



An
Bord
Pleanála

Inspector's Report

ABP-307380-20

Development	Development of this site situated at the rear (a protected structure). Change of use of workshop area to restaurant use.
Location	No. 8 The Parade, Kilkenny
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	19/448
Applicant	The Lite Bite Restaurant Ltd., t/a Ristorante Rinuccini
Type of Application	Permission
Planning Authority Decision	Grant Permission
Type of Appeal	Third Party v Grant of Permission
Appellant	Paradept Properties
Observer(s)	None
Date of Site Inspection	02.09.2020
Inspector	Anthony Kelly

1.0 Site Location and Description

- 1.1. The site is located in the centre of Kilkenny, on the opposite side of The Parade from Kilkenny Castle.
- 1.2. The ground floor/basement premises of the four storey end of terrace building is occupied by Ristorante Rinuccini. The building has a red brick front façade. Public access to the restaurant is from The Parade via an entrance arch and glazed roof area. There is a laneway along the western side of the building. There are doors and windows along the laneway elevation and an extractor unit.

2.0 Proposed Development

- 2.1. The application is for permission for a change of use of a 71sqm workshop area to restaurant use.
- 2.2. The overall building has a stated floor area of 778sqm with an indicated maximum height of 16.58 metres.
- 2.3. A three month extension of time was requested by the applicant and was granted. Further information was submitted in relation to, inter alia, clarifying the proposed use as the relocated restaurant kitchen, internal connectivity between the proposed kitchen and the existing restaurant, that significant material alterations of the building fabric are not anticipated and the relocation of the extractor unit.

3.0 Planning Authority Decision

3.1. Decision

The planning authority granted permission for the development subject to 10 no. conditions including development contributions, a waste management plan, detail of the extraction system, construction practices, operational practices, Irish Water connection, the involvement of an archaeologist in any sub-surface work and detail of works in the existing kitchen area.

3.2. Planning Authority Reports

3.2.1. The two Planning Officer's reports form the basis of the planning authority decision. The latter report considers that, having regard to the provisions of the Kilkenny City & 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) and does not detract from the protected structure on site.

3.2.2. Other Technical Reports

Conservation Officer – No objection subject to conditions on foot of the further information response.

Environmental Health Officer – No objection.

3.3. Prescribed Bodies

Irish Water – No objection. Observations made.

3.4. Third Party Observations

Two submissions were received from Paradept Properties (owner of No. 8 The Parade) and Martin Crotty, 6 Lower Patrick St. The issues raised are largely covered by the grounds of appeal with the exception of the following:

- The applicant's leasehold area is identified as being under the applicant's ownership. The main building is owned by Paradept Properties.
- The structure has a planning history contrary to Item 18 of the planning application form.
- It is unclear if there is an intention to install an extractor unit. Any further intrusion in the airspace over the very narrow laneway will seriously restrict further access as there is a danger of hitting off such units.
- Request for time restrictions on the running of any extractor or air conditioning units to not run after 10pm at night or before 9am in the morning.

- Unclear if patrons will enter/exit the extension from the laneway. This is a private laneway and, if so, all necessary written consents need to be obtained.

4.0 Planning History

While there have been previous valid planning applications there are no recent applications specifically relevant to the current planning application.

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'. A restaurant is cited as a permissible use under Section 3.4.5.4 (General Business) of the Plan.
- 5.1.2. Section 7.3 (Heritage – Built Heritage) and Section 7.4 (Architectural Heritage) of the Plan are relevant to the application. Protected structures are referred to in Section 7.4.4 (Record of Protected Structures) and the National Inventory of Architectural Heritage is referred to in Section 7.4.5. The building is a protected structure (RPS No. B202; this is described in the Plan as a 'terrace of four, four and three-bay, three-storey over basement Georgian townhouses, built 1791'). It is also included in the NIAH (Ref. No. 12001060). While the front area of the building facing The Parade is contained within Kilkenny Castle ACA, the workshop footprint subject of the application is not included within the ACA boundary. (The site 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 the River Nore SPA and River Barrow and River Nore SAC approx. 130 metres to the north.

6.0 The Appeal

6.1. Grounds of Appeal

The grounds of appeal are submitted by Paradept Properties, Tig Mhuire, Archersfield, Castle Road, Kilkenny which represents the owners of No. 8 The Parade. The main issues raised can be summarised as follows:

- The applicant holds a lease on the basement and part of the ground floor. They own the workshop subject of the application and the adjoining building to the south and east within the 'blue line'. The appellant has legitimate concerns about the impact of the intensification of the restaurant on the tenants in the upper floors (a fitted kitchen showroom, office units and an apartment), and on the value of the property. The appellant considers the documentation submitted to the planning authority is incomplete and considers it has no option but to appeal the decision and rely on the Board to obtain detailed information which should be provided and made available to the owners.
- The appellant was informed by the applicant that a fire safety certificate had been applied for and that the works are underway. Such works appear to be premature and possibly unauthorised. The outcome of the fire safety certificate application is of great concern to the appellant as the Building Control Authority could require measures to be taken within No. 8. The fire safety certificate application drawings, submitted with the grounds of appeal, illustrate the full extent of the enlarged restaurant operation and it goes far beyond the 71sqm area of the planning application. The 'red lines' between the planning application and fire safety certificate are very different and the latter application indicates a restaurant use on the upper floor even though planning permission was not sought for this. Had this intention been disclosed as further information

the appellant believes the planning authority would have required re-advertisement. The appellant has no option but to question the extent and detail of the proposed development by means of an appeal.

- Engineering drawings are at variance with the fire safety certificate drawings including different ground floor layouts and a door connection between the existing workshop and part of the restaurant in the basement of No. 8. The opening would be an alteration to the protected structure, but it is not included in the planning application. It would also require the consent of the owners of the building.
- The owners hold a veto over any work to No. 8 and have legal standing to resist the expansion of the restaurant. It appears works have taken place which may require permission for retention.
- The relocation of the extraction unit will render the upper floor windows of No. 8 more exposed to noise and odours.
- The single foul drainage outfall for the entire building could be overloaded.
- The intensification of the use of the workshop would adversely affect the amenity of the offices and apartment.

6.2. Applicant's Response

The main points made can be summarised as follows:

- The appeal raises a number of matters which are non-planning related. The grounds of appeal are mostly grounded on issues not typically assessed by An Bord Pleanála e.g. fire safety, legal and property ownership matters and potential enforcement proceedings. The grounds of appeal are largely vexatious, and the applicant is of the opinion the appeal has been made to enable negotiation on commercial matters outside the planning process. No part of the site/building subject of the planning application is controlled by the appellant and it is fully owned by the applicant.
- The planning application is complete, comprehensive and fully compliant with statutory requirements. The planning authority accepted the application as a valid application.

- The grounds of appeal refer to different building and development assessment codes e.g. fire safety and building regulations, which are not relevant in the context of this planning appeal. The grounds of appeal seek to introduce other legal matters, clearly not legal planning matters, into the assessment of the proposal. This is made clear in the Development Management Guidelines 2007 and the Planning & Development Act, 2000 (as amended) where it is stated that matters of law should not generally be adjudicated by planning authorities or An Bord Pleanála. The planning authority is satisfied that the applicant had sufficient legal interest to make the planning application. The applicant is fully aware that the grant of permission does not solely entitle the implementation of the development. The appeal is grounded on the detailed post-planning considerations that may arise rather than an assessment of the proposal in the context of the proper planning and sustainable development of the area.
- The Council's Conservation Officer did not raise any concerns regarding the change of use and related works.
- No evidence has been provided to support the appellant's view that the relocation of the extraction unit would render the upper floor windows much more exposed to noise and odours. The applicant engaged a consultant to prepare an Odour Risk Assessment and a Noise Impact Assessment (submitted with the applicant's response). These reports confirm that the revised method of ventilation and kitchen extraction will be more effective than the current abatement arrangement and it is positioned further away from the offices and apartment. Condition 3 of the planning authority decision requires exact specifications of the method of extraction to be provided to the planning authority and the applicant submits this is sufficient to address any potential amenity impacts.
- The restaurant extension is consistent with the functioning of a busy city centre district.

6.3. Planning Authority Response

The main points made can be summarised as follows:

- An informed judgement was made on the documentation submitted with the planning application and further information was also sought. Details relevant to coming to the decision to grant are contained within the planner's reports.
- A complaint was received that works had commenced on the site when the appeal was lodged, and two site inspections were carried out. The workers were advised to cease all works as the work was not permitted under planning. A Warning Letter has been issued in relation to the unauthorised works.

6.4. Observations

None.

6.5. Further Responses

Further responses were sought and received from both the planning authority and the appellant on foot of the applicant's response to the grounds of appeal, specifically the Odour Risk Assessment and Noise Impact Assessment. The additional comments made can be summarised as follows:

Planning Authority

- In granting planning permission, the planning authority was satisfied that a justified decision had issued which took account of third party submissions and issues relating to conservation matters.
- A third party complaint was received relating to works having commenced in the area subject of P.A. Reg. Ref. 19/448. As no decision had been made by An Bord Pleanála, and taking into account it is a protected structure, a warning letter issued relating to the unauthorised change of use of a workshop to a commercial kitchen and unauthorised development on a protected structure. The planning authority would like to inform the Board that they are fully satisfied with the decision to grant permission. The planning authority had no option but to issue the warning letter as no grant had issued from An Bord Pleanála. However, if the Bord grants permission the enforcement file can potentially be closed.

Appellant

- It is disingenuous to suggest that the works which have been carried out may not be premature or unauthorised and may not fall under planning legislation because at the most fundamental level there is a general obligation to obtain permission. The development has been carried out which begs the question as to whether an application for permission should even be entertained. Examination of the fire safety certificate application drawings was a legitimate exercise because it shows the conversion of the upper level of the workshop, outside the planning application, to a dining area and, as far as the appellant is aware, this has been carried out.
- The Noise Impact Assessment concludes that noise attenuation is necessary. It is not established if effective attenuation is practicable.
- The applicant's response presents a very selective summary of the Odour Risk Assessment. The report concludes that the risk of odour impact is high and that control measures are required. However, there is no firm commitment given to implement these measures.

7.0 **Assessment**

The main issues are those raised in the grounds of appeal and the Planning Report 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:

- Site Inspection
- Zoning
- Impact on Amenity
- Conservation/Protected Structure
- Other Codes
- Appropriate Assessment

7.1. Site Inspection

- 7.1.1. On the site inspection it was apparent that the works for which the planning application was made i.e. the conversion of a workshop to a commercial kitchen for Ristorante Rinuccini, had been carried out and the kitchen was operational. The responses received from the planning authority indicates that they are aware of this and a warning letter was issued in this regard.
- 7.1.2. The planning application is for 'permission' as opposed to 'permission for retention'. Notwithstanding, given that there are no implications for environmental impact assessment or appropriate assessment and the planning authority is aware of the works that have been carried out, I consider that the appeal can be considered as submitted.

7.2. Zoning

- 7.2.1. The use of the 71sqm ground floor area is cited as a workshop. The workshop is enclosed on three sides by Ristorante Rinuccini. The workshop is to be converted to a kitchen with the existing kitchen area converted to a dining area. 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. Therefore, I consider that the use is consistent with the zoning objective and the principle of the development is acceptable, subject to the detailed considerations below.

7.3. Impact on Amenity

- 7.3.1. Impact on the amenity of other tenants in the building is referenced in the grounds of appeal. Noise and odour from the extractor unit, which has been relocated, is specifically referenced in this regard and was also referenced in the submission from Martin Crotty. An Odour Risk Assessment and Noise Impact Assessment was submitted with the applicant's response to the grounds of appeal.
- 7.3.2. I note initially that the proposed change of use is acceptable in this 'general business' zoned area within the city centre. Because of its location there is always likely to be some degree of background noise.

- 7.3.3. The Noise Impact Assessment notes that Condition 3(a) of the planning authority decision required air emissions, noise, odour etc. not to impair or interfere with the environment. The Noise Impact Assessment considers that mitigation measures are required to reduce noise emissions from the extractor unit and an in-duct attenuator is proposed. The assessment concludes that, following installation of the mitigation measure, noise emissions will be neutral and will not result in adverse impact.
- 7.3.4. The Odour Risk Assessment considers that the new extractor location is in an area likely to experience better dispersion than the previous alleyway location. 'Risk scores' were calculated for both locations and while the new location is considered a 'high impact risk', the original location was considered a 'very high impact risk' based on criteria including dispersion and proximity of receptors. Odour control measures are set out as are maintenance recommendations. With the measures in place the assessment concludes the new location would not result in any significant adverse effects on local amenity.
- 7.3.5. Having regard to the fact that there is already a restaurant use at this location, the extractor unit has been relocated only by approx. 8 metres and the city centre location I consider that, subject to an appropriate condition relating to noise and odour, there would be no significant impact on the amenity of other tenants in the building or elsewhere in the vicinity.

7.4. Conservation/Protected Structure

- 7.4.1. The building of which the workshop/kitchen forms part is a protected structure and it is included in the NIAH. While the four storey element of the building is contained within an ACA, the area subject of the planning application is not.
- 7.4.2. The application proposal was somewhat unclear initially in that there was no obvious internal connection between the existing restaurant and the workshop, and it raised the question of whether it was to be a separate, independent unit accessed from the laneway. Further information was sought, inter alia, for detail of the access, how the development may impact on the protected structure and clarity on any ground works. The response showed an internal connection between the existing restaurant and the workshop in the south east area which, it is stated, involves the removal of a portion of existing modern blockwork. The response considered the workshop building to be

a completely modern steel structure building with infill blockwork and a contemporary roof structure with rooflights. There is no impact on historic fabric. This was considered acceptable by the planning authority.

- 7.4.3. There appears to have been two external alterations made to the laneway elevation contrary to the elevation drawings which state that no works were proposed. The extractor unit has already been relocated further back from the public road by approx. 8 metres. It also appears that the workshop entrance, which was a timber door as per the elevation drawings and photographs attached to the 'Photographic Record of Protected Structure' submitted with the initial application, has been replaced by a window of similar dimensions.
- 7.4.4. I do not consider the internal or external alterations have a significant impact on the setting or character of the protected structure and I consider that they are acceptable.

7.5. Other Codes

- 7.5.1. Much of the grounds of appeal refers to issues relating to a fire safety certificate, mechanical and electrical engineering drawings, possible unauthorised activity and other legal matters.
- 7.5.2. A decision on a planning application is based on an assessment of the development specific to the planning application i.e. in this case whether or not the change of use of a workshop to a commercial kitchen as part of an existing restaurant, is acceptable and in accordance with the proper planning and sustainable development of the area. Having regard to the previous sections of this assessment I consider that the change of use is acceptable and consistent with the land use zoning objective and it would have no undue adverse impact on the amenity of the area or on the setting, character and fabric of the protected structure.
- 7.5.3. Section 7.8 (Conditions relating to other codes) of the Development Management Guidelines for Planning Authorities (2007) states, inter alia, that 'It is inappropriate, however, in development management, to deal with matters which are the subject of other controls unless there are particular circumstances e.g. the matters are relevant to proper planning and sustainable development and there is good reason to believe that they cannot be dealt with effectively by other means. The existence of a planning condition, or its omission, will not free a developer from his or her responsibilities under

other codes and it is entirely wrong to use the development management process to attempt to force a developer to apply for other some licence, approval, consent, etc.’ Section 7.8.3 (Fire conditions) of the Guidelines states ‘it must be emphasised that when dealing with a planning application, fire safety can only be considered where it is relevant to the primary purpose of the Acts...’ In addition, 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. Having regard to the foregoing, I do not consider issues in relation to a fire safety certificate relevant to this specific planning application.

- 7.5.4. This planning application grants permission for the development sought and any other unauthorised activity that may exist, or where a development may not be constructed in accordance with its permission, is solely a matter for the relevant planning authority. The Board has no role in, or powers of, enforcement.
- 7.5.5. I consider that the other legal issues referred to in the grounds of appeal are civil matters between the respective parties.
- 7.5.6. In conclusion, I consider that issues relating to a fire safety certificate, mechanical and electrical engineering drawings, possible unauthorised activity and other legal matters are not material considerations in this planning application.

7.6. **Appropriate Assessment**

- 7.6.1. Having regard to the nature and scale of the development 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 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 and Environs Development Plan 2014-2020 and the nature and scale of the development, it is considered that, subject to compliance with the conditions as set out below, the development would be consistent with the provisions of the plan in terms of land use, would not have any adverse impact on the setting, character or fabric of the protected structure and would not seriously injure the amenities of the area or property in the vicinity. The 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 14.04.2020, 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. Within eight weeks of the date of grant of this permission the developer shall submit to the planning authority full detail of the extractor unit. The extractor unit shall include the mitigation measure cited in Section 5 of the Noise Impact Assessment received by An Bord Pleanála on 20.07.2020. Appropriate odour control as set out in Section 3.3 of the Odour Risk Assessment received by An Bord Pleanála on 20.07.2020 shall also be included as shall proposals for maintenance of the unit. Thereafter, the unit on site shall be as approved by the planning authority.

Reason: In the interest of the amenity of the area.

3. 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.

4. 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.

5. 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 within eight weeks of the date of grant of this planning application. Thereafter, the waste shall be managed in accordance with the agreed plan.

Reason: To ensure the provision of adequate refuse storage.

6. 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.

Anthony Kelly

Planning Inspector

24.09.2020