



An  
Bord  
Pleanála

## Inspector's Report ABP305796-19

### Development

Permission for Alterations to existing 2<sup>nd</sup> floor Rooftop Area and Retention of permission for (a) Connections between 37/38 Camden Row and Opium, (b) Change of use from kegroom to seated area at 37 Camden Row, (c) Use of the ground floor internal yard to the north of 37/38 Camden Row as a smoking/outdoor area.

### Location

37/38 Camden Row, Dublin 8 and Opium Bar No. 26 Wexford Street, Dublin 2 and Dublin 8.

### Planning Authority

Dublin City Council.

### Planning Authority Reg. Ref.

3711/19.

### Applicant

Trebleside DAC.

### Type of Application

Permission and Retention of Permission.

### Planning Authority Decision

Grant.

<b>Type of Appeal</b>	Third Party -v- Grant.
<b>Appellants</b>	John Corcoran and Anthony Lynch.
<b>Observers</b>	None.
<b>Date of Site Inspection</b>	15 <sup>th</sup> January 2020
<b>Inspector</b>	Paul Caprani.

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## 1.0 Introduction

ABP305796-19 relates to a third-party appeal against the decision of Dublin City Council to issue notification to grant planning permission and retention of planning permission for alterations to an existing 2<sup>nd</sup> floor rooftop smoking area at the Opium Bar on Wexford Street, Dublin 8. The third party appeal argues that the proposed development will have adverse impacts on the residential amenity of property in the vicinity through excessive noise and the grant of planning permission also relies on conditions that are deemed to be non-enforceable.

## 2.0 Site Location and Description

- 2.1. The Opium Bar is located on Wexford Street in the south inner city. Wexford Street forms part of one of the main radial routes to the city centre. The subject site is located on the west side of the street to the immediate north of its intersection with Camden Row.
- 2.2. The Opium Bar has frontage onto Wexford Street, (No. 26) Camden Row, (Nos. 37 and 38) and onto Liberty Lane (a small lane which runs to the west of the site and parallel to Wexford Street)). The Opium Bar comprises of a three-storey building which is located between Whelan's Pub and Music Venue and a hardware store on the Wexford Street elevation. The appellants live above the Hardware Store on Wexford Street. The Camden Street elevation accommodates two-storey buildings which are occupied by commercial buildings including an alternative entrance into Whelan's Music Venue. The buildings on Camden Street also accommodate some residential development overhead.

## 3.0 Proposed Development

The current application seeks planning permission for alterations to the existing second floor rooftop smoking area by eliminating the eastern part of the existing smoking area and providing a roof to enclose part of the existing smoking area in the central portion of the building. Retention of permission is also sought for:

- (a) Connections between 37 and 38 Camden Row which forms part of the Opium Bar.
- (b) The change of use from keg-room to seated area at No. 37 Camden Row (approximately 26 square metres).
- (c) The use of the ground floor internal yard area to the north of No. 37 to 38 Camden Row as a smoking/outdoor area.

#### **4.0 Planning Authority's Decision**

Dublin City Council in its decision dated 3<sup>rd</sup> October, 2019 issued notification to grant planning permission subject to 13 conditions. Condition No. 12 required that the development comply with the requirements of the Code of Practice in relation to noise and air pollution.

##### **4.1. Observations**

- 4.1.1. An observation to the planning authority was received by the current appellants the contents of which have been read and noted. An observation was also received from the Camden Village Residents and Business Association and Mr. Mark Hallinan which state that the proposed development will have an adverse impact on the amenities of the area and that some of the works undertaken to date are unauthorised.
- 4.1.2. An observation from Transportation Infrastructure Ireland recommends that if the above application is successful and is not exempt from the Section 49 levy scheme for Light Rail, a Section 49 supplementary contribution should be attached.

##### **4.2. Assessment by Planning Authority**

- 4.2.1. A report from the Roads, Street and Traffic Department Road Planning Division states that there is no objection subject to standard conditions.
- 4.2.2. An Environmental Health Report from Dublin City Council's Senior Environmental Health Officer states that there are no details about noise control provided with the submission for the application and the potential impact this development will have on residents in the area. The unit has received numerous complaints with respect to

activities at the subject site which primarily relate to noise from patrons and music. The proposal will lead to increased noise levels which will affect residents in the area. On this basis the unit recommends that permission be refused.

4.2.3. The planner's report notes the extensive planning history associated with the subject site and also notes the relevant enforcement history together with the observations and submissions objecting to the proposed development. The interdepartmental reports are also noted as are the development plan provisions which are relevant to the subject application. The planner's report notes that the current application relates to a second-floor rooftop terrace which is in situ and is currently undergoing alterations. It is noted that the planning history relating to the site is complex (see relevant planning section below) and that the current application seeks to regularise matters. The enclosing of the east/west access route is in accordance with the enforcement notice and is welcomed. Furthermore, it is noted that the overall size of the terrace would be reduced by over 18 square metres. This aspect of the proposal is deemed to be acceptable. While the design of the proposed enclosed area is rudimentary, it is located centrally within the roof and would not be visible from public vantage points.

4.2.4. With regard to the second element of the application, it is noted that planning permission was recently granted to amalgamate Nos. 38a and 38b Camden Row into a café/restaurant at ground floor level and a two-bedroomed apartment at first floor level. The main concern with the use of the outdoor courtyard as a smoking area is the impact on the amenity of surrounding residents. It is noted that a two-bedroomed apartment at first floor level is established at No. 38 Camden Row. Having regard to the city centre location it is not considered that the use of the rear courtyard as a smoking area between the hours of 7 a.m. and 11 p.m. associated with the consented café/restaurant would result in an unduly detrimental impact on the amenity of this apartment with regard to noise and air quality. Furthermore, a condition ensuring that the link would only be used by staff would ensure that patrons of Opium would not be using this area as a smoking area should also be attached. Based on the above arguments Dublin City Council issued notification to grant planning permission for the proposal.

## 5.0 Planning History

- 5.1. The following relevant planning history associated with the subject site is set out below.
- 5.2. Under Reg. Ref. 2812/19 planning permission was refused for a new opening/connection to the external yard of No. 38 Camden Row which is to the south of the existing Opium Garden Bar at ground floor level together with a change of use of the external yard to smoking area. Permission was refused for the following reason:
- Having regard to the requirements of the Dublin City Development Plan and the Z5 zoning objective together with Section 16.32 of the said Plan it is considered that the proposed development would seriously injure the residential amenity of adjoining properties in terms of disturbance, noise pollution and air pollution. The proposed development would set an undesirable precedent and would be contrary to the proper planning and sustainable development of the area.*
- 5.3. Under Reg. Ref. 2678/19 retention of planning permission was refused for the relocation and reconfiguration of a pitched roof constructed under previous planning permission Ref. 6790/07 at second floor/rooftop together with the relocation of water tanks and services to the bar/assembly recreation area at this level maintaining the open air arrangement and reducing the usable floorspace that was previously granted from 245 square metres to 140 square metres. Dublin City Council refused permission on the basis that the second floor terrace gives rise to an unacceptable level of disturbance to the amenities of the area and property in the vicinity including nearby residential units. The proposal would therefore be contrary to the proper planning and sustainable development of the area.
- 5.4. Under Reg. Ref. 3680/18 retention of planning permission was granted for the replacement of bitumen covered roof shelter to the garden for the glazed roof shelter together with minor elevational and layout changes altering a previous permission to the existing bar (3377/11).
- 5.5. Under Reg. Ref. 4206/18 permission was granted at 38a and 38b Camden Row for alterations and additions to a previously granted application (Ref. 3518/18) to extend trading hours of the café/restaurant from 7 a.m. to 11 p.m.

- 5.6. Under Reg. Ref. 3518/18 permission was granted for an extension to the existing deli at No. 38a and 38b Camden Row to facilitate an on-site dining area via a change of use of the adjacent unit at No. 38a from retail/radio broadcast unit to café/restaurant and the amalgamation of Nos. 38a and 38b to a single unit together with minor alterations to the existing first floor residential unit together with associated signage.
- 5.7. Under Reg. Ref. 2198/18 Dublin City Council refused retention of planning permission for a replacement of a bitumen covered roof shelter to a garden with a glazed roof shelter together with minor elevational and layout changes.
- 5.8. Under Reg. Ref. 3229/18 Dublin City Council refused planning permission for a change of use from a ground floor office premises to a facility for the preparation and consumption of food.
- 5.9. Under Reg. Ref. 3377/11 planning permission was granted at the Opium Bar for a change of use of 13/14 Liberty Lane from photographic studio to outdoor smoking area, office storage staff area and toilet facilities to service the existing public house at 26 Wexford Street.
- 5.10. Three other planning applications dating from 2007 and 2002 all of which relate to alterations to the existing premises at No. 26 Wexford Street are referred to in Table 1 on pages 3 and 4 of the Dublin City Council Planner's Report.

## 6.0 Grounds of Appeal

- 6.1. The decision was appealed on behalf of the owners of No. 27 Wexford Street, the building to the immediate north of the Wexford Street elevation of the site. It comprises of a retail unit at ground floor level with residential apartments above. It is stated that the proposed smoking area is less than 10 metres from the appellant's property. The appellants have been subject to excessive noise and smoke emanating from the second-floor smoking area since its construction in 2017.
- 6.2. The grounds of appeal go on to set out the planning history associated with the site and notes that two of the more recent applications (Reg. Ref. 2812/19 and Reg. Ref. 2678/19) were both refused planning permission (see section on Planning History above). Details of the enforcement history is also set out.



- 6.3. It is also suggested that the nature and extent of the development is not all together clear from the public notices.
- 6.4. Section 4 of the submission sets out the actual grounds of appeal.
- 6.5. It is argued that proposed development will have an unacceptable and adverse impact on adjoining residential amenity and as such does not support the mix of uses and inhibits the area's ability to sustain life and vitality as envisaged under the Z5 zoning objective set out in the development plan. The proposal lacks an adequate noise assessment and it is noted that a refusal was recommended on the basis of excessive noise impacts by the Dublin City Council, Air Quality Monitoring and Noise Control Unit.
- 6.6. It is not clear from the drawings submitted whether the unauthorised smoking area is being retained or altered during the current application. Either way it will have a severe detrimental impact on the adjoining residential premises.
- 6.7. There are numerous statements in the Development Management Standards section contained in the development plan which required licensed premises to strike a balance between providing cultural entertainment and to protect the amenities of residents from an overconcentration of such late-night venues. The development plan also seeks to discourage the development of super-pubs where it is proposed to extend such commercial premises or vary the opening hours of such premises. The onus is on the applicant to demonstrate that the proposed development will not be detrimental to the residential, environmental quality or the established character or function of the areas.
- 6.8. It is stated that there are already a number of super-pubs in this general area.
- 6.9. It is also argued that Condition No. 4 which required that "the link between the courtyard at the rear of No. 38 Camden Row and Opium at No. 26 Wexford Street shall be used by staff only at any time" is unenforceable and will lead to excessive negative impacts on adjoining residential amenity.
- 6.10. Concerns are expressed that the application was not accompanied by a detailed noise assessment.
- 6.11. Reference is made to Section 16.36 of the development plan which states that where it is considered that a proposed development is likely to create a disturbance due to

noise, a condition may be imposed by the Planning Authority limiting the hours of operation and the level of noise generation. The failure of a Planning Authority to apply any condition specifically limiting noise levels or the hours of operation for the rooftop garden/smoking area results in a contravention of the development plan.

- 6.12. It is also suggested that Condition No. 3 which relates to the serving, preparation and consumption of hot or cold food within the second-floor roof terrace would be non-enforceable.
- 6.13. It is argued that the appellant has lost tenants previously as a result of noise emanating from the rooftop bar.
- 6.14. Finally, it is argued that the applicant has failed to address previous reasons for refusal at the subject site which include reference to the adverse impact arising from the proposed smoking area on the residential amenities of the area.

## **7.0 Appeal Responses**

### **7.1. Planning Authority's Response to the Grounds of Appeal**

A response dated 20<sup>th</sup> November 2019 states that the reasoning on which the Planning Authority's decision is based is set out in the planner's report and this has already been forwarded to An Bord Pleanála. The planning report deals fully with the relevant issues raised and justifies its decision.

### **7.2. Applicant's Response to the Grounds of Appeal**

A response was received on behalf of the applicants from SSA Architects and this is summarised below.

It states that the kernel of this appeal appears to be related to the use of the rooftop area as a smoking and hospitality area. The current application does not make reference to any of these uses and these were already established in 2007 under Reg. Ref. 6790/07.

With regard to previous refusals, it is stated that Dublin City Council previously refused permission for two applications based on vexatious and fraudulent complaints to the City Council. On foot of discussions and engagements with Dublin City Council an agreement was found to regularise all planning matters on the premises.

With regard to relevant enforcement history, it is refuted that the rooftop smoking area and glazed roof shelter is unauthorised development. Any subsequent applications for retention were made on a non-prejudicial basis.

With regard to the unforceable nature of Condition No. 4, it is stated that any observation of the link would establish whether or not staff or others are using it.

The claim that there is excessive noise emanating from the premises and this has resulted in the cessation of specific tenancies is unsustainable as a reason for appealing the decision. The applicants offer to rent all the residential units from the appellants at an enhanced commercial rate in order to provide accommodation for its staff.

Finally, it is stated that the current application is not a super-pub, in fact it is three separate and distinct licensed premises. The applicants are satisfied that the uses are consistent with the City Development Plan.

## **8.0 Development Plan Provision**

- 8.1. The site is governed by the policies and provisions contained in the Dublin City Development Plan 2016 – 2022.
- 8.2. The subject site is zoned Z5 City Centre *“to consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity”*.
- 8.3. The primary purpose of this use zone is to sustain life within the centre of the city to intensive mixed-use development. The strategy is to provide a dynamic mix of uses which interact with each other, help create a sense of community, and to which sustain the vitality of the inner city both by day and night. As a balance and a recognition of the growing residential communities in the city centre, adequate noise reduction measures must be incorporated into the development especially mixed-use development and regard should be given for the hours of operation.
- 8.4. Section 16.32 specifically relates to nightclubs, licensed premises, casinos and private members clubs.

- 8.5. In recognition of the importance of Dublin as a thriving and multi-dimensional capital city, there is a need to facilitate the concept of the 24-hour city, particularly the city centre and other key districts.
- 8.6. Dublin City Council will encourage entertainment/cultural/music uses which help create an exciting city for residents and tourist alike, and which are capable of attracting people in the cutting-edge industry such as digital media. There is a need to strike an appropriate balance between the role of these entertainment uses in the economy of the city and the following:
- To maintain the high-quality retail functions of the primary city centre streets and ensure a balanced mix of uses.
  - To protect the amenities of residents from an overconcentration of late-night venues.
  - Noise emanating from and at the boundaries of these establishments are issues which need to be addressed in planning applications for such establishments. Noise insulation and reduction measures, especially relating to any mechanical ventilation or air conditioning, will be required to be submitted with any such planning application.
  - The development of “Superpubs” will be discouraged and the concentration of pubs will be restricted in certain areas of the city where there is a danger of overconcentration of these to the detriment of other uses.
- 8.7. In the cases where new issues, including uses such as casinos and private members clubs, extensions to the existing use are in variation in opening hours of a public house are proposed, the onus is on the applicant to demonstrate that such proposed development will not be detrimental to the residential, environmental quality or the established character or function of the area. Matters that shall be taken into account by the Planning Authority in assessing proposals for these uses and extensions to such uses include but are not limited to the following:
- The amenity of neighbouring residents and occupiers.
  - Hours of operation.
  - Traffic management.

- Shop frontage treatment and impact on the streetscape.
- The proposed signage.

## 9.0 EIAR Screening Determination

The proposed development does not fall within a class of development for which an EIAR.

## 10.0 Planning Assessment

I have read the entire contents of the file, visited the subject site and its surroundings and have had particular regard to the planning history pertaining to the subject site and the issues raised in the grounds of appeal. The main issues in determining the current application and appeal before the Board are as follows:

- Impact on Surrounding Residential Amenity
- Enforceability of Conditions
- Description of Proposed Development
- Other Issues

### 10.1. Impact on Surrounding Residential Amenity

10.1.1. The appeal places considerable emphasis on the impact of the existing smoking area on the residential amenity on surrounding residences. I refer the Board to the appendices submitted with the appeal which supports the concerns set out in the appeal that residential use on the upper floors of buildings in the vicinity is incompatible with the noise generated from the smoking area associated with the existing premises. The grounds of appeal also highlight related issues which argues that the adverse noise impact is incompatible with the land use zoning objective which seeks to derive a mix of uses under the Z5 zoning and that the proposal constitutes a 'Superpub' which is also incompatible with development plan policy. Reference is also made to the lack of noise assessment associated with the outside smoking area and the fact that the environmental health report prepared on behalf of Dublin City Council also recommended a refusal.

- 10.1.2. The key consideration that the Board should in my opinion acknowledge in determining the current application and appeal is the fact that there are extant permissions granted under Reg. Ref. 6790/07 and 3377/11 which permits an outdoor smoking area to the rear of the premises at upper floor level. While details of these applications are not contained on file, both the Planning Authority and the applicant in its response to the grounds of appeal, acknowledge the fact that an outdoor smoking area has been established and has the benefit of planning permission under previous applications. It is not the purpose of the current application and appeal to revisit issues in relation to the principle of incorporating an outdoor smoking area in this assessment. It is also clear from the planner's report that the current planning application seeks to regularise matters on foot of an enforcement notice which was issued in relation to non-compliance with planning permission 6790/07.
- 10.1.3. According to the drawings submitted the actual smoking area at second floor level is to be reduced in size and is to incorporate a new roof to cover the east/west corridor from the smoking area to the new storage room for the ice machines.
- 10.1.4. Thus, the alterations proposed at second floor level will not in my view in any way exacerbate or intensify the existing use of the area for outdoor smoking. While it is acknowledged that there may be a noise problem associated with the outdoor smoking area, the subject application before the Board is not for a new or extension to the outdoor smoking area. If anything, the alterations sought under the current application which reduces the overall size of the smoking area may be more beneficial in amenity terms.
- 10.1.5. On this basis I consider that many of the issues raised in the grounds of appeal which relate to the principle of the use of the second-floor area as an outdoor smoking area are not strictly relevant to the application before the Board. The Board in my view should confine its deliberations to the alterations sought under the current application rather than revisiting and evaluating the principle of the use of the space as a smoking area. In this regard, I do not consider that the issues raised in relation to compatibility with the land use zoning objective, the requirement for a noise assessment and issues with regard to the concentration of Superpubs are relevant issues to the application before the Board. Furthermore, I do not agree with the conclusions set out in the Environmental Health Report that the development will

lead to increased noise levels which will affect residents in the area with resultant complaints. There is no evidence to suggest that a reduction in the size of the smoking area sought under the current application will result in increased noise levels.

## **10.2. Enforceability of Conditions**

10.2.1. The grounds of appeal suggest that many of the conditions and specifically Conditions Nos. 3 and 4 are unenforceable. These conditions relate to the restriction on the serving, preparation or consumption of hot or cold beverages or food within the second floor roof terrace and the requirement that the link between the courtyard to the rear of No. 38 Camden Row and No. 26 Wexford Street shall be used by staff only. There is an onus on the applicant to comply with these conditions as non-compliance will result in the contravention of the planning permission issued. Any enforcement issues associated with conditions are a matter for Dublin City Council and not An Bord Pleanála.

## **10.3. Description of Proposed Development**

10.3.1. The grounds of appeal argue that the nature and extent of the development have not been adequately described and that some confusion arises with regard to the quality of the documentation submitted including the drawings. It is my opinion that the public notices clearly indicate that planning permission is sought for alterations to the existing second floor rooftop smoking area including provision of a roof enclosure and this is indicated on Drawing PL055.

10.3.2. Permission is also sought for the retention for the reduce in partially covered smoking area and for connections between 37 and 38 Camden Row and a change of use from a Keg room to a seated area and a change of use from a ground floor internal yard to use as an outdoor smoking area. The proposed changes are set out in more detail in the planner's report. I consider the nature and extent of the proposed development is adequately described in the public notices. However, if the Board consider that there is sufficient ambiguity in the notice submitted, it can always require that the applicant submit revised notices and seek observations on any revised notices submitted prior to issuing a determination.

## **10.4. Other Issues**

10.4.1. The only other issue raised in the observations submitted to the Planning Authority relates to the imposition of a supplementary development contribution under Section 49 of the Planning and Development Act 2000 for the Luas Crosscity Line. Transport Infrastructure Ireland have requested that such a condition be attached if applicable, in the case where planning permission was granted for the proposal. I note that Dublin City Council did not attach such a condition. This in my considered opinion is appropriate on the basis that the current application would fall within the limits of the exemptions set out in Section 11 of the Supplementary Contribution Scheme as the proposal relates for a change of use from one commercial/retail use to another and as such no supplementary contribution would apply.

## **11.0 Appropriate Assessment**

Having regard to the nature and scale of the proposed development and nature of the receiving environment together with the proximity to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

## **12.0 Decision**

Grant planning permission for the proposed development based on the reasons and considerations set out below.

## **13.0 Reasons and Considerations**

It is considered that the development for which permission and retention of planning permission is sought would, subject to conditions set out below, not seriously injure the amenities of the area or of property in the vicinity, would not be prejudicial to public health and would generally be in accordance with the proper planning and sustainable development of the area.



## 14.0 Conditions

1. The development shall be carried out 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 prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

**Reason:** In the interest of clarity.

2. Water supply and drainage arrangements shall be agreed in writing with the planning authority prior to the commencement of development.

**Reason:** In the interest of orderly development.

3. The applicant or developer shall enter into a water and/or wastewater connection agreement with Irish Water if applicable prior to the commencement of development.

**Reason:** In the interest of orderly development.

4. Site development and building works shall be carried out between the hours of 7 a.m. to 6 p.m. Mondays to Friday, 8 a.m. to 2 p.m. on Saturdays and not at all on Sundays or 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.

5. There shall be no loudspeaker announcements, playing of any music (live or recorded) of any kind, the screening of any shows, the projection of any audio or visual equipment or projection of any other audible material projected in or from the roof terrace.

**Reason:** In the interest of environmental amenity.

6. There shall be no serving, preparation or consumption of hot or cold beverages or food within the second-floor roof terraced.

**Reason:** In the interest of environmental amenity.

7. The link between the courtyard at the rear of No. 38 Camden Row and Opium shall be restricted to staff only and shall not be used as a public link between the two premises.

**Reason:** In the interest of environmental amenity and the proper land use planning of the local area.

8. The following requirements of the Transportation Planning Division shall be complied with:

- The door of the seated area to be retained at No. 37 Camden Row shall not open out onto the public footpath unless otherwise agreed in writing with the Transportation Planning Division.
- All costs incurred by Dublin City Council, including any repairs to the public roads services necessary as a result of the development shall be at the expense of the developer.

**Reason:** In the interest of traffic safety.

9. The developer shall comply with the requirements set out in the Codes of Practice issued by the Noise and Air Pollution Section of Dublin City Council.

**Reason:** To ensure a satisfactory standard of development.

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Paul Caprani,  
Senior Planning Inspector.

29th January, 2020.