



An
Bord
Pleanála

Inspector's Report ABP-305471-19

Question

Whether the change of use of the fifth floor from Offices to Embassy Office is or is not development or is or is not exempted development.

Location

23, Shelbourne Road, Ballsbridge, Dublin 4

Declaration

Planning Authority

Dublin City Council South

Planning Authority Reg. Ref.

0346/19

Applicant for Declaration

Finance Ireland Ltd.

Planning Authority Decision

Is exempted development

Referral

Referred by

Finance Ireland Ltd.

Owner/ Occupier

U & I PLC.

Observer(s)

None

Date of Site Inspection

9th January 2020.

Inspector

Bríd Maxwell

1.0 Site Location and Description

- 1.1. The referral site relates to no 23 Shelbourne Road, Ballsbridge in Dublin 4. The property comprises a recently refurbished 6 storey office building located on the western side of the Shelbourne Road opposite the traffic junction at Crampton Avenue. The Section 5 declaration request relates to the proposed use of the fifth floor. I note that the building is presently unoccupied and is advertised as available to let with *Lisney*. The original building apparently dates from the 1970s, and was formerly known as the Faculty building, however no specific details of the history of the site are provided on the referral file.

2.0 The Question

- 2.1. The referral is made by Hughes Planning and Development Consultants on behalf of Finance Ireland Ltd. The question as posed is:

“Whether the change of use of the fifth floor, No 23 Shelbourne Road, Ballsbridge, Dublin 4 from offices to embassy office use, is or is not development and whether this change of use constitutes exempted development or not.”

3.0 Planning Authority Declaration

3.1. Declaration

By order dated 21st August 2019, Dublin City Council issued notification of its decision that the development is exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The City Council Planner's report notes that the Z1 zoning pertaining to the site does not allow for office use as permissible use or open for consideration, however the unit already has an office use and permission granted as such. The office use established at 23 Shelbourne Road comes within Class 3 of the Planning and

Development Regulations 2001 (as amended), and the “Embassy: Office” use proposed in, this instance also comes within Class 3 of the aforementioned regulations. Accordingly, the change of use subject of this referral constitutes exempted development.

3.2.2. Other Technical Reports

None

4.0 Planning History

0300/19 Section 5 Declaration. Decision date 23 July 2019. Referrer *Spectre (Shelbourne) Ltd.* The City Council declared 23 July 2019 that the proposed change of use from office to embassy office constitutes exempted development.

0382/19 Section 5 Declaration. Decision date 18th September 2019. Referrer Transaction Network Services (Ireland) Limited. The City Council determined that the office use established at 23 Shelbourne Road comes within Class 3 of the Planning and Development Regulations 2001 (as amended) and the Embassy office use proposed also comes within class 3 of the afore-mentioned regulations and accordingly, the change of use subject of this referral constitutes exempted development.

3136/16 Permission granted 20th September 2016 for minor alterations to existing six-storey office building comprising works to the front (north-eastern elevation) and existing entrance doorway to provide for (i) timber laminate cladding with integrated backlit building signage and lighting, (ii) new ground floor projecting entrance feature with glazed cantilevered canopy over (iii) removal of existing aluminium doors and installation of replacement sliding frameless glass doors, and (iv) all associated site works necessary to facilitate the development.

3581/14 Permission granted on 26th January 2015 for ground floor extension, including new entrance, three vertical glazing window elements with additional floor areas on each floor, new boundary wall treatment, new signage and elevational alterations.

5193/08 Permission refused 28th August 2009 for demolition of existing six storey office building with heights ranging between five and eight storeys overall total building height proposed, to include the lower ground floor level to be nine storeys and development to comprise a total gross floor area of 9,952m² setbacks proposed at fifth and sixth floor levels to accommodate roof terraces; green roof also proposed, a three-level basement proposed beneath to provide for 50 car parking spaces, 100 bicycle spaces, ancillary facilities storage, plant room and reuse storage, vehicular access from Shelbourne road.

5.0 Policy Context

5.1. Development Plan

5.1.1 The Dublin City Development Plan 2016-2022 refers. The site is zoned Objective Z1. “to protect, provide and improve residential amenities”.

Notably office is not listed as a permitted or open for consideration use.

Appendix 21 sets out Land use definitions and includes:

Office - “A building in which the sole or principal use is the handling and processing of information and research, or the undertaking of professional, administrative, financial, marketing or clerical work, and includes a bank or building society but not a post office or betting office.”

Embassy: Office – “A building or part thereof, or land used by a foreign government for diplomatic purposes, where the use of the building is primarily commercial and where the residential content is minimal, which may include a foreign trade delegation, trade office or public embassy offices.”

5.2. Natural Heritage Designations

None

6.0 The Referral

6.1. Referrer's Case

6.1.1 The referral is made by Hughes Planning and Development Consultants on behalf of Finance Ireland Ltd. The grounds of referral are summarised as follows:

- Due to the nature of proposed embassy office, particularly involving visiting members of the public, the use may fall into class 2 of part 4 schedule 2 of the Planning and Development Regulations 2001 as amended and is materially different to class 3, which is the existing use.
- The public element of the proposed embassy office raises notable concerns relating to parking provision, access and safety.
- Office use is predominantly used for administrative purposes not centred around visiting members of the public.
- The change of use to embassy office represents a material change of use and as such is not exempted development.
- Proposed embassy office contravenes the Z1 zoning objectives.
- Precedent case references include:

R3419. Dun Laoighaire-Rathdown County Council declared that the use of St Heliers, Stillorgan Park, Blackrock Co Dublin as an embassy was not exempted development. ¹

3188/113 Permission granted by Dublin City Council for change of Use from Mixed Commercial and multi occupancy residential use to Embassy Office Use. 69 Merrion Road Dublin 4.

0023/12 Dublin City Council issued Section 5 declaration 2 March 2012 Change of Use from Office to Embassy Office, 8 Raglan Road Dublin 4. Dublin City Council issued Section 5 declaration on 2nd March 2012. It is contended that as that change of use pertained to the entire office building it does not set a precedent for office to embassy office.

¹ Subsequently upheld on appeal to the Board Ref ABP304696-19. See Section 7.3 below.

0098/12 Change of use from Office to embassy office, 45-47 Pembroke Road, Ballsbridge, Dublin 4. Section 5 declaration issued by Dublin City Council on 7 August 2012. Contrasts to the proposed change of use at 23 Shelbourne road as it involved the entire building.

0174/19 Change of use from office to embassy office, 65 Fitzwilliam Square North Dublin 2. Dublin City Council issued Section 5 declaration on 16th September 2013. Subject of this building was an entire office building and therefore does not set a precedent.

- It is submitted that the proposed change of use is not exempt pursuant to Class 2 and Class 3 of Schedule 2 Part 4 and Article 10 of the Planning and Development Regulations 2001, as amended.

6.2. Planning Authority Response

6.2.1 The planning Authority did not respond to the grounds of referral.

6.3. Owner/ occupier's response

6.3.1 The owner /occupier did not respond to the grounds of referral

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 3(1) states the following in respect of 'development'.

- (i) In this Act , development means except where the context otherwise requires the carrying out of any works on, in, over or under land or the making of any material change of use of the structures or other land.

7.2. Planning and Development Regulations, 2001

Part 4 of Schedule 2 of the Regulations 'Exempted development – Classes of Use:

Class 2

Use for the provision of

- (a) Financial services.
- (b) Professional services (other than health or medical services).
- (c) Any other services (including use as a betting office).
- (d) Where the services are provided principally to visiting members of the public

Class 3

Use as an office, other than use to which class 2 of this part of the Schedule applies.

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 a change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

7.3. Other

The following Board decisions are relevant

ABP-304696-19 The Board decided that the change of use of an office building to use as an embassy at St Helier's Stillorgan Park, Blackrock, Co Dublin, is development, and is not exempted development.

I note that the reporting inspector had recommended that the change of use would not be material and therefore not development. The Board however, concluded that

The permitted use was offices together with caretaker's flat. The change of use to use as an embassy would be a factual change of use, and this change of use raised material issues relevant to the proper planning and sustainable development of the area, including differing levels of pedestrian and vehicular traffic and the potential

impacts on the residential amenities of neighbouring properties through altered hours of operation, including evening functions and other activity, and would therefore constitute a material change of use.

Having regard to case law, and to the nature of uses carried out in an embassy it is considered that an embassy does not constitute an office and therefore does not come within the scope of Class 3 of Part 4 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, or any other Class of Use set out in Part 4.

Accordingly, the development in this instance cannot avail of the exemption provided for under Article 10 (1) of the Planning and Development Regulations, 2001 as amended, and

There are no provisions, in this Act and Regulations by which the development in this case would constitute exempted development.

Derek Quinlan v An Bord Pleanála & Anor [2009] IEHC 228.

PL29S227769 PL29S227770 involved related applications for development consisting of firstly refurbishment and extension of the existing offices and secondly alteration and refurbishment of the interior and exterior of offices and all ancillary site works at 43 Ailesbury Road, Dublin 4. Permission was granted in both cases by Dublin City Council. Condition 3 sought to restrict the use of the entire premises for use as an embassy and not to be used as general offices or any other uses unless authorised by a prior grant of planning permission and this condition was subject to a first party appeal. The first party appeals set out that the premises had an established office use since prior to October 1964 and development plan distinctions between embassy and office use cannot cut down the scope of an owners entitlements on foot of pre 1964 existing use rights. The first party argued that both the existing and proposed uses fall within Class 3 of Part 4 of the Second Schedule to the 2001 regulations. The Board rejected the appeals and directed the Council to attach condition 3 and the reasons and considerations as follows:

“It is considered that the established/permitted use of the site is as an embassy and that such use does not come within the meaning of office use as defined under Class

3 of Part 4 of the Second Schedule of the Planning and Development Regulations 2001. Furthermore, having regard to the location of the site in a Residential Conservation Area, Zoning Objective Z2 in the current Development Plan for the area, and also to section 15.18.0 where objectives regarding embassy use are set out, it is considered that the attachment of the condition is warranted being in accordance with the provisions of the current Development Plan for the area. In deciding not to accept the Inspector's recommendation to omit condition 3, the Board considered that use as an embassy does not come within any of the classes set out in Part 4 of the Second Schedule of the Planning and Development Regulations 2001 and concurred with the view of the planning authority."

Subsequent High Court case Derek Quinlan v An Bord Pleanála & Anor [2009] IEHC 228. Judicial Review proceedings taken by the first party sought to quash the above decisions of the Board. The Judgement of the High Court on the question as to whether embassy use is the same as office use within the meaning of Class 3 of Part 4 of the Second schedule of the 2001 Regulations. The judge in the case Mr Justice Dunne considered that the issue of what does not come within the scope of office use is quintessentially a matter for the planning authority and the Board and not the Court.

8.0 Assessment

8.1. Is or is not development

8.1.1 The definition of 'development in Section 3.1 of the Act, 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 ". I note that the building is currently unoccupied having been recently extensively refurbished. The extent of information provided to the Board's is limited in terms of the specific nature of the existing and proposed use of the property. The considerations are solely based on the limited detail provided regarding established "office" use and intended "embassy office" use.

8.1.2 The Board has adjudicated on three cases which are relevant in the consideration of the current proposal as outlined above ABP304696-19 St Helier's Stillorgan, Blackrock, PL29S227769 and PL29S227770 43 Ailesbury Road. The Board's decisions in relation to 43 Ailesbury Road which were subsequently upheld in judicial review proceedings concluded that embassy office use does not constitute an office and does not come within the scope of class 3 of Part 4 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, or any other Class of use set out in Part 4. The Board noted that use as an embassy raises material issues relevant to the proper planning and sustainable development of the area including differing levels of pedestrian and vehicular traffic and the potential for impacts on residential amenities of neighbouring property through altered hours of operation including evening functions and other activities.

8.1.3 Having regard to the foregoing I consider that there is adequate precedent established by the Board's previous decisions which set out the distinction between use as a office and use as an embassy office to allow the Board to conclude that the use of the fifth floor of 23 Shelbourne Road as embassy offices raises matters different from those that would arise under use as office and is materially different and therefore constitutes development.

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

8.2.1. Neither the Act nor the Regulations provide for a change of use from office to embassy office as exempted development. Accordingly, I conclude that the material change of use of the fifth floor from office use to embassy office 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 change of use of the fifth floor of 23 Shelbourne Road, Ballsbridge, Dublin 4, from office use to

embassy office is or is not development or is or is not exempted development:

AND WHEREAS Hughes Planning and Development Consultants on behalf of Finance Ireland Ltd. requested a declaration on this question from Council and the Council issued a declaration on the 21st day of August, 2019 stating that the matter was development and was exempted development:

AND WHEREAS Hughes Planning and Development Consultants on behalf of Finance Ireland Ltd referred this declaration for review to An Bord Pleanála on the 17th day of September 2019:

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

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Articles 5, 6, 9 and 10 of the Planning and Development Regulations 2001, as amended,
- (c) Part 4 of Schedule 2 of the Planning and development Regulations 2001, as amended, and in particular Classes 2 and 3 of that Part,
- (d) Previous decisions of An Bord Pleanála under file reference numbers PL29S2247769 and PL29S227770 and ABP 305471-19
- (e) Relevant case law, and in particular the judgement of the High Court in the case of Derek Quinlan – v - An Bord Pleanála & Anor [2009] IEHC 228

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 change of use of the fifth floor of an office building of 23 Shelbourne Road to use as an embassy office is development and is not exempted development.

Bríd Maxwell
Planning Inspector

21st January 2020