated (e.g. for emergency purposes); that is not the type of condition used here.

- Controlled access – they consider that persons attending the premises and its grounds would remain within the provisions of the planning permission provided that activity is controlled and does not become the dominant activity or a substantial element of the activity, which would have effects outside the permitted area.
- Permitted land use relates to the area of the site and the capacity of the premises for the purpose for which permission was granted and the material effects on the public realm and on persons resident in the area, which are controlled by conditions.
- The 2017 permission confirms permission for controlled public access to the landscaped gardens for uses incidental and ancillary to the primary hotel use established by permission, taking into account canal-side location and the favoured means of access for pedestrians and cyclists from the tow-path public amenity area.
- Controlled access is in accordance with the permission.
- The use of the garden area is incidental to and ancillary to the use of the premises as a hotel.
- The operation of this premises as a hotel is provided on foot of planning permissions for a hotel on the lands contained in the parent permission and subsequent planning permissions.
- The 2017 permission confirms permission exists for ‘controlled public access to the remainder of the open space area and for it to be landscaped, with details to be agreed with the PA.
- The Order was to grant permission for controlled public access to the remainder of the open space at the canal bank level.
- S5(4) is not the proper procedure and has thwarted the use of the appropriate procedure under S34(5).
- The PA should be informed that ABP has no jurisdiction in the matter.

- The owner is anxious to resolve compliance with condition 2(c), but can only do so in a situation whereby FCC is prepared to abide by appropriate procedures.
- The submission is accompanied by photographs of the exterior of the premises and the lawn area, together with maps.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000, as amended

Section 2(1) of the 2000 Planning and Development Act states as follows:-

“In this Act, except where the context otherwise requires – ‘development’ has the meaning assigned to it by Section 3 ...”

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”.

Section 3(1) of the 2000 Planning and Development Act states as follows:-

“In this Act, ‘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(2) of the Act provides that the Minister, by regulations, provide for any class of development to be exempted development. The principal regulations made under this provision are the Planning and Development Regulations, 2001.

S34 (5) The conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development; if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination.



## 7.2. **Planning and Development Regulations, 2001**

Article 6(1) of the Planning & Development Regulations, 2001 as amended states as follows:-

“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.”

Article 9(1) of the Planning & Development Regulations, 2001 as amended, provides a number of scenarios whereby development to which article 6 relates shall not be exempted development for the purposes of the Act, which includes at Article 9(1)(a)(i)

contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

Schedule 2, Part 1, Exempted Development — General

Sundry Works CLASS 9

The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.

The height of any such structure shall not exceed 2 metres.

## 7.3. **Other**

I have consulted the Board's database of referrals. The following refer to public houses:

301491 (similarly 302714) – This referred to the premises known as the Button Factory (formerly The Temple Bar Music Centre): whether the use of the premises (in whole or in part) with a publican's seven day licence in lieu of the use of the premises with a Publican's Licence (ordinary) Theatre is or is not development or is or is not exempted development. the Board decided that it was development and not exempted development as:

- the permitted use of the subject premises is, as set out in the planning permission granted under planning register reference number 1661/92
- an additional use, that being a public house, would be introduced
- which would be materially different from the permitted uses by reason of changes to opening hours and trading patterns, likely impacts on neighbouring residential amenity, thus constituting development.

RL2419 This referred to the bar at the Auburn House, (Athlone) Hotel, whether operating independently of the hotel is or is not development or is or is not exempted development

There was a planning history pertaining to the site, whereby the bar was permitted as ancillary to hotel use.

The Board decided that the development was not exempted development, as follows:

The bar was permitted under the Planning and Development Acts as a use ancillary to and associated with the hotel use on the site, and that its operation as other than ancillary to or associated with the hotel use would constitute a material change in use.

RL2879- Whether the use of a premises as a Guest House and Restaurant with a Publican's On-Licence in lieu of a Special Restaurant Licence is or is not development or is or is not exempted development.

The Board decided that the development was not exempted development:

The change of licence would create a public house, therefore an additional use that would not be incidental the main use as a guest house and restaurant.

The new use would be materially different from a guest house and restaurant use with changes in terms of trading patterns, likely impacts on area etc.

There was no exempted development provision in the Planning Regulations for change of use from guest house to public house.

## 8.0 **Assessment**

### 8.1. **Procedure**

- 8.1.1. The owner/occupier objects to the process stating that the matter is one of compliance and should have been referred under section 34(5) to the Board by the planning authority. They further state that the question and referral do not comply with S127 because the reasons, considerations and arguments have not been stated.
- 8.1.2. It appears to me that the question stated by the third party in the submission to the planning authority is clear. The planning authority has referred the question to the Board. I am not aware of any reason why the Board should not deal with the referral.
- 8.1.3. The purpose of this referral is not to determine the acceptability or otherwise of the uses and development in question, in respect of the proper planning and sustainable development of the area, but whether or not the matter in question constitutes development, and if so falls within the scope of exempted development.
- 8.1.4. Planning enforcement is a matter for the planning authority and does not fall within the jurisdiction of the Board.

### 8.2. **Is or is not development**

- 8.2.1. Both the question to the planning authority and the response of the owner/occupier refer to the permission granted under 06F.248506, PA ref. FW 17A/0070. That file is attached to the current file.
- 8.2.2. I note that the response from the owner / occupier refers to the submission of documents in relation to compliance under condition 2 which were deemed by the planning authority not to be in compliance. As the owner / occupier states in this regard the planning authority did not avail of the provisions of S34(5) by referring the matter to the Board for determination; neither did the applicant refer the matter to the Board for determination.
- 8.2.3. With regard to the subject matter of the current referral, condition no 2 of 06F.248506 refers only to the uncovered area and not to the covered outdoor area.

2. Within three months of the date of this order, revised plans and particulars shall be submitted to the planning authority for written agreement indicating:

Landscaping of the area to the west of the hotel building and covered area, to include (a) a modest smoking area, and (b) controlled public access to the remaining open space area.

8.2.4. The drawings on 06F.248506, PA ref. FW 17A/0070 have notations which include: 'new awning and Perspex side walled smoking area to be retained noted as (g) on public notices'. Item g on the public notices stated 'replacement of old awning and clear Perspex side walling with new awning and Perspex side walling to include a larger footprint of this covered outdoor space (18.5 sq m)'.

8.2.5. Double lines on the layout drawing indicate a boundary along the canal and the open space to the west, and show a gap between the boundary and the covered structure where the gateway is now located.

### **8.3. Use of the Covered Area**

8.3.1. In my opinion the use of the covered area as a bar with counter and dispensing facilities and with a counter for the sale of ice cream, was not part of the development proposal under PL06F.248506, and such use is not part of the permission granted. Therefore having regard to the planning history of the site, whereby this area was to be a covered outdoor area associated with the bar, but not a dispensing bar, the use for dispensing alcohol and ice cream is an intensification of use, which could have potential impacts on neighbouring amenity, and is therefore development and not exempted development.

### **8.4. Use of the Un-Covered Area**

8.4.1. The area west of the covered area was indicated on the drawing no. 01 (of 3) on 06F.248506, PA ref. FW 17A/0070 with a notation 'Terrace Bistro Dining'. This area is laid out in paving and grass, enclosed by a thick hedge with picnic type tables (ie. table and integrated seat units), placed throughout the enclosure on both surfaces. Access is via 2 pairs of double doors from the covered area and from the canal pathway via a gate, locked on the date of inspection, on which there is signage

referring to the 12<sup>th</sup> Lock premises. Numerous signs within the enclosure request users to wait to be seated.

8.4.2. In the context of the reasons given for the permission and refusal (06F.248506, PA ref. FW 17A/0070), which include reference to the zoning objective: to preserve and provide open space and recreational amenities, the term controlled public access appears to me to refer to managing and limiting the use of this area. The reason for refusal of the structure for dispensing ice creams/coffee was that it was considered it would constitute an unreasonable intensification of the non-conforming use and contravene the zoning objective. The laying out of the entire area with picnic benches could be said to 'manage' public access but does not in my opinion 'limit' public access. I consider that the use of this area, laid out with seating for customers, is not in accordance with condition 2(c) and that the use is therefore a change of use. In my opinion since the use of this area was considered in a previous planning application/appeal and the use was restricted for planning reasons, the change of use is development and not exempted development.

8.4.3. In relation to the provision of the entrance, the drawing no. 01 (of 3) previously indicated a gap at the end of the covered area, which accessed the outdoor area. In my opinion, in terms of the planning history, direct access is not restricted. Exemption is provided under Schedule 2, Part 1, Class 9 of the Planning and Development Regulations, 2001, as amended.

## 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 use of the area marked 'x' on the drawing supplied, the covered area, as a Bistro Bar is or is not development or is or is not exempted development; and the use of the area marked 'y' on the drawing supplied, the uncovered area, as an open beer garden is or is not development or is or is not exempted development; and whether direct access from the canal bank to the uncovered area is or is not development or is or is not exempted development.

**AND WHEREAS** Myles Meagher requested a declaration on this question from Fingal County Council. and the Council did not issue a declaration on the due day of 1<sup>st</sup> July 2019 but referred the question to the Board for determination

**AND WHEREAS** Fingal County Council referred the question to An Bord Pleanála on the 1<sup>st</sup> day of July 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 of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (a) Schedule 2, Part 1, Class 9 of the Planning and Development Regulations, 2001, as amended,
- (b) the planning history of the site.

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) The use of the covered outdoor seating area as a Bistro Bar is development and not exempted development.
- (b) The use of the uncovered outdoor area as a customer seating area is development and not exempted development.
- (c) The use of a direct access to the outdoor area from the canal bank is development and is permitted development.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the use of the covered outdoor seating area as a Bistro Bar and the uncovered outdoor area as a Bistro Bar seating area is development and is not exempted development.

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Planning Inspector

9<sup>th</sup> December 2019

Appendices

Appendix 1 Photographs

Appendix 2 Fingal County Development Plan 2017-2023, extract.