



An  
Bord  
Pleanála

## Inspector's Report

### ABP-307372-20

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<b>Development</b>	Change of use to a licensed restaurant to include the established ancillary takeaway/home delivery service, rear extension, canopy extension to front.
<b>Location</b>	Gardens, Kilkenny, Co Kilkenny
<b>Planning Authority</b>	Kilkenny County Council
<b>Planning Authority Reg. Ref.</b>	19/618
<b>Applicant</b>	High Street Social Ltd.
<b>Type of Application</b>	Permission
<b>Planning Authority Decision</b>	Grant Permission
<b>Type of Appeal</b>	Third Party v Grant of Permission
<b>Appellant</b>	Daniel Lenihan
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	02.09.2020
<b>Inspector</b>	Anthony Kelly

## 1.0 Site Location and Description

- 1.1. The site is located on High St. in the centre of Kilkenny City with a vehicular entrance off William St.
- 1.2. There is an existing three-storey structure on site addressing High St., set back from the street with a courtyard to the front. The ground floor is currently occupied by 'Sam's', a pizza/pasta restaurant with a delivery service. There is a three-storey and four-storey building to either side of the front courtyard which is publicly accessible. There is a vacant area of land within the site curtilage to the rear/west which is accessed from an archway between and under other properties on William St. to the north. To the north of the rear curtilage is the rear elevations of properties addressing William St. and there are other buildings adjacent to the rear/west, which appears to include some residential use. To the south there is an old, stone structure in ruins in the rear area of the adjacent property.
- 1.3. The site has a stated area 0.076 hectares.

## 2.0 Proposed Development

- 2.1. The application is for permission for:
  - The change of use of the ground floor from an existing 185sqm restaurant to a licenced restaurant to include the established ancillary takeaway/home delivery service,
  - The provision of a canopy to part of the 108sqm forecourt to extend the restaurant,
  - An 81sqm extension of the restaurant to the rear with a retractable roof structure,
  - A new 127.24sqm licenced restaurant to the rear,
  - An 89.8sqm storage/food prep area to the rear.
- 2.2. The applicant cites the proposed floor area as 591.04sqm though this includes the forecourt canopy area and smoking areas to the rear.

- 2.3. In addition to standard planning application plans and particulars the application was accompanied by a cover letter.
- 2.4. An extension of time request to respond to a further information request was granted by the planning authority. Further information was submitted in relation to, inter alia, an Archaeological Assessment, an Architectural Heritage Impact Assessment (AHIA), courtyard canopies, incorporation of the basement area, a Method Statement for the stabilisation and conservation of the boundary walls including a copy of a grant application, revisions to the rear extension area including reduction in height, provision of a setback to the northern boundary, roofing of the entire rear area and removal of the smoking areas, clarity that the premises will be used as location where food is the main offering but where alcohol may be consumed without the need for food to be purchased, relocation of the air to water heating pump to the store building and painted signage to the front façade. Photomontages were also submitted.

### **3.0 Planning Authority Decision**

#### **3.1. Decision**

The planning authority decided to grant permission subject to 12 no. conditions including a financial contribution, submission of a waste management plan, operational practices (including a closing time of 23.30 seven days a week, the yard area shall not be used as an outdoor space for patrons and no entrance from the archway from William St.), construction practices, Irish Water connection, archaeological monitoring and compliance for conservation issues.

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

- 3.2.1. The two Planning Officer's reports form the basis of the planning authority decision. The report considers that, having regard to the provisions of the Kilkenny City and Environs Development Plan 2014-2020, the zoning objective and city centre location, the development, subject to conditions, does not seriously injure the architectural heritage or visual amenities of the Architectural Conservation Area (ACA), does not detract from the protected structure on site nor create a negative impact on nearby

residents and will be in accordance with the proper planning and sustainable development of the area.

### 3.2.2. **Other Technical Reports**

**Architectural Conservation Officer** – Clarification of further information recommended in relation to the Archaeological Assessment and windows and signage detail.

**Environmental Health Officer** – No objection subject to conditions.

### 3.3. **Prescribed Bodies**

**Dept. of Culture, Heritage and the Gaeltacht** – An archaeological condition is recommended. (No response received on the further information submission).

**Irish Water** – No objection. Observations made.

**An Taisce** – Inadequate documentation to make an adequate assessment. (No response received on the further information submission).

### 3.4. **Third Party Observations**

Five submissions were received from Sinéad Mahony, 23 High St. (Mahony's Pharmacy on the north side of the front courtyard), Brian Keane, 4 William St. (landlord of the commercial property), Jerry Rafter, The 'Rafter' Dempsey's lounge/bar and guesthouse, 4 Friary St., Cllr. Malcolm Noonan and Daniel Lenihan, Straffan, Co. Kildare (who owns No. 20 High St., the property forming the south side of the front courtyard). The issues raised are largely covered by the grounds of appeal with the exception of the following:

- Height of awning or material for canopy not specified.
- Impact on natural light to No. 23 High St.
- Railing is different to the original.
- Occupation of 4 William St. will be compromised by way of impact on natural light, overlooking, noise, smoke, security, use of the archway for commercial traffic or pedestrians and waste disposal.

- The proposed development is too large for the site.
- Grave concern that the development would become a licenced premises or pub. There are enough pubs in the city. A super pub is not needed on High St. and it is not included in the City Development Plan. Unacceptable concentration of late-night establishments in the one area.
- A building condition survey and archaeological investigation should be carried out. Works should not compromise the integrity of the built fabric and opportunities to bring it back to its original form should be explored. A canopy will detract from the heritage aspects of the house. Concrete paving to the courtyard should be removed. A planting scheme and reinstatement of the railings should be considered. Signage should be appropriate to the ACA.

## 4.0 Planning History

P.A. Reg. Ref. 04990078 – Permission granted in 2005 for demolition of the extension and outhouses to the rear and construction of a single-storey extension to the rear to form new seating area, kitchen, stores etc., conversion of existing ground floor to restaurant seating area, conversion of first and second floor accommodation to 2 no. three-bed apartments and new timber windows.

## 5.0 Policy Context

### 5.1. Kilkenny City & Environs Development Plan 2014-2020

- 5.1.1. The site is in an area zoned 'General Business' which has an objective 'to provide for general development'. Permissible uses include restaurants, public houses and coffee shops/cafes.
- 5.1.2. Sections 7.3 (Heritage – Built Heritage) and 7.4 (Heritage – Architectural Heritage) of the Plan are relevant to the planning application. The structure (No. 21 High St., 'Uncle Sam's') is designated as a protected structure in the Plan, RPS No. B57. It is described as an 'attached four-bay three-storey over basement house, c.1750, possibly

incorporating fabric of earlier house, c.1600, on site. In use as glebe house, post-1820'. It is also included in the NIAH as Ref. No. 12000055. The site is contained within the boundary of the City Centre ACA. Protected structures are referred to in Section 7.4.4, the NIAH is referred to in Section 7.4.5 and ACAs are contained in Section 7.4.6 of the Plan. (The site is also a Recorded Monument, RMP No. KK019-026(051), (a 16<sup>th</sup>/17<sup>th</sup> Century house) and is within the zone of archaeological potential established around the Historic Town of Kilkenny RMP. No. KK019-026).

## **5.2. Architectural Heritage Protection Guidelines for Planning Authorities (2011)**

5.2.1. These guidelines are relevant to the planning application.

## **5.3. Natural Heritage Designations**

5.3.1. The closest Natura 2000 sites are River Nore SPA and River Barrow and River Nore SAC approx. 180 metres to the east.

## **5.4. EIA Screening**

Having regard to the nature and scale of the proposed development and the nature of the receiving environment, which is a fully serviced urban location, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination stage, and a screening determination is not required.

## **6.0 The Appeal**

### **6.1. Grounds of Appeal**

The grounds of appeal are submitted by Daniel Lenihan, New Rd., Straffan, Co. Kildare who owns No. 20 High St., the property forming the south side of the courtyard to the front of 'Sam's'. The main issues raised can be synthesised as follows:

- The appellant is unaware how No. 20 is included in the development address. The application site is 21 High St. They have two distinct eircodes. The appellant is content to leave the question to the Board of whether or not the incorrect address is a matter for invalidation.
- The primary concern relates to the use and enclosure by railings of the courtyard. The inclusion of No. 20 as the address could be viewed by others, including the planning authority, that the applicant has some title interest in No. 20 and more of a right to enclose this area for, in effect, their exclusive use.
- It is accepted the courtyard was enclosed behind railings in the past. However, these were removed in 1977 and the area then became open to the public and in effect became a public space. This raises the question whether the applicant now has the right to close off or limit access to the public which has been uninterrupted for fifty years. Access to the courtyard will be limited to the public in its capacity as a restaurant.
- No. 20, and the same may well apply to Nos. 22/23, has benefitted from uninterrupted access to the side elevation for maintenance and repair and has the reasonable expectation of possible future development potential of No. 20 via the courtyard. Customer access to the display window to the front/side will be prevented by the railing and will have a negative impact on the commerciality of the premises.
- The appellant fails to understand how railing off and limiting access to an area where there has been uninterrupted access for at least 50 years can accord with the proper planning and sustainable development of the area. The Board is requested to omit or suitably restrict the proposed development of the courtyard should the balance of the proposal merit permission.

## 6.2. Applicant's Response

- The applicant considers that the appeal is invalid. The initial submission to the planning authority was made on behalf of Daniel Lenihan and Helen Clarke (leaseholder, of the Fig Tree Restaurant which occupies No. 20). Helen Clarke's name was included without her consent and she had no intention of objecting. The appellant's agent contacted the planning authority in relation to

this after the statutory deadline for receipt of submissions. Her name and address was subsequently 'blackened out' on the submission. There are issues of accepting submissions outside the statutory period and altering accepted submissions. The submission and appeal are ultra vires and invalid.

- The issue of the address was clarified to the planning authority during the planning process.
- A right-of-way map is enclosed as is the title map for the site. The forecourt is owned as part of No. 21. It is clearly acknowledged that there are rights-of-way to the benefit of Nos. 20 and 22/23. These rights are set out in legal documents and described as 'pedestrian in nature only'. The applicant is well aware of these property rights. The appellant's primary concern seems to be a legal concern as to the protection of a right-of-way. The right-of-way situation has been reviewed with the leaseholders of No.20 and the owner of Nos. 22/23. The design of the railings respects these rights of way.
- The applicant has the right to replace the railing and the planning authority granted permission. It was unclear why the railing was removed but its reintroduction allows part of the historic fabric of Kilkenny to be reintroduced. It allows a better restaurant space and creates a focal point of interest along the street. The right-of-way enjoyed by the appellant's property will not be diminished. They will have access to any locking or security introduced as part of the railing and there is a pedestrian gate for their use along the side of the forecourt. They will continue to have uninterrupted access and the height of the railing does not negatively impact on the properties concerned. The canopies are kept to the rear line of the side display windows of Nos. 20 and 22/23.

### **6.3. Planning Authority Response**

No further comment to make.

### **6.4. Observations**

None.



## 6.5. Further Responses

None.

## 7.0 Assessment

The main issues are those raised in the grounds of appeal and the Planning Reports and I am satisfied that no other substantive issues arise. The issue of appropriate assessment also needs to be addressed. The issues can be dealt with under the following headings:

- Zoning
- Proposed Development to the Rear
- Enclosure of the Courtyard
- Archaeology/Conservation
- Appropriate Assessment

### 7.1. Zoning

- 7.1.1. The site is in an area zoned 'General Business' in the Kilkenny City & Environs Development Plan 2014-2020 which has an objective 'to provide for general development'. Permissible uses include restaurants, public houses and coffee shops/cafes which are all relevant to the proposed use. Therefore, I consider the proposed use, which is stated in the further information response as a location where food is the main offering but where alcohol may be consumed without the need for food to be purchased, is consistent with the zoning objective. The principle of the development is therefore acceptable, subject to the detailed considerations below.

### 7.2. Proposed Development to the Rear

- 7.2.1. The design of the proposed development to the rear was slightly revised by way of further information. The footprint and height of the restaurant extension was reduced and smoking areas omitted. The rear area has an indicated height of 5.2 metres with

external finishes of timber sheeting with a copper green standing seam roof. Substantial glazing is proposed to the southern elevation. Similar external finishes are proposed for the detached store building to the rear of the site.

- 7.2.2. I consider the development of an underutilised backland area in the centre of the city is a positive development and the revisions made would result in limited impact on light/shadowing impact on adjoining property. The development also proposes the stabilisation of the historic boundary walls to the rear. I do not consider the proposed development to the rear would have an adverse impact on the ACA or the amenity of property in the vicinity.

### **7.3. Enclosure of the Courtyard**

- 7.3.1. This is the main issue in the grounds of appeal.
- 7.3.2. Land registry detail has been submitted with the applicant's response to the grounds of appeal which demonstrates that the courtyard is part of No. 21. A photograph was included in the AHIA (Fig. 7) which shows a railing along the front of the courtyard area. It is stated this railing was removed after 1977. The AHIA considers that the courtyard, also known as Post Office Square, would have been publicly accessible at some times and not at others, depending on the use of the structure which was variously a glebe house for St. Mary's Church, a residence/Post Office and the current restaurant use. While it is privately owned, it is publicly accessible. The courtyard is an attractive space, but it is currently somewhat unused. There is no seating provision and it does not appear to be much utilised as a type of civic space for gatherings.
- 7.3.3. I consider the provision of external seating at this location would bring activity and animation to the courtyard. The canopies are set back 3-4 metres from the building line of the adjacent properties which will not have a significant effect on their glazed side displays areas. The four proposed canopies are easily removed and there is no physical connection to the front of the building. I do not consider the canopies are of such a scale that there would be an adverse impact on the setting of the protected structure or on the wider ACA.
- 7.3.4. Having regard to the content of the grounds of appeal, I consider the applicant is entitled to make a planning application to enclose the courtyard as it is under the applicant's control. I note that provision has been made for access to both relevant

third parties as part of their rights-of-way. I consider any further legal matters are civil issues between the relevant parties and are not a matter for the Board. Section 34(13) of the Planning & Development Act, 2000 (as amended) states a person shall not be entitled solely by reason of a permission under this section to carry out any development.

- 7.3.5. The courtyard is in the applicant's control, a railing previously existed at this location, rights-of-way are acknowledged and are being maintained and I do not consider there will be any significant adverse effect on the adjoining commercial units. The current courtyard is an attractive space but appears to be underused. I consider the proposed development would revitalise this space and would not have any undue adverse impact on the setting of the structure or the ACA and I consider the enclosure of the courtyard to be acceptable. Also raised in the grounds of appeal was the matter of the development address. In this regard, validation of the planning application is a matter for the planning authority and the planning authority accepted the application as submitted.

#### **7.4. Archaeology/Conservation**

- 7.4.1. No. 21 High St. is a protected structure (RPS No. B57), a recorded monument (KK019-026(051)), it is included in the NIAH (Ref. 12000055) and is contained within an ACA. Brief detail of the structure and site was contained within the original planning application on site. The existing building incorporates the remains of a merchant stone house dating to c.1580. Renovations occurred around the middle of the 18<sup>th</sup> Century and around 1800. The front façade is Georgian but it appears older to the rear, and the remains of an Elizabethan mansion (Archer House/'Hole in the Wall') are to the south. The building was identified on older OS maps as St. Mary's Glebe House indicating it was associated with St. Mary's Church to the rear of the Tholsel (custom house on the opposite side of High St. to the north east). Some other alterations were carried out more recently mainly in relation to the existing restaurant on the ground floor, including the single-storey rear extension. The rear yard was once two individual burgage plots which were probably amalgamated in the 18<sup>th</sup> Century. The planning authority sought further information in relation to several aspects of the application in terms of archaeology/conservation.

- 7.4.2. Additional relevant documentation was submitted with the further information response. The executive summary of the Archaeological Assessment considers excavation works to the rear will be minimal because of the lightweight timber structure to be constructed. It will not impact on the setting of the monument or physically impact on it and can be easily reversed. Hoarding should be erected between the site and southern boundary wall during construction to avoid accidental damage and a 1 metre setback to the burgage wall and Elizabethan structure should be maintained. The Assessment received by the Board from the planning authority is incomplete. However, given that this issue does not form part of the grounds of appeal, the Dept. of Culture, Heritage and the Gaeltacht have no objection subject to an archaeological monitoring condition, the executive summary was received and the planning authority had no significant issue with this aspect of the application, I consider the application can be considered on the basis of the documentation received. The AHIA considers the proposed development minimises impact to the historic fabric of the protected structure and allows views of the ruins of the Archer House previously hidden. The further information response provides for the use of the existing basement whereas the original proposal covered the basement access. Overall, the proposed development has limited impacts according to the AHIA. The Method Statement submitted relates to the boundary walls which includes the gable of the ruins. The second Planning Officer's report notes that a section 57 declaration has been approved in relation to works to the boundary wall.
- 7.4.3. The planning authority included Condition 12 in their grant of permission which relates to archaeological and conservation issues. Condition 12(a) of the planning authority decision may refer to a typographical error in the submitted archaeological assessment but it can be included for clarity. I consider Condition 12(b) to be unnecessary when there is already an archaeological monitoring condition included. Compliance relating to windows, signage and the railing is reasonable.
- 7.4.4. I consider the development would be acceptable in the context of archaeology and conservation issues and the refurbishment and new use of the protected structure and development of the backland area is a positive development.

## **7.5. Appropriate Assessment**

- 7.5.1. Having regard to the nature and scale of the development proposed and to the nature of the receiving environment, namely an urban and fully serviced location with no hydrological pathway to any 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.

## **8.0 Recommendation**

I recommend that planning permission should be granted subject to conditions, for the reasons and considerations as set out below.

## **9.0 Reasons and Considerations**

Having regard to the provisions of the Kilkenny City & Environs Development Plan 2014-2020 and the nature and scale of the proposed development, it is considered that, subject to compliance with the conditions set out below, the proposed development would be consistent with the provisions of the Plan in terms of land use, would be acceptable in terms of the development of the protected structure and its curtilage within an Architectural Conservation Area and would not seriously injure the amenities of the area. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

## **10.0 Conditions**

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars submitted on 19.03.2020, 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. Details of the materials, colours and textures of all the external finishes to the proposed development shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

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

3.
  - (a) Details of all signage shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.
  - (b) Details of all new windows, from a suitably qualified professional, shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.
  - (c) Details of the front railing, from a suitably qualified professional, shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

**Reason:** In the interest of the amenities of the area and the protection of the protected structure.

4. Section 4 of the Archaeological Assessment received by the planning authority on 19.03.2020 states a surviving thirteenth century cross-beam derives from a substantial structure with walls 1.3 metres thick and having a room at least 5.45 metres wide. Prior to commencement of development, the developer shall clarify whether this is a new uncovered element on site and, if so, how it can be incorporated in the development to the written approval of the planning authority.

**Reason:** In the interest of the protection of the protected structure.

5. (a) All works to the protected structure shall be carried out in line with best conservation practice as set out in the Architectural Heritage Protection Guidelines for Planning Authorities issued by the Department of Arts, Heritage and the Gaeltacht in October, 2011 and the relevant volumes of the Department's Advice Series publications.
- (b) All works to the protected structure, shall be carried out under the supervision of a qualified professional with specialised conservation expertise.
- (c) All works shall be undertaken by skilled and experienced conservation contractors and specialists with relevant experience of historic materials and techniques.
- (d) The conservation professional in (b) shall sign off on completion that the works have been carried out in line with best conservation practice and shall prepare a report recording the works carried out and submit this to the planning authority and the Department of Culture, Heritage and the Gaeltacht.

**Reason:** In the interest of the protection of built heritage.

6. The yard area between the rear of the proposed extension and the store building shall not be used as an outdoor space for patrons of the development and the access from William Street shall not be used as an entrance way to the development by patrons.

**Reason:** In the interest of the amenities of the area.

7. Drainage arrangements, including the disposal of surface water, shall comply with the requirements of the planning authority for such works and services.

**Reason:** In the interest of public health.

8. Prior to commencement of development, the applicant or developer shall enter into a water and/or waste water connection agreement(s) with Irish Water.

**Reason:** In the interest of public health.

9. (a) 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.  
(b) The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development including traffic management, noise management measures and off-site disposal of construction waste.

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

10. The developer shall facilitate the archaeological appraisal of the site and shall provide for the preservation, recording and protection of archaeological materials or features which may exist within the site. In this regard, the developer shall:  
(a) notify the planning authority in writing at least four weeks prior to the commencement of any site operation (including hydrological and geotechnical investigations) relating to the proposed development, and  
(b) employ a suitably-qualified archaeologist prior to the commencement of development. The archaeologist shall assess the site and monitor all site development works.

The assessment shall address the following issues:

- (i) the nature and location of archaeological material on the site, and



(ii) the impact of the proposed development on such archaeological material.

A report, containing the results of the assessment, shall be submitted to the planning authority and, arising from this assessment, the developer shall agree in writing with the planning authority details regarding any further archaeological requirements (including, if necessary, archaeological excavation) prior to commencement of construction works.

In default of agreement on any of these requirements, the matter shall be referred to An Bord Pleanála for determination.

**Reason:** In order to conserve the archaeological heritage of the area and to secure the preservation (in-situ or by record) and protection of any archaeological remains that may exist within the site.

11. All service cables associated with the proposed development (such as electrical, telecommunications and television) shall be located underground. Ducting shall be provided by the developer to facilitate the provision of broadband infrastructure within the proposed development.

**Reason:** In the interests of visual and residential amenity.

12. A plan containing details for the management of waste, including the provision of facilities for the storage, separation and collection of the waste and, in particular, recyclable materials shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. Thereafter, the waste shall be managed in accordance with the agreed plan.

**Reason:** To ensure the provision of adequate refuse storage.

13. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefitting 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 prior to commencement of development 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.

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Anthony Kelly

Planning Inspector

22.09.2020