



An  
Bord  
Pleanála

## Inspector's Report ABP-307112-20

### Question

EXPP: 1. Construction of a smoking/beer garden to rear of pub. 2. Use of upstairs rooms as student/short term letting. 3. Raising of flat roof to rear by c.600mm and construction of a 2m high fence to create an outside amenity area.

### Location

Lamplighters Pub, 79 The Coombe / 1  
Brabazon Street, Dublin 8

### Declaration

Planning Authority	Dublin City Council South
Planning Authority Reg. Ref.	0098/20
Applicant for Declaration	Andreas Brueggener
Planning Authority Decision	Is exempted development

### Referral

Referred by	Andreas Brueggener
Owner/ Occupier	Creative Real Estate Ltd.
Observer(s)	None

**Date of Site Inspection**

24/08/2020

**Inspector**

Gillian Kane

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## **1.0 Site Location and Description**

- 1.1.1. The site of the proposed development is that of a three-storey corner site Victorian building at the junction of Brabazon Street and the Coombe. It is operated out as a public house on the ground floor and there are traditional bar fittings in the interior.
- 1.1.2. The existing public house entrance is at the centre of the frontage onto the Coombe and there are two windows in on both façades. A narrow footpath is located along the frontage of both Brabazon Street and The Coombe. Three storey houses are located along the west side of Brabazon Street. No 2, the referrer's property is shallow in depth, and adjoined to the side and rear side to the north by the Lamplighter premises. To the west side along the Coombe there are three storey buildings most of which have a retail or community use at ground floor level. A dwelling to the west of the subject property is currently under refurbishment.
- 1.1.3. Access to the upper floors of the Lamplighters was not possible due to public health guidance on the number of people indoors and the requirement to complete Covid-19 Pre-Site Inspection Clearance forms for each person.

## **2.0 The Question**

- 2.1. Whether 1) the construction of a smoking / beer garden to the rear of the pub, 2) use of upstairs rooms as student / short term letting and 3) the raising of a flat roof to the rear by c.600mm and the construction of a 2m high fence to create an outside amenity area are or are not development and are or are not exempted development.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

- 3.1.1. On the 25<sup>th</sup> March 2020, Dublin City Council issued a declaration stating that 1) the construction of a smoking / beer garden to the rear of the pub, 2) use of upstairs rooms as student / short term letting and 3) the raising of a flat roof to the rear by c.600mm and the construction of a 2m high fence to create an outside amenity area are EXEMPT from the requirement to obtain planning permission.
- 3.1.2. The Reasons & Considerations are that the works to the public house in relation to the provision of a smoking area, replacement of the rear roof and the construction of a timber fence are deemed exempted development within the meaning of 4(1)(h) of

the Planning and Development Act 2000, as amended. The use of the upstairs accommodation for short term letting for a duration of 15 days or more is deemed exempted development as per section 3A of the Planning and Development Act 2000, as amended.

### 3.2. **Planning Authority Reports**

- 3.2.1. **Planning Report:** Toilets were relocated internally allowing the construction of a smoking area. Whilst an opening was created, no increase in floor area or intensification of use arose. No visual change. Works are exempt under 4(1)(h). Use of the upper floors for residential letting pre-dates '63. As per section 3A of the act, short term letting is only development is 14 days or less. Wooden fence is not visible and flat roof was for maintenance, therefore exempt under 4(1)(h).

## 4.0 **Planning History**

Planning Authority Reg. Ref. **2676/18**: Planning permission REFUSED for change of use of first and second floors over existing ground floor public house from private residence to boutique hostel. Also extensions to existing first and second floors to rear over public house allowing for additional 4 new bedrooms with en-suite, also removal of existing roof to allow for new third floor penthouse which will consist of 4 new bedrooms, new lounge and kitchen. With reception area on first floor and all associated site works. The two reasons for refusal were:

1. Having regard to the nature and scale of the proposed development to accommodate a proposed 'boutique hostel', the lack of adequate information submitted regarding the nature of this hostel, the proximity of the first , second and third floor extensions to adjoining residential properties along Brabazon Street, it is considered that the proposed development would be seriously injurious to the residential amenities of properties in the vicinity, could lead to overshadowing, loss of daylight , excessive noise and general disturbance and would therefore be contrary to the proper planning and sustainable development of the area.

2. Having regard to the architectural significance of this building, and having regard to the removal of the roof and inappropriate addition at third floor level , it is considered that the proposed development would be an incongruous form of development at this important street corner, would be visually obtrusive and would

seriously injure the residential and visual amenities of properties in the vicinity and would be contrary to the proper planning and sustainable development of the area.

- 4.1.1. **ABP-301303-18:** Planning permission was granted for the re-positioning of front door to corner, modification and upgrading to front fascia, new signage, two new windows to side facing onto Brabazon Place and increasing windows by 200mm facing onto Coombe Road for additional light and all associated site works at The Lamplighter Pub, 79 The Coombe, Dublin.
- 4.1.2. The enforcement history attached to the subject property is outlined in the Referrers submission.

## 5.0 Policy Context

### 5.1. Development Plan

- 5.1.1. The operative development plan is the Dublin City Development Plan, 2016-2022 according to which the site is subject to the zoning objective: “Z4: *to provide for and improve mixed services facilities.*” The adjoining area of Brabazon Street, which includes the appellant’s property are subject to the zoning objective Z1: “*To protect, provide for and improve residential amenities.*”

## 6.0 The Referral

### 6.1. Referrer’s Case

- 6.1.1. An agent on behalf of the owner of the property 2 Brabazon Street, to the immediate south / rear of the Lamplighters pub has submitted the declaration of Dublin City Council to the Board for review. The submission includes a cover letter, a letter from a Planning Consultant, photos, appendices and digital documents. **Matters unrelated to the referral are not summarised.**
- 6.1.2. The submission of the Referrer’s agent can be summarised as follows:
- The referrer owns the dwelling house adjoining the public house.
  - It is submitted that the declaration of the Planning Authority is not correct and denies the Referrer the opportunity to object to development.
  - It is submitted that the development comprising a new open roof structure for the smoking area, the raising of a flat roof by 600mm for an amenity / deck area with a deck are not exempted development under section 4(1)(h) of the Planning and

Development Act 2000, as amended as the works materially affect the external appearance of the structure and because the works are not for the improvement or alteration of the structure.

- A material change of use of structures or land constitutes development that requires planning permission. Prior to the change of use, the smoking / beer garden area was toilets. It is submitted that a material change of use has occurred as the more intensive public bar area has moved to the rear with part of the roof left open. The location of the smoking area is more visible and audible from the surrounding properties. Before, there was no visible or audible presence
- The first-floor roof area was never used as a sitting out / amenity area. The use of the raised roof for amenity purposes constitutes a material change of use and should be subject to a requirement to seek planning permission.

6.1.3. The submission of the Referrer can be summarised as follows:

- The demolition of the toilet block and its conversion to an open smoking area is a material change of use and an intensification of use.
- The change of use of the roof area to an amenity area is a change of use and an intensification of use
- The erection of a timber fence has materially affected the external appearance of the structure and of neighbouring structures to render it inconsistent with such.
- In 2014 the upper floor rooms of the public house were not rented. A brochure advertising the sale of the pub referred to the rooms as storage.
- In Jan 2018 renovation work undertaken resulted in 9 ensuite bedrooms and communal areas.
- Renting of the rooms on the AirBnB platform was the subject of an enforcement letter in September 2018. (Appendix 2).
- In March 2019 an additional roof construction was built on top of the existing flat roof, raising it by approx. 600mm. This was used as an amenity area. A warning letter was sent by DCC in June 2019 (appendix 5). A 2m high fence was constructed around the roof area.
- A warning letter issued under section 153 was sent in August 2019 (appendix 8).

- A section 5 declaration was submitted in February 2020 (appendix 10), a decision on which issued from DCC on March 25<sup>th</sup> 2020 (appendix 11). The inspectors report is included as appendix 13.
- Until June 2019, the area of the smoking garden was the toilet area and storeroom with a closed roof and 3 no. skylights. The roof was removed in June 2019 and a new open roof was constructed. The area was decorated as a smoking / pub area.
- Such an open area will increase noise. This is a material change of use. The smoking area is opened at noon each day and voices can clearly be heard. This must be subject to a planning application.
- The use of the flat roof as an amenity area is a new use.
- In March 2019 work began on constructing a new roof. Prior to this there was a cornice of approx. 600mm on the border all to the referrers back yard. The difference in height was such that a ladder was required to cross between the front and rear roofs. The pub owners claim that this is a replacement roof is rejected.
- A 2m fence was erected around the area in June 2019. There are no other similar structures in the vicinity. Had the fence been located away from the Referrers property, he would not object.
- The Board is requested to find that the smoking area, the use of the roof and the timber fence all are development and all are not exempted development.

## 6.2. Planning Authority Response

- 6.2.1. None on file.

## 6.3. Owner/ occupier's response

- 6.3.1. A response to the Referral was submitted by an agent on behalf of the owner of the subject premises. The submission refers to the history of the subject site, both planning and use. The uses to which the subject premises are put are all established use pre-64 and they have never been abandoned. **Matters unrelated to the planning issues raised in the referral are not summarised.**



6.3.2. The response can be summarised as follows:

- The Referrers interpretation of section 4(1)(h) is incorrect. The works comprising the relocation of the toilets are works for the maintenance, improvement or other alteration affecting only the interior. There is no extension and no added area.
- The reorganisation of space within a planning unit is exempted development. ref. Clarence Hotel case. A lounge area that was outside has been moved inside to provide smoking facilities. There has been no increase in the area of the planning unit and no material intensification of use.
- There is no 'beer garden'. It is an enclosed area with an opening in the roof to comply with smoking legislation. There is a high-level wall demarcating the boundary between the pub and the residential premises to the rear.
- Both the toilets and the smoking area are ancillary to the proper operation of the primary use of the premises as a public house. There has been no material change in use and no material intensification of use.
- The subject premises has extensive accommodation overhead the ground floor bar. The primary use is identifiable as a commercial premises.
- Rooms are let on an annual basis, or subject to agreement, but not less than 15 no. days duration.
- Provision of rented accommodation is an established use. There is evidence from previous owners regarding rental history.
- There has been no change from roof to amenity area. The flat roof has always been available as a roof amenity area, ancillary to the upper floor accommodation.
- A similar arrangement exists at no. 78 The Coombe. The properties share a boundary. The pub owners replaced the metal fence with a timber fence for improved safety, security and to prevent overlooking.
- The upper floors of the property were not derelict and water damaged. The previous owner has given a declaration that the floors were rented.
- The estate agent brochure referred to the area as storage to increase attention to the property for sale.

- There is an established use on the upper floors and the primary use of the premises as a trading public house was never abandoned. Therefore section 4(1)(h) applies.
- The roof was not raised by 600mm. Insulation work was undertaken from inside the building.
- The Referrer has indicated that he has no objection to the fence. The fence is not located on the boundary line of the Referrers property.
- In conclusion, it is submitted that the works in question are exempted development under section 4(1)(h) of the Planning and Development Act 2000, as amended. There has been no material change or intensification of use,

#### 6.4. Further Responses

6.4.1. The Referrer has responded to the Owners Response. **Matters unrelated to the planning issues raised in the referral are not summarised.**

6.4.2. The referrers response can be summarised as follows:

- The rooms on the upper floors have been uninhabited for many years.
- There is no roof garden on the Referrers property.
- The Clarence Hotel judgment is not relevant to the subject case.
- The removal of a large portion of roof and the conversion into a lounge area with amplified music is intensification and a material change of use.
- The smoking area is constructed in such a way that noise is audible in the Referrers back yard. The sound is intensified by the reverberation off the two walls which rise about 140cm above the roof opening.
- The toilets and the lounge area were always together in the same closed building. The works brought the toilets from the rear to the middle of the building and the lounge from the middle to the rear. This and the addition of amplified music is a material change of use and a material intensification of use.
- The fence and the amenity area should be set back from the Referrers boundary.

- The upper floors were shown without sanitary facilities in the sales brochure, lending support to the submission that the floors were not used for residential purposes and the roof was not used as an amenity area.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

- 7.1.1. The following statutory provisions are relevant in this instance.
- 7.1.2. Section 2(1): In this Act, except where the context otherwise requires "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...;
- "structure" means any building, structure, excavation or other thing constructed or made on, in or under any land, or any part of a structure so defined and (a) Where this context so admits, includes the land on, in or under which the structure is situated".
- 7.1.3. **Section 3(1):** in this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.
- 7.1.4. **Section 4(1):** sets out developments that shall be exempted development for the purposes of this Act.
- 7.1.5. **Section 4(1)(h):** The following shall be exempted developments for the purposes of this Act— development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;
- 7.1.6. **Section 5(1):** If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

- 7.1.7. **Section 5(3)(a)** Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration. (b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).
- 7.1.8. **Section 5(4):** Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

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

- 7.2.1. Article 6(1) of the Planning and Development Regulations, 2001 states that “Subject to Article 9 development of a class specified in Column 1 and Part 1 of Schedule 2 shall be exempted development for the purposes of the Act”.

## 8.0 **Assessment**

- 8.1.1. The Board will note that there is considerable correspondence and other documents on file relating to disputes between the owner of the subject premises and the Referrer. The issues raised by the parties regarding legal disputes, trespass, data protection or any other legal or civil matter are not within the remit of this referral and are not a matter for assessment by the Board.
- 8.1.2. The purpose of this referral is not to determine the acceptability or otherwise of the above proposal in terms of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.

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

- 8.2.1. The Board has been requested to determine the development status of three particulars: 1. Construction of a smoking/beer garden to rear of pub. 2. Use of upstairs rooms as student/short term letting. 3. Raising of flat roof to rear by c.600mm and construction of a 2m high fence to create an outside amenity area.

- 8.2.2. That the three items are works has not been disputed by any of the parties to the referral. However, in the interests of clarity, the following refers. In Section 2 of the Planning and Development Act 2000, as amended, the definition of "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.
- 8.2.3. It is considered that the construction of a smoking/beer garden to rear of pub and the raising of flat roof to rear by c.600mm and construction of a 2m high fence to create an outside amenity area are "works" as they are clearly acts of construction. As per section 3(1) of the Act, "development" is the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land. I am satisfied that the construction of a smoking/beer garden to rear of pub and the raising of flat roof to rear by c.600mm and construction of a 2m high fence to create an outside amenity area are works, and that such works would be carried out on land and therefore constitute "development" as per section 3(1) of the Planning and Development Act 2000, as amended.
- 8.2.4. Regarding the use of upstairs rooms as student / short term letting, the owner of the public house as stated that the upper floors have been upgraded and now provide 9 no. ensuite bedrooms. Floor plans submitted to the Planning Authority under Planning Authority reg. ref. 2676/18 show the existing first floor plan as being a kitchen, lounge, dining room and office. The existing second floor plan is shown as being laid out as 4 no. bedrooms, a study and a bathroom. The change of these rooms into 9 individual ensuite rooms involves an act of construction that is works under section 2(1) and development as per section 3(1) of the Act.
- 8.2.5. I am satisfied that each of the three questions, namely the construction of a smoking/beer garden to rear of pub, the use of upstairs rooms as student/short term letting and the raising of flat roof to rear by c.600mm and construction of a 2m high fence to create an outside amenity area are development as per section 3 of the Planning and Development Act 2000, as amended.

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

- 8.3.1. The second question to be addressed is whether those development works constitute exempted development.

### **Construction of Smoking Area / Beer Garden**

- 8.3.2. As a starting point, some of the documentation submitted to the Board refers to the area in question as a smoking area and / or a beer garden. The terms have been used interchangeably by the referring party and the Planning Authority. The owners agent submits that the area is enclosed, that no element of garden exists and the smoking area has therefore improperly been characterised as a beer garden.
- 8.3.3. Given the assortment of tables, bar stools and other seating areas provided within the 'smoking area', the likelihood is that patrons of the premises may consume their drinks within this space. I draw the Boards attention to the decision under ABP-304059-19 within which such a scenario was considered to be development and not to be exempted development. I note the finding of the Inspector that "the smoking area / beer garden would constitute an extension to the internal seating area of the existing public house". I concur with that assessment and find it applicable to the subject premises.
- 8.3.4. I further note the decision of the Board under RL2986 that the conversion of a former keg store to a smoking area was a material change of use as it involved the an extension of the footprint of the public area of the public house and involved consequent intensification of use which had material consequences in relation to the planning of the area. The Boards order under RL3524 that the development would constitute an extension to the internal seating area of the existing public house, and, having regard to the Supreme Court judgement in Michael Cronin (Readymix) Ltd - v - An Bord Pleanála (Supreme Court Appeal No. 304/2010, 30th May 2017) an extension is a development that does not come within the exemption afforded by Section 4 (1)(h) of the Planning and Development Act 2000, as amended.
- 8.3.5. The subject area formerly was an enclosed toilet block. That it is now an open space, with longer, more frequent and likely more intense use will lead to greater noise levels. Given that the subject area is surrounded on all sides by residential properties, such a change creates material planning consequences. It is likely that a Planning Authority would consider the likely effects such as noise, fumes and late-night activity on the amenities of the surrounding properties. Having regard to the material consequences with respect to the proper planning and sustainable development of the area, it is considered that a material change of use has occurred, which amounts to development.

- 8.3.6. The Planning and Development Act and Regulations provide for circumstances where a material change of use, although amounting to 'development', may be exempted development. However, it is considered that there are no circumstances arising in the current case where the change of use would be exempted development.
- 8.3.7. The agent for the owner has submitted that the works are exempt under section 4(1)(h) of the Act as the works do not materially affect the external appearance of the structure so as to render it inconsistent with the character of the structure of neighbouring properties. The replacement of a solid flat roof with an opening, which is covered with a retractable umbrella renders the subject roof entirely inconsistent with the multiple surrounding flat roofs. That it cannot be seen from the street is not relevant as the subject roof can clearly be seen from the upper levels of the large number of immediately surrounding properties, many of which are in residential use. It is considered that the works would materially affect the external appearance of the building so as to render the appearance inconsistent with the character of the property itself and/or with the character of neighbouring structures. It is therefore concluded that the works are not exempted development by virtue of Section 4(1)(h) of the 2000 Act, as amended.
- 8.3.8. The Board will note that similar decisions has been arrived under the following referrals: RL3127, RL2792, RL2527, RL2341, RL2986 and RL3054.

#### **Use of Upstairs Rooms as student / short term let**

- 8.3.9. The Board will note that access to these upper floors was not possible on the date of my site inspection due to the requirement for all persons on the premises to comply with the An Bord Pleanála Pre-Site Inspection Clearance Forms and public health guidance about the number of people indoors.
- 8.3.10. The submission of the owner of the public house is that the use of the upper floors for rented accommodation is an established use. The agent submits that the 9 no. individual ensuite rooms are 'let on an annual basis, or subject to lodger agreement basis for periods of less than one year and not for any periods of less than 15 days duration.' The agent states that this established use has not ceased or been abandoned as suggested by the referrer. A letter stating to be from the former owner

(The board will note it is not signed) refers to the letting of the upper floors on a short and long term basis during the period 1997 to 2017.

- 8.3.11. I note Planning Authority reg. ref. 2676/18 within which planning permission was sought for a change of use of first and second floors over existing ground floor public house from private residence to boutique hostel. I draw the Boards attention to the floor plans submitted with Planning Authority reg. ref. 2678/18 which show the existing first floor plan as being a kitchen, lounge, dining room and office. The existing second floor plan is shown as being laid out as 4 no. bedrooms, a study and a bathroom.
- 8.3.12. It is possible that the entire upper floors were rented as a single private residence, in which case the use of the upper floors as rented accommodation has not changed. This does not tally with the agents submission that “the accommodation has always been let on a short term basis to students, workers and person visiting Dublin city centre”. If as is suggested by both the Referrer and the owner of the public house, that the rooms on the upper floors are rented out individually on an annual basis (see letter to the Board dated June 19<sup>th</sup> 2020), then this would arguably be considered a material change in use and an intensification of use. The use of the two upper floors by one family unit say, would be considerably less intense than the use of the two floors by 9 no. individuals.
- 8.3.13. I draw the Boards attention to RL3502 wherein the Board determined that the change of use to serviced apartments raised planning considerations that were materially different to planning considerations relating to use as residential apartments. The Board order referred to “*In particular, (i) the extent and frequency of coming and going to and from the apartments from short-term renters and servicing staff*”. Whilst the subject development is not exactly the same, the frequency and extent of movements to and within the two floors would raise similar considerations for a Planning Authority to address. A somewhat similar decision was reached by the Board under ABP-304692-19, wherein “*the use of the subject premises for year-round short term letting would represent a change of use from the permitted use, and such change of use would raise material issues relevant to the proper planning and sustainable development of the area, including differing levels of pedestrian and vehicular traffic, including demand for additional car parking, and the potential for*



*impacts on residential amenity in terms of noise and opening hours and would constitute a material change of use, and would, therefore, be development.”*

- 8.3.14. The agent is clear that none of the rooms are let on a short-term basis and therefore section 3A of the Planning and Development Act 2000, as amended, does not apply.
- 8.3.15. As noted above, it is apparent that there is significant disagreement between the two parties to this referral regarding the status of the subject premises. The nature of a section 5 referral to the Board is not to find in favour of one party over another, as may be the case in a legal dispute. There are limitations on the remit of the Board under the Act and a decision of the Board does not grant approval or development consent for any works, use or other development.

### **Raising of Flat roof and construction of 2m high fence**

- 8.3.16. That the subject flat roof was raised by 600m is disputed by the owner of the public house. His agent states that the roof was strengthened, had insulation installed internally and sealed from the outside. The agent states that there has been no change in use, as the roof was always available as a roof amenity area.
- 8.3.17. This inspector is not in a position to definitively declare that the roof was raised as access to the site was not possible and nonetheless, the works have already been undertaken so a site visit could not confirm the height of the roof prior to the works.
- 8.3.18. Regarding the fence, I note Class 11 of Part 2, Schedule 2 of the Regulations. This provides that in properties other than a house, the construction, erection, lowering, repair or replacement, of a fence is exempted development where it does not exceed 1.2m in height where it a new structure and 2m where it is a replacement structure. That the fence is not visible from the public realm is not relevant. The subject fence, being a new structure at a height of 2m is not exempted development under Class 11.
- 8.3.19. None of the multiple flat roofs in the immediate area have been permanently fenced off in such a manner. I am satisfied that the erection of a 2m high fence renders the subject roof area inconsistent with the character of the structure and the neighbouring structures. It is considered that the subject fence is not exempt under section 4(1)(h).

- 8.3.20. Regarding the long-established use of the flat roof as an amenity area, as submitted by the owner, no evidence to support this position has been submitted to the Board. That is not to say it is not true, only that no verification has been provided. The Referrer has submitted that it is not the case. It is not the job of the Board to declare that one position is true and one is not. However, it would be unusual for an unsecured flat roof that was not constructed as a supporting structure, to be freely available for tenants to use as a recreation area. The intended usual use of a flat roof could reasonably be assumed to be essentially a 'non-use', with access for maintenance and repair only. To use the roof for recreational purposes, commencing either on day 1 or at some point subsequently is by its very nature a change of use in my opinion. Given the planning issues pertaining to a roof amenity area (particularly one adjacent to a number of boundaries; visual impact, overlooking, etc.) as opposed to a clear, unused roof, it follows that the change of use in question is material for planning purposes (*Galway County Council v. Lackagh Rock*). It is considered that the use of the flat roof as a formal amenity area that is available to residents of the upper floor constitutes a material change of use.
- 8.3.21. I note the decision of the Board under RL2757 wherein it was concluded that “(a) the provision of railings around a flat roof constitutes works and these works facilitate a change of use of a flat roof to use as open space in the form of a balcony or roof garden, which is a change of use and which is considered to be a material change of use and which together with the works constitutes development, (b) the development does not come within the scope of section 4(1)(h) of the Planning and Development Act, 2000, being works which materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structure”.
- 8.3.22. It is considered that 1) the construction of a smoking / beer garden to the rear of the pub, 2) use of upstairs rooms as student / short term letting and 3) the raising of a flat roof to the rear by c.600mm and the construction of a 2m high fence to create an outside amenity area are development and are 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 1. Construction of a smoking/beer garden to rear of pub. 2. Use of upstairs rooms as student/short term letting. 3. Raising of flat roof to rear by c.600mm and construction of a 2m high fence to create an outside amenity area is or is not development or is or is not exempted development:

**AND WHEREAS** Andreas Brueggener requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 25th day of March, 2020 stating that the matter was development and was exempted development:

**AND WHEREAS** referred this declaration for review to An Bord Pleanála on the 21st day of April, 2020:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (e) the pattern of development in the area:

**AND WHEREAS** An Bord Pleanála has concluded that the construction of a smoking/beer garden to rear of pub, the use of upstairs rooms as student/short term letting and the raising of flat roof to rear and construction of a 2m high fence to create an outside amenity area is development and is not exempted development:

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the construction of a smoking/beer garden to rear of pub, the use of upstairs rooms as student/short term letting and the raising of flat roof to rear and construction of a 2m high fence to create an outside amenity area is development and is not exempted development.

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Gillian Kane  
Senior Planning Inspector

28 August 2020