



An  
Bord  
Pleanála

## Inspector's Report ABP-307929-20.

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<b>Development</b>	Permission for works to An Pucan, Forster Street, Galway.
<b>Location</b>	An Pucan, 11 Forster Street, Galway.
<b>Planning Authority</b>	Galway City Council.
<b>Planning Authority Reg. Ref.</b>	20/103.
<b>Applicant(s)</b>	Connacht Hospitality Ltd.
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Grant with Conditions.
<b>Type of Appeal</b>	First Party v S48 Condition
<b>Appellant(s)</b>	Connacht Hospitality Ltd..
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	13 <sup>th</sup> October 2020.
<b>Inspector</b>	A. Considine.

## 1.0 Site Location and Description

- 1.1. The subject site is located on Forster Street, around the corner from Eyre Square in Galway City Centre. The wider area includes a variety of city centre uses, including bars, restaurants, retail shops, hotels and residential accommodation. The 'An Pucan' bar is a well established public house which occupies the ground floor of a mid-terrace three storey building. It is noted from the information submitted that the upper floors of this building are currently unoccupied.
- 1.2. The layout of the bar provides for a front bar which leads to a rear lounge area with a second bar counter. The lounge area includes a stage area and is used for live music and DJs. The area the subject of this appeal is located outside the main bar area and includes a landscaped garden area which is used by patrons as an outdoor seating / dining area with tables and chairs provided. The area includes TVs and there are speakers which pipe the music from the lounge into the space. This area also includes a bar counter, and the space adjoins the beer garden of O'Connell's bar which lies to the west.
- 1.3. The site has a stated area of 250m<sup>2</sup> with the area of garden having a useable area of 130m<sup>2</sup>.

## 2.0 Proposed Development

- 2.1. Permission is sought, as per the public notices for the development which will consist of:
  - A) Planning permission for the continued use of the existing outdoor seating/dining area previously granted Planning Ref. 15/27 on a temporary basis which is due to expire on 23rd June 2020.
  - B) Planning retention for the existing timber counter structure to the rear of the outdoor seating/dining area.
  - C) Planning permission to use the existing outdoor timber counter structure as a bar serving facility for the existing outdoor seating/dining area.
  - D) Planning permission to use the existing ground floor toilets to the rear of the outdoor seating/dining area.

- E) Planning permission to play amplified music/sound to a limited level of 84dB(A),

all at An Púcán, 11 Forster Street, Galway.

2.2. The application included a number of supporting documents including as follows;

- Plans, particulars and completed planning application form
- Planning Report
- Music Noise Assessment

### 3.0 Planning Authority Decision

#### 3.1. Decision

The Planning Authority decided to issue a split decision, granting planning permission for the following elements of the proposed development:

- A) Planning permission for the continued use of the existing outdoor seating/dining area previously granted Planning Ref. 15/27 on a temporary basis which is due to expire on 23rd June 2020.
- B) Planning retention for the existing timber counter structure to the rear of the outdoor seating/dining area.
- C) Planning permission to use the existing outdoor timber counter structure as a bar serving facility for the existing outdoor seating/dining area.

And to refuse planning permission for the following elements of the proposed development:

- D) Planning permission to use the existing ground floor toilets to the rear of the outdoor seating/dining area.

**Reason:** the proposed change of use of the rear of No. 9 Eyre Square and its use in association with the bar at the rear of No. 11 Forster Street, would compromise the long term viability of no. 9 Eyre Square and would contravene Policy 11.4.5 of the Galway City Council Development Plan 2017-2023.

- E) Planning permission to play amplified music/sound to a limited level of 84dB(A).

**Reason:** The proposal to allow amplified music into the beer garden, notwithstanding the acoustic screen, could potentially result in a loss of amenity for surrounding properties and would be contrary to the proper planning and sustainable development of the area and the Councils policies in relation to outdoor beer gardens.

Condition 3 of the grant of permission limits the permission to a 5 year period.

Condition 5 states as follows:

Within one month of the final grant of this permission the developer shall pay to Galway City Council a contribution of €2,665 (two thousand and six hundred and sixty five Euro).

**Reason:** So that the developer shall contribute an equitable portion of the cost of services which facilitate the development. The use or return of this contribution shall be carried out as provided for in the Planning & Development Act 2000 (as amended)

## 3.2. Planning Authority Reports

### 3.2.1. Planning Reports

The Planning report considered the proposed development in the context of the details submitted with the application, internal technical reports, third party submissions, planning history and the City Development Plan policies and objectives. The report does not include an Appropriate Assessment Screening Report.

The Planning Report concludes that elements of the proposed development are acceptable, while others are not. The Planning Officer recommends that a split decision issue as described in Section 3 of this report.

### 3.2.2. Other Technical Reports

**Transportation Department:** No objection subject to compliance with conditions.

### 3.2.3. **Prescribed Bodies**

None.

### 3.2.4. **Third Party Submissions**

There are 2 no. third party objections/submissions noted on the planning authority file. The issues raised are summarised as follows:

F.X. & Pat O'Brien:

- Previous permission, PA ref 15/27 refers, including Condition 6 which stated 'no amplified music shall be played in the outdoor dining area hereby approved' with the given reason 'to prevent annoyance by reason of noise to occupants of nearby premises and to protect the amenities of the area'.
- This condition has been regularly breached and a Warning Letter was sent to the applicant within 2 months of the grant of permission for non-compliance with this condition.
- Objects to item E) in the current application.

An Taisce:

- Issues raised in terms of the description of the development whereby permission is sought for items C, D and E and it should be retention as they are in situ and have previously been highlighted as being unauthorised.
- The address should include 9 Eyre Square as it is proposed to use the toilets associated with that property.
- Questions whether an assessment / monitoring was carried out to assess the impact of the previous grant of planning permission.
- The application seeks permission for elements which have been refused permission. The reasons for the conditions excluding such elements have not changed.
- The submitted Music Noise Assessment references the TVs and speakers. These elements are not permitted.
- Previous issues in relation to fire safety. An up-dated Fire Risk Assessment and inspection should take place.

- There has been no application to change the use of 9 Eyre Square.
- Previous conditions have not been complied with in relation to the restoration of the rear yard of No. 9 Eyre Square.

## 4.0 Planning History

The following is the relevant planning history pertaining to the subject site:

**PA ref: 15/27:** Permission granted for (1) retention and completion of excavations and groundworks to rear of building; (2) retention of demolition of sheds to rear of building; and (3) permission for alterations to existing licensed premises to include (a) alterations to rear of premises to provide 1 no. new window and 2 no. door openings to proposed al fresco dining/smoking area, (b) timber fencing to rear of building and (c) alterations to existing shopfront, all at An Pucan, 11 Forster Street, Galway. A number of restrictive conditions included.

**PA ref: 15/276:** Permission granted for retention of 5 no. retractable canopies and associated support structures within the existing outdoor seating area, all at An Pucan, 11 Forster Street, Galway.

The Board will note that the site was the subject of a Warning Letter in relation to works carried out under PA ref: 15/27.

## 5.0 Policy and Context

### 5.1. Development Plan

The Galway City Development Plan 2017 – 2023, is the relevant policy document relating to the subject site. The site is located in the City Centre and on lands zoned 'CC' City Centre where it is the stated objective 'To provide for city centre activities and particularly those, which preserve the City Centre as the dominant commercial area of the City'.

Policy 11.4.5 of the Plan states 'where development for and/or extensions to licensed premises, including off-licences, night-clubs and takeaways are being considered in the City Centre Area, the Council will take into account the following:

- The effect of the proposed development on the amenities of the area,

- The effect of the proposed development on the mix of uses in the area,
- The size, number and location of existing licenced premises in the area.

The Development Plan also precludes the extension of licenced premises in certain areas of the City Centre in the interests of amenity, but Eyre Square is not identified as such an area.

## **5.2. Development Contribution Scheme 2016-2020**

5.2.1. The Galway City Council Development Contribution Scheme 2008-2012 was extended on the 11<sup>th</sup> of April 2014, where it is to remain in place until the review is finalised. I could not find a more recent scheme. The scheme provides that the applicable rate for commercial development, including Shops, Restaurants, Night Clubs and Public Houses is €41.00 per square meter.

5.2.2. The scheme provides that an exemption / reduction rate will apply in certain circumstances. Such circumstances do not include for developments as being sought in this appeal.

## **5.3. Development Contribution Guidelines for Planning Authorities 2013**

5.3.1. These guidelines were prepared to assist planning authorities to achieve, through their development contribution schemes, a balance between the cost of the services provided and the need to support economic activity. The preparation of a Development Contribution Scheme is a reserved function of elected members as provided for in the Planning and Development Acts 2000-2010, while the Department is tasked with providing the policy guidance framework.

5.3.2. Section 2 of the Guidelines deals with Supporting Economic Development and advises that Development Contribution Schemes are required, amongst other requirements, to facilitate reduced rates for temporary permissions, including 50% of normal rate for permissions of up to 5 years.

5.3.3. Double Charging is also discussed and the Guidelines note that the ‘practice of “double charging” is inconsistent with both the primary objective of levying development contributions and with the spirit of capturing “planning gain” in an equitable manner’. The Guidelines also provided that ‘any development contribution

already levied and paid in respect of a given development should be deducted from the subsequent charge'.

#### **5.4. Natural Heritage Designations**

The site is not located within any designated site. The closest Natura 2000 site is the Galway Bay Complex SAC (Site Code: 000268) and the Inner Galway Bay SPA (Site Code: 004031) which is located approximately 365m to the east of the site.

Lough Corrib SAC (Site Code 000297) is located approximately 475m to the west of the site.

#### **5.5. EIA Screening**

Having regard to nature and scale of the development, together with the brownfield nature of the site, 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 and a screening determination is not required.

### **6.0 The Appeal**

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

- 6.1.1. This is a first party appeal against the decision of the Planning Authority to include condition 5 which requires the payment of a development contribution in the amount of €2,665.
- 6.1.2. It is submitted that the terms of the Development Contribution Scheme have not been properly applied and that the condition has been included in error. It is submitted that the attachment of contribution conditions to both planning application PA ref 15/27 and PA ref 20/103 essentially means that the applicant is paying twice for the same development.
- 6.1.3. It is requested that condition 5 be omitted.



## 6.2. **Planning Authority Response**

The Planning Authority submitted a response to the first party appeal advising that the development contribution scheme was correctly applied with the calculation of the amount generated by the proposed use being 50% of what a permanent extension or increase in floor area would have generated.

The Planning Report of 17<sup>th</sup> July 2020 clearly sets out the basis for the contribution. The report notes that ‘as a non-covered outdoor area and with a 5 year temporary permission, it is considered that 50% of the rate should be applied for this additional area.’ In addition, and of note, is the inclusion of the following sentence in the report:

“It should be noted that if a further application for a beer garden is made at the end of this 5-year time period no additional financial contribution will be payable.”

It is considered that this approach accords with the Ministerial Guidelines on the prior Development Contribution Scheme and it is requested that the Board uphold the Councils decision and include condition 5.

## 6.3. **Observations**

None.

## 6.4. **First Party Response to PAs Response to First Party Appeal**

The first party responded to the PAs response re-stating that the Development Contribution Scheme has not been correctly applied for the temporary permission. It is not considered reasonable to charge 50% for a further 5-year period and it is further submitted that it is not apparent how the further charge accords with the Ministerial Guidelines.

Reference is made to the ‘Development Contribution Guidelines for Planning Authorities 2013, and in particular, Section 2 (Supporting Economic Development which refers to the issue of double charging. It is again requested that condition 5 be omitted.

## 7.0 Assessment

- 7.1.1. This assessment relates to a first party appeal under S48(10) of the Planning & Development Act, 2000 as amended. The first party has appealed condition no. 5 of the decision of Galway City Council to grant permission for the proposed development. S.48(10)(b) of the Act provides that an appeal may be brought to the Board where an applicant for permission under section 34 considers that the terms of the development contribution scheme have not been properly applied in respect of any condition laid down by the planning authority.
- 7.1.2. Section 48(10)(c) states that where an appeal is brought in accordance with paragraph (b), and no other appeal of the decision of the planning authority is brought under Section 37, the planning authority shall make the grant of permission as soon as may be after expiration of the appeal period, provided the appellant furnishes adequate security for the payment of the full amount of the contribution as specified in the condition.
- 7.1.3. In considering the appeal, I note that the Board is bound by the terms of the adopted Development Contribution Scheme and Supplementary Development Contribution Scheme and cannot deviate from same. The merits or appropriateness of any adopted Development Contribution Scheme is not open for interpretation by the Board as referenced in Cork City Council –v- An Bord Pleanala (2006). Rather, the Board is required to assess whether the terms of the scheme, as written, have been correctly applied.
- 7.1.4. In terms of the current proposal, I consider it appropriate to address the planning history of the overall site. It is the first party's case that the terms of the Development Contribution Scheme have not been properly applied as condition 3 of the previous grant of permission, PA ref 15/27 refers also included a development contribution condition. It is submitted that the attachment of contribution conditions to both planning application PA ref 15/27 and the current application PA ref 20/103 essentially means that the applicant is paying twice for the same development.
- 7.1.5. The development contribution payable for the new outdoor dining area was calculated under the 2015 decision as €5,330. This figure was reached based on the 130m<sup>2</sup> floor area and based on the €41/m<sup>2</sup> contribution required in the Development Contribution Scheme. However, Galway City Council decided to grant temporary

permission for the use of the outdoor seating / dining area as part of the public house, and in doing so, facilitated a 50% reduction in the rate of the development contribution payable. The planners report for the 2015 application clearly sets out the justification for this reduction based on the development being for 'a non-covered outdoor area and with a 5 year temporary permission'. The development contribution payable under the 2015 temporary permission therefore was €2,665.

- 7.1.6. The current appeal relates to the continuation of the use of the outdoor area and the City Council again decided to grant a temporary permission for 5 years. The Planning Officers report deals specifically with the issue of financial contributions and notes that if a further application for a beer garden is made at the end of this 5 year time period no additional financial contribution will be payable. The report further notes that the development does not generate an additional transportation contribution as provided for in the Galway City Council Development Contribution Scheme.
- 7.1.7. The Galway City Council Development Contribution Scheme 2008-2012 was extended on the 11<sup>th</sup> of April 2014, where it is to remain in place until the review is finalised. I could not find a more recent scheme. The scheme provides that the applicable rate for commercial development, including Shops, Restaurants, Night Clubs and Public Houses is €41.00 per square meter. The scheme also provides that an exemption / reduction rate will apply in certain circumstances. I would note that the Development Contribution Guidelines for Planning Authorities 2013 require that local authorities provide for reduced rates for temporary permission, including 50% of normal rate for permissions of up to 5 years.
- 7.1.8. The issue arising in this instance relates to the fact that the Planning Authority applied the reduction in the initial decision on the basis of the temporary permission being granted as well as the outside nature of the development. It is the submission of the First Party that the current request for essentially, the 'second half' of the full development contribution, is double charging as the circumstances of the development have not changed. It remains a temporary planning permission for the continued use of an outside space.
- 7.1.9. Overall, I would concur with the first party in this instance. There is no proposal to significantly amend the nature of the development previously permitted, rather

permission is sought to continue the use of the space, and temporary permission has been granted by the Planning Authority. I am satisfied that the relevant development contribution has been paid under the previous temporary permission and to request a further contribution would amount to 'double charging'. I am therefore satisfied that the Development Contribution Scheme has **not** been correctly applied.

7.1.10. There are no issues of a Special Development Contribution arising in this case.

## 8.0 **Appropriate Assessment**

The site is not located within any designated site. The closest Natura 2000 site is the Galway Bay Complex SAC (Site Code: 000268) and the Inner Galway Bay SPA (Site Code: 004031) which is located approximately 365m to the east of the site. Lough Corrib SAC (Site Code 000297) is located approximately 475m to the west of the site.

8.1.1. Overall, I consider it is reasonable to conclude on the basis of the information available that the proposal individually or in combination with other plans or projects, would not adversely affect the integrity of a Natura 2000 site having regard to the nature and scale of the proposed development and separation distances involved to adjoining Natura 2000 sites. It is also 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.

## 9.0 **Recommendation**

It is recommended that Condition 5 of the grant of permission be REMOVED, on the basis that the terms of the Development Contribution Scheme, 2008-2012, extended on the 11<sup>th</sup> of April 2014, have not been properly applied.

## 10.0 Decision

The Board, in accordance with Section 48 of the Planning and Development Act, 2000, as amended, considered, based on the reasons and considerations set out below, that the terms of the Development Contribution Scheme for the area had not been properly applied in respect of condition number 5 and directs that the said Council to REMOVE condition number 5 and the reasons therefore.

## 11.0 Reasons and Considerations

Having regard to

- a) the provisions of the Galway City Development Contribution Scheme 2008-2012, extended on the 11<sup>th</sup> of April 2014,
- b) the Development Contribution Guidelines for Planning Authorities 2013,
- c) the planning history associated with the subject site, and
- d) the information submitted in support of this appeal,

the Board is satisfied that the development the subject of this appeal has been levied under a previous planning decision by Galway City Council, PA ref 15/27 refers, where the Planning Authority applied a 50% reduction in the liability due to the temporary nature of the permission and the outside nature of the seating / dining area in accordance with the requirements of the Development Contribution Guidelines for Planning Authorities 2013, at the time. The Board considered, based on the evidence submitted, that the terms of the Development Contribution Scheme have not been properly applied.

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A. Considine

Planning Inspector

04<sup>th</sup> November, 2020