



An  
Bord  
Pleanála

## Inspector's Report

### ABP-309228-21

<b>Development</b>	Extension to first floor kitchen, change of use of part of first floor office to kitchen store and retention of revised location for wheelchair accessible toilet.
<b>Location</b>	Rear of existing licensed premises at, Gibney's Bar, 5, 6 & 7 New Street, Malahide, Co. Dublin.
<b>Planning Authority</b>	Fingal County Council
<b>Planning Authority Reg. Ref.</b>	F20A/0559
<b>Applicant(s)</b>	J.J. Gibney Ltd.
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Grant permission.
<b>Type of Appeal</b>	First Party
<b>Observer(s)</b>	Catriona Dolan, Mary Lynch and Majella Dunne.
<b>Date of Site Inspection</b>	16 <sup>th</sup> March 2021.
<b>Inspector</b>	Barry O'Donnell

## 1.0 Site Location and Description

- 1.1. The subject site is situated on the east side of New Street, in the centre of Malahide, and consists of a terrace of two-storey buildings in use primarily as a public house, Gibneys, and an off-licence. The site also contains a residential use, at the southern end of the terrace.
- 1.2. New Street contains a mix of a mix of uses, including cafes, restaurants, public houses, houses and newly constructed apartment blocks with retail at ground level, at the northern end.
- 1.3. The area of the site affected by this appeal is the main 2-storey public house building and rear first floor area, which contains covered and uncovered public areas, in the form of a roof garden and terrace. The area also currently contains a private outdoor area, accessible from the first floor of the public house but which is not accessible to customers. The roof garden/terrace are accessed via external stairwells to the south and north sides of the main public house building and are also accessible from the first floor kitchen area and private residence.

## 2.0 Proposed Development

2.1. Permission is sought for:

- Construction of extension to existing first floor kitchen level (additional floor area 24.25sqm) & change of use of part of existing first floor office (5sqm) to kitchen store. The areas in question are at the north end of the building.
- Proposed increase in floor area of landscaped roof garden & sun terrace for customer use (additional floor area of 17.8sqm),
- Retention of revised location for wheelchair accessible toilet,
- Removal of requirement for annual noise monitoring review,
- Change to permitted opening hours for landscaped roof garden & sun terrace for customer use to normal 7-day licence hours with closing time 11.30pm Monday-Thursday, 12.30am Friday-Saturday and 11pm Sunday.

## **3.0 Planning Authority Decision**

### **3.1. Decision**

- 3.1.1. The Planning Authority granted permission for the development on 18<sup>th</sup> December 2020, subject to 9 No. planning conditions.

Condition No. 2 required that the landscaped roof garden and sun terrace area shall not be occupied outside of 11am-10.30pm seven days per week, except where otherwise agreed with the Planning Authority.

Condition No. 3 required that a noise monitoring review shall be submitted to the Planning Authority on an annual basis.

Condition No. 4 required that no public address system, amplified music, TVs or bands shall be permitted within the landscaped roof garden and sun terrace and that no sound amplification shall be installed in the garden or terrace or projected into the first floor from other areas of the premises nor shall any television or screen or similar be installed therein.

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

- 3.2.1. Planning Report dated 11<sup>th</sup> December 2020, which outlined that the development is in accordance with the TC zoning objective applying to the lands. Regarding the architectural conservation area location, the report noted that front and side elevation drawings were not provided with the application, which would depict the appearance of the development but, concluded that the development would not give rise to undue visual impact. The report considered the proposed additional floor space and development to be retained would be acceptable, subject to retention of the requirement for annual noise monitoring and retention of the opening hours approved under permission Ref. PL06F.246483. The report recommended that permission be granted, subject to 11 no. planning conditions. Condition nos. 8 (related to taking in charge) and 9 (financial contribution in lieu of open space provided) were omitted by hand.

- 3.2.2. Other Technical Reports

**Water Services** report dated 4<sup>th</sup> December 2020, which outlined no objection to the development subject to 2 standard conditions relating to surface water controls.

**Environmental Health, Air & Noise Unit** report dated 9<sup>th</sup> December 2020, which advised that the Unit had no objection to the development. The report also advised that no noise complaints had been received at the time of the report, relating to activities carried out on the site.

**Conservation Officer** report dated 10<sup>th</sup> December 2020, which outlined that the Officer had no comments on the application.

### 3.3. **Prescribed Bodies**

- 3.3.1. Irish Water submission dated 5<sup>th</sup> November 2020, which outlined no objection to the development subject to a standard condition.
- 3.3.2. Dublin Airport Authority submission dated 9<sup>th</sup> December 2020, which outlined that the Authority had no comment on the application.

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

- 3.4.1. A number of third party observations were received on the application, the issues raised in which can be summarised as follows:
  - Concerns that external walls will continue to be used for unauthorised signage in this architectural conservation area location.
  - The condition requiring that no public address system, amplified music, TVs or bands shall be permitted within the landscaped roof garden and sun terrace and that no sound amplification shall be installed in the garden or terrace or projected into the first floor from other areas of the premises nor shall any television or screen or similar be installed therein should be retained.
  - The application has not demonstrated that additional external areas will not give rise to noise nuisance.
  - Increased opening hours will intensify the usage of the area. Limitations should be set regarding opening hours.

## 4.0 Planning History

4.1. The site has an extensive planning history. Those records of relevance to the current appeal include:

F17A/0051 - Permission refused on 20<sup>th</sup> March 2017 for retention of an external T.V. screen and surrounding structure in the open courtyard at the rear of the premises adjacent to the northern boundary wall. Permission was refused for 2 reasons, relating to visual impact and impact on the architectural and commercial character of Malahide.

F15A/0140 - (ABP Ref. PL06F.246483) Permission granted on 25th August 2016 for Change of use of existing first floor level flat roof to landscaped roof garden and sun terrace, bar, servery. Permission was granted subject to 9 no. planning conditions.

Condition 3 required that no public address system, amplified music, TV's or bands shall be permitted within the first floor landscaped roof garden and sun terrace and no sound amplification shall be installed in the garden or terrace or projected into the first floor from other areas of the licence premises, nor shall any television screen, or similar, be installed therein.

Condition 4 required that a noise monitoring programme shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development, to include an annual review undertaken by a qualified acoustic engineer at the nearest noise sensitive location. The developer shall carry out any amendments to the subject development requested by the planning authority subject to the review.

Condition 7 required that the landscaped roof garden and sun terrace area shall not be occupied by the public outside of the hours of 11.00am-10.30pm seven days per week and deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the planning authority.

F11A/0040 - Permission refused on 7<sup>th</sup> February 2012 for change of use of existing first floor level flat roof to landscaped roof garden and sun terrace for customer use, including perimeter screening, raised seating areas and roof canopies, access stairs and dispense bar and servery. Permission was refused for 1 reason, relating to concerns regarding overdevelopment and intensification of use, which would have a detrimental impact on the amenities of nearby residential properties.

F03A/1670 - Permission granted on 22<sup>nd</sup> March 2004 for a two-storey store at rear incorporating the relocation of boiler house to first floor level and new external metal stairs for access to first floor level.

F02A/1173 - Permission granted on 30<sup>th</sup> January 2003 for a single storey extension and alterations at ground floor level to provide additional toilet facilities and additional floor area to lounge and to integrate 2 small, covered areas into the main building.

## 5.0 Policy Context

### 5.1. Development Plan

- 5.1.1. The site is zoned 'TC' Town and District Centre under the Fingal County Development Plan 2017-2023, with an objective to '*Protect and enhance the special physical and social character of town and district centres and provide and/or improve urban facilities.*'
- 5.1.2. The site also falls within an Architectural Conservation Area, which encompasses the historic core of the town.
- 5.1.3. The development strategy for Malahide is set out at Section 4.2. The development strategy for Malahide is to promote the consolidation of the existing urban form and the sensitive promotion of amenities. The need to upgrade and support the development of the core as a town centre will be balanced with the need to conserve its appearance as an attractive, historic village settlement and to retain the existing amenities of the area, being cognisant of its proximity to an ecologically sensitive coastline including European Sites. The Strategy contains a number of Objectives, including the following which are relevant to the proposed development:

*'Objective MALAHIDE 3 Retain the existing centre with its mixed use and varied architectural character as the heart and focal point of Malahide.'*

## **5.2. Natural Heritage Designations**

5.2.1. The subject site is not located within or adjacent to any designated European Site.

## **5.3. EIA Screening**

5.3.1. The proposal includes a smallscale extension at first floor level and change of use/continuation of use of an existing building. This type of development does not constitute an EIA project and so the question as to whether or not it might be sub-threshold does not arise.

## **6.0 The Appeal**

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

The Grounds of Appeal can be summarised as follows: -

- The appeal concerns condition Nos. 2, 3 and 4 of the Planning Authority's decision.
- Condition No. 2
  - The applicant is seeking a level playing field regarding operating conditions with other bars and restaurants in Malahide, none of which has a requirement to close at 10.30pm.
  - Reference is made to Siam Thai, which is closer to residential properties at Townyard House and which serves customers up to 1am on Friday and Saturday nights and also hosts live music acts on these nights.
  - It is proposed that the roof garden and terrace should be permitted to open during normal trading hours as a drinking and dining venue. Limitations on opening hours could consist of the exclusion of any late bar trading for the first floor terrace area.

- The applicant is an experienced publican, with a trading history dating back to 1937. The pub has never had an issue with unruly behaviour on the premises and a good relationship is enjoyed with local residents, traders and the Gardai.
- The existing ground floor level courtyard is open during normal trading hours.
- The small increase in the size of the roof garden and terrace are not intended as an intensification of use of the premises. First floor areas in a pub only generate 1/3 of the turnover generated by the equivalent floor area at ground floor level. The additional area is intended to facilitate better social distancing in the short term, and in the long term to facilitate separation between smokers and rooftop diners.
- The development of the roof garden and terrace has improved the quality of the offering at the premises and serves to meet ongoing demands for outdoor dining and drinking facilities in Malahide.
- The development is in-keeping with the TC zoning which applies to the site, which seeks to retain existing amenities and provide services for the local population and for tourists and to improve the physical character of the village.
- Covid19-related social distancing requirements have reduced the indoor capacity of many licensed premises to approx. 25% of normal capacity. This has had a significant direct impact on turnover, which impacts on employment.
- The success of the roof garden and terrace is evidenced by continued increase in food sales as a percentage of total turnover, which has doubled since the areas were opened in 2017.
- Condition No. 3
  - The roof garden and terrace have operated since 2017 and the applicant is not aware of any complaints made to the Planning Authority. Reference is made to the Environmental Health report on the application, which outlined that no complaints had been received by that department.



- The most recent noise compliance report (November 2018) showed that Gibneys is not a source of noise nuisance, and that other premises were the dominant generators of noise in the area.
- The monetary cost of an annual noise monitoring review is in the region of €5,000 Ex. VAT. The applicant is not aware of any other similar developments in the area that are required to carry out such an annual review. The onus disadvantages the applicant and a level playing field is sought.
- The roof garden and terrace incorporate noise control measures. A 2.4m high privacy screen was erected along the north boundary and a 2.1m privacy screen was erected along the south boundary. They were intended to reduce the risk of noise disturbance and overlooking of surrounding properties.
- Additional screening around the ground floor courtyard has further improved the sound insulation properties of the building.
- The applicant notes that occupiers at Ross Cottages, the nearest residential properties to the premises, did not make any submissions on the application.
- Given the relatively small scale of the proposed increase in floor area of the first floor terrace, it is argued that the current noise environment is unlikely to be adversely affected.
- The Planning Authority has adequate powers of enforcement under legislation to deal with noise-related matters.
- Condition No. 4
  - The condition seeks to exclude all forms of broadcast media, including television from the roof garden and terrace.
  - The applicant has not sought permission to use the area as an outdoor music venue and the inability to erect a TV places the applicant at a commercial disadvantage to other premises in the area, which are not subject to this type of restriction.
  - The roof garden and terrace are primarily a sit-down area, with a more restaurant than bar environment. The presence of TVs is aimed at providing background entertainment.

- Acoustic monitoring has shown that noise from the premises is not perceptible, nor has it given rise to any increase in the levels measured at the two sensitive receptor locations examined.

## 6.2. Planning Authority Response

- 6.2.1. A submission was received dated 22<sup>nd</sup> February 2021, requesting that conditions 2, 3, 4, 8 and 9 are upheld by the Board.

## 6.3. Observations

A joint submission has been made on behalf of Catriona Dolan, Mary Lynch and Majella Dunne, prepared by AOS Planning.

- The proposals to extend the kitchen area and retain a revised location for a wheelchair accessible toilet are supported.
- Proposals to extend the roof garden and terrace and to remove conditions previously attached by An Bord Pleanála are not supported.
- Condition No. 2
  - The applicant states that they are seeking a level playing field and has identified that other premises in the area operate under normal trading hours, but has neglected to mention that they are operated within the premises.
  - The applicant operates the largest licensed premises in the area and any further increase in the extent of intensity of use is disproportionate, having regard to the need to protect residential amenities in the area. The proposed increase in size of the roof garden and terrace will bring potential noise sources closer to residential properties and will increase the intensity of the use of the premises.
  - It is disingenuous to state that the development is intended to facilitate increased separation distances. It is an intensification for additional dining and drinking facilities.
  - The benefits of the development to improving village outdoor space is questioned. The village core contains an abundance of high-quality outdoor

space and does not need to be augmented with a small area of commercial activity.

- The Board is also advised that the applicant has separately applied for permission for outdoor seating on New Street.
- Condition No. 3
  - The lack of noise complaints is proof of the effectiveness of the condition which requires noise monitoring.
  - The proposals to extend the roof garden terrace increase the need for noise monitoring.
- Condition No. 4
  - The public notices did not advertise the applicant's intention to use the roof garden for the viewing of televised sporting events.
  - The proposed increase in size of the roof garden and terrace will bring potential noise sources closer to residential properties and will increase the intensity of the use of the premises.
  - The acoustic monitoring undertaken to date appears to have been done in the absence of amplified sound. It therefore provides no basis for the prediction that amplified sound will not give rise to adverse effects.
- An additional condition is sought, which would require that the northern wall of the existing first floor kitchen should not be used for the display of advertising material.

#### **6.4. Further Responses**

- 6.4.1. None received.

#### **6.5. Prescribed Bodies**

- 6.5.1. The appeal was circulated to The Heritage Council, Minister for Culture, Heritage and the Gaeltacht, Failte Ireland, An Taisce and the Arts Council. No responding submissions were received.

## 7.0 **Assessment**

7.1. Having inspected the site and considered the contents of the appeal in detail, the main planning issues in the assessment of the appeal are as follows:

- Principle of development;
- Impact on the town centre;
- Impact on neighbouring properties
- Appropriate Assessment

### 7.2. **Principle of Development**

7.3. The proposed development is consistent with the 'TC' zoning objective, under which public house uses are permitted. The development is in keeping with the vision for the area and is also in keeping with the pattern of development in the area.

### 7.4. **Impact on Town Centre**

7.4.1. I do not consider the development would have any undue impact on the town centre or architectural conservation area. The proposed kitchen store does not involve any alterations to the external envelope of the building, the enlarged roof garden/terrace and wheelchair accessible toilet are within the envelope of the building and the proposed kitchen extension, at the north end of the building, would not project beyond the side of the existing building and would not be overly prominent or appearing out of character in the available views.

7.4.2. I note that the application drawings do not include front or north side elevation drawings. I am satisfied that there is sufficient information contained on the provided drawings to make a decision on this appeal. I note, in this respect, that the Planning Authority's Conservation Officer report on the application offered the view that the development would have a limited, if any, impact onto New Street.

### 7.5. **Impact on Neighbouring Properties**

7.5.1. There are two issues to be considered, in respect of impacts on neighbouring properties; the impact of the proposed kitchen extension on the north-adjointing property and the impact of the continued use and enlargement of the roof

garden/terrace, which is proposed to operate for extended hours and without any requirement to undertake annual noise monitoring.

- 7.5.2. Regarding the proposed kitchen extension, this element of the development would have no undue overshadowing impact on the south-adjoining property, which has been extended to the rear, at ground floor level, and which is operated as a betting office at ground floor level.
- 7.5.3. Regarding the impact of the continued use and enlargement of the roof garden/terrace, I note that the previous Inspector recommended that annual noise monitoring should be required to be undertaken, as a means of monitoring the impact of the development on an ongoing basis, in conjunction with other powers available to the environmental health office of the Planning Authority, to enforce noise limits.
- 7.5.4. Permission was granted for the roof garden and terrace in August 2016 and it is unclear how many annual noise surveys have been undertaken and provided to the Planning Authority; however, I note that a copy of a Noise Compliance Report dated 2<sup>nd</sup> November 2018, prepared in accordance with the requirements of condition No. 4 of PL06F.246483 by ICAN Acoustics, has been provided as part of the appeal and the Planning Authority's Environmental Health, Air & Noise Unit advised in its submission on the application that no noise complaints have been received in relation to the site.
- 7.5.5. It appears from reading the Noise Compliance Report, that it was the only such report undertaken by the applicant.
- 7.5.6. I acknowledge the findings of the report, that the ambient noise climate renders noise emissions from the subject site predominantly inaudible; however; I am concerned that the applicant's proposal to not undertake any further annual noise monitoring appears to be based on the conclusions of a single survey, which was undertaken over a single night (night of 29<sup>th</sup>/30<sup>th</sup> September 2018).
- 7.5.7. The applicant also seeks to enlarge the area of the roof garden/terrace and to extend its hours of use to normal 7-day licence hours, which is likely to intensify the use of the external area and has the potential to generate increased noise levels. The enlarged roof garden/terrace would be provided by reconfiguring the existing first floor layout and would not require any further extension of the building. Both of these

proposals are, in my opinion, reasonable, in the context of the established use of the first floor area as a roof garden/terrace and in the absence of any complaints by the Planning Authority's Environmental Health Department, but I consider the requirement for annual noise monitoring should be maintained, given the potential for increased noise which undoubtedly arises from a more intensive use of the area. I do not consider the applicant has adequately demonstrated that the proposed development would have no undue noise impacts for nearby residential properties.

- 7.5.8. The applicant has also sought to have condition 4 of the Planning Authority's decision omitted, which required that no public address system, amplified music, TVs or bands shall be permitted within the landscaped roof garden or projected into the area from other parts of the premises. I note that a similar condition was attached by the Board, as part of its original grant of permission for the roof garden/terrace.
- 7.5.9. From the Grounds of Appeal, it appears that the applicant's objection to the inclusion of this condition relates to the restriction on TVs within the roof garden.
- 7.5.10. I am in agreement with the approach and recommendation of the previous Inspector, that additional potential noise sources should be precluded as part of the initial grant of permission for the roof garden/terrace, however; the situation has evolved, to where the roof garden/terrace has now operated without complaint since 2017 and I consider it is reasonable to allow the installation of TVs, subject to maintaining the requirement for annual noise monitoring. I note, in this regard, that both condition No. 4 of the Board's Order on Ref. PL06F246483 and condition No. 3 of the Planning Authority's decision to grant for the subject development included a requirement that *'the developer shall carry out any amendments to the subject development requested by the Planning Authority subject to the review.'* This provides a mechanism for ongoing review and detailed management of the roof garden/terrace, including noise generated by TVs, should the issue arise.
- 7.5.11. Regarding other aspects of the condition, i.e. public address systems and amplified or live music, I agree with the previous Inspector and Planning Authority that it would be inappropriate to allow these within the roof garden/terrace.
- 7.5.12. I would therefore recommend to the Board, should they decide to grant permission, that a revised condition should be attached, requiring that no public address system,

amplified music or bands shall be permitted within the landscaped roof garden or projected into the area from other parts of the premises.

## **7.6. Other Issue**

- 7.6.1. The observers have requested that an additional condition be attached, requiring that the northern wall of the existing first floor kitchen should not be used for the display of advertising material. A condition (No. 6) was attached to the original grant of permission for the roof garden/terrace which required that no additional signage shall be displayed or erected on the site. I am satisfied that this provides adequate control over signage at the site and a similar condition is recommended in this instance, should the Board decide to grant permission, where there is a proposed extension of the existing building. Unauthorised development is a matter for the Planning Authority to investigate.

## **7.7. Appropriate Assessment**

- 7.7.1. The subject site is not within or adjacent to of any Natura 2000 site, the nearest designated sites being the Malahide Estuary Special Protection Area (Site Code 004025) and Special Area of Conservation (Site Code 000205), which are approx. 250m north.
- 7.7.2. Having regard to the nature and scale of the proposed development, which comprises a small-scale first floor extension of an existing building and change of use/continuation of use on urban, zoned and serviced lands, 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**

- 8.1. I recommend that permission for the proposed development be granted, subject to conditions as set out below.

## **9.0 Reasons and Considerations**

- 9.1. Having regard to the TC zoning objective which applies to the site under the Fingal County Development Plan 2017-2023, under which public house uses are permitted,

together with the site's town centre location, the scale and design of the proposed development, the pattern of development on the site to date and the pattern of development in the vicinity, it is considered that, subject to compliance with the conditions below, the proposed development would not seriously injure the amenities of the area or of property in the vicinity, would not be prejudicial to public health and would, therefore, be in accordance with proper planning and sustainable development

## 10.0 Conditions

1.	<p>The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.</p> <p><b>Reason:</b> In the interest of clarity.</p>
2.	<p>No public address system, amplified music or bands shall be permitted within the first floor landscaped roof garden and sun terrace. No sound amplification shall be installed in the garden or terrace or projected into the first floor from other areas of the licence premises, nor shall any television screen, or similar, be installed therein.</p> <p><b>Reason:</b> To protect the amenities of adjoining properties.</p>
3.	<p>A noise monitoring programme shall be agreed with the Planning Authority, to include an annual review undertaken by a qualified acoustic engineer at the nearest noise sensitive location, which shall be submitted to the Planning Authority. The developer shall carry out any amendments to the subject development requested by the Planning Authority subject to the review.</p>



	<p><b>Reason:</b> In the interest of protecting the amenity of the nearby residential properties.</p>
4.	<p>Water supply and drainage arrangements, including the disposal of surface water, shall comply with the requirements of the planning authority for such works and services.</p> <p><b>Reason:</b> In the interest of public health</p>
5.	<p>Notwithstanding the provisions of the Planning and Development Regulations 2001, as amended, or any statutory provision amending or replacing them, no advertisement signs (including any signs installed to be visible through the windows), advertisement structures, banners, canopies, flags, or other projecting elements shall be displayed or erected on the buildings or within the curtilage of the site, unless authorised by a further grant of planning permission.</p> <p><b>Reason:</b> To protect the visual amenities of the area.</p>
6.	<p>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.</p> <p><b>Reason:</b> In order to safeguard the residential amenities of property in the vicinity.</p>
7.	<p>The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting 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</p>

	<p>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.</p> <p><b>Reason:</b> 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.</p>
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Planning Inspector

25<sup>th</sup> March 2021