



An
Bord
Pleanála

Inspector's Report

ABP-309874-21

Development	Alterations to previously granted planning permission the omission of condition no. 6 and amendments to condition no. 7
Location	21 High St , Kilkenny
Planning Authority	Kilkenny County Council
Planning Authority Reg. Ref.	21/6
Applicant(s)	High Street Social Limited.
Type of Application	Permission
Planning Authority Decision	Refuse
Type of Appeal	First Party
Appellant(s)	High Street Social Limited
Observer(s)	None
Date of Site Inspection	10 th of November 2021
Inspector	Caryn Coogan

1.0 Site Location and Description

- 1.1. The site is 21 High Street, Kilkenny, which is 0.076Ha, and is located in the heart of the Kilkenny City, opposite the City Hall. High Street consists of a three-storey streetscape hosting a variety of town centre uses, but substantially consists of retail outlets. The subject site is or has been a takeaway restaurant on the ground floor.
- 1.2. 21 High Street is a three storey and three bay building, which is a protected structure in the current development plan. It has an unusual setback from the main streetscape creating a courtyard/ forecourt area to the front flanked on both sides by three storey buildings addressing High Street.
- 1.3. There is a long narrow garden/ yard area to the rear that runs along the back of a number of properties on William Street, which is a cul de sac street of three storey buildings running perpendicular to High Street.
- 1.4. The site has a vehicular/ gated entrance off William Street, it was locked the day of my inspection.
- 1.5. Properties along William Street which back onto the site are commercial on the ground floor and in some instances offices on first and second floors. There is an apartment in one of the buildings backing onto the site.

2.0 Proposed Development

- 2.1. Under appeal reference **ABP 307372-20** the Board granted permission for the following development:-
 - The change of use of the ground floor from an existing 185sq.m. restaurant to a licenced restaurant to include the established takeaway/ home delivery service;
 - The provision of a canopy to part of the 108sqm forecourt to extend the restaurant;
 - An 81sq.m. extension of the restaurant to the rear with a retractable roof structure;
 - A new 127sq.m. licenced restaurant to the rear;

- 89sq.m. storage/ food preparation area to rear.

2.2 The Board's decision included Conditions 6 and 7 as follows:

Condition No. 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 access from William Street shall not be used as an entrance to the development by patrons.

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

Condition No. 7

The hours of operation of the restaurant shall be restricted to between 0700hours and 23.30hours, Monday to Sunday, unless otherwise authorised in a subsequent planning permission.

Reason: In the interests of orderly development and the amenity of the adjoining properties.

2.3 The subject of this application is to remove/ amend the above two conditions.

3.0 Planning Authority Decision

3.1. Decision

Kilkenny Co. Co. refused to remove the two conditions for the following reason:

Having regard to the use permitted on the site as a licenced restaurant and the planning conditions attached therein, the proposed increase in opening hours and the intensification of the rear yard area by the use as a dining area and by means of access to the premises, would is considered, impact on residential amenity of the surrounding area of William Street, would present risk of increased noise pollution to the adjoining residential area. The omission of Condition No. 6 and amendments to Condition No. 7 of P19/618 (ABP Ref. 307372) therefore would seriously injure the amenities of the area and would be contrary to the proper planning and sustainable development of the area.

3.2. **Planning Authority Reports**

3.2.1. ***Planning Reports***

The report states the opening hours prescribed are in line with the An Bord Pleanala decision under appeal reference ABP 307372, and that the premises was indicated to be a licenced restaurant where the restaurant will be the main sell, and the restaurant should close at 11.30 pm every night of the week.

Condition No. 6 referred to the yard area between the rear of the permitted extension and the store building not been permitted as an outdoor space and access from William Street not used as an entrance way by patrons.

The applicant wants to use the space for Al Fresco dining. Overall if the opening hours are increased, there is a risk of the rear yard area being used as a beer garden in the colder months, and this could present noise pollution to the surrounding residents, by utilising the rear space for drinking and accessing it off William Street, even with the hours restricted. To maintain the residential amenity of residents in close proximity and to control potential noise pollution, the conditions as imposed by the Board should be upheld.

3.2.2. ***Other Technical Reports***

None

3.3. **Prescribed Bodies**

None

3.4. **Third Party Observations**

The third-party objections stated the following concerns:

- There is an unacceptable number of late-night establishments in one area. The establishment is a licenced restaurant. The addition of a bar licence alters its planning and legal status.
- Bar and restaurant use are listed separately in the Planning Act
- The al fresco restaurant has the potential to become a beer garden.

- There is a large residing population along William Street

4.0 Planning History

4.1 Planning Reference 19618 (ABP 307372-20)

Planning permission granted in 2020 for the change of use of ground floor restaurant to a licenced restaurant to include the existing takeaway, and to extend the restaurant to the front and rear to cater for outdoor dining, as outlined in Section 2.1 above under the description of the proposed development.

5.0 Policy Context

5.1. Development Plan

The current development plan for the area is Kilkenny City and Environs Development Plan 2014-2020.

The subject site is zoned **General Business** – *To provide for general development.* Permissible uses include restaurants, public houses and coffee/shops/cafes.

The building is a protected structure, however this appeal does not relate to the building.

5.2. Natural Heritage Designations

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

6.0 The Appeal

6.1. Grounds of Appeal

- 6.1.1 The decision of the planning authority is short sighted and fails to allow reasonable use of a modest city centre space in a controlled manner or to address the concerns regarding amenity which do not stand up to scrutiny and can be positively addressed by condition. The rationale for the grant of permission does not rely on the impact of

Covid-19. However, the decision is particularly harsh in the current context where businesses are facing extreme challenges to survive.

6.1.2 Potential Capacity of Outdoor Area

The outdoor area to the area has capacity for 30No. seats. This is a modest number and does not allow for a significant customer density within the space. The proposal does not result in an intensification of uses on the site. Considering Covid-19 and long-term outcomes, restaurant facilities will have to be laid out spaciouly. The current proposal is to enhance amenities, provide an optional dining space but not to notably intensify the trading area. The planning authorities claim the space would only be used by drinkers during the winter months is totally incorrect. It is intended this will be a year-round space with patrons provided appropriate heaters, blankets during the colder months to enable dining to be pleasant.

6.1.3 Potential Noise Impact

The planning authority states the proposed change in opening hours and use of the rear yard would present a risk of increased noise pollution to adjoining residential areas. The statement 'adjoining residential area' is misleading and disingenuous. The site is located in the heart of the City Centre and zoned for 'General Businesses'. There are no residentially zoned lands proximate to the site.

Under appeal reference PL96.243594 for a pub in Blackrock, Co. Dublin, it was considered the premises was not a standalone pub in the middle of a residential area, it was in a commercial area with a mix of uses.

The rear yard area is bounded by properties on William Street and the 'Hole in the Wall' bar. The properties bounding the site at the rear include a beauty salon, office retailing, and a first-floor apartment, FDC Group offices, architects' office, accountant's office, beauty salon and Kilkenny MABS. The surrounding area is not residential. There is only a one-bedroom apartment backing onto the site.

The appeal includes an Operational Noise Management Plan which demonstrates a commitment to noise management and includes details of a curfew at 11pm, and details of waste bin emptying hours.

6.1.4 Closing Hours

The Board is asked to amend condition No. 7, which restricts the use of the premises to between 0700 and 2330 Monday to Sunday. The restriction of the hours will seriously impact on the viability of the business and is not consistent with other businesses in the City Centre. The hours imposed by the planning authority curtail the potential of the business without any credible basis to do so. The condition is unfair and unwarranted. There are 16 similar business which feature food and drink in Kilkenny City Centre. The full results of the survey relating to these premises is included in Appendix A of the appeal. A summary of the findings is:-

- Of the 16No. food/ beverage businesses surveyed, 13 had planning applications granted which did not impose restrictions to opening or closing hours.
- Unable to view the conditions of 3 Friary Gardens or 10 Irishtown
- 87% of applications granted had no restrictive hours.

It is submitted the use and regulation of such premises is best controlled by the licencing legislation which effectively monitors and manages businesses of this nature. The site is appropriately located in the city centre and the restriction of opening hours is unnecessary.

6.1.5 Operating hours in rear yard

There is one residential unit bounding the site. The use of the yard area space should be more controlled than the rest of the premises. Condition No. 7 could be re-written as follows:

The following restrictions shall apply to the use of the outdoor yard area:-

- *The outdoor garden area shall be closed to patrons from 23:00 to 12:00 seven days a week;*
- *The noise mitigation measures indicated in the 'Noise Management Plan' submitted to the Board shall be fully implemented.*

Reason: In the interests of orderly development.

The reworded condition is reasonable and balanced.

6.2. **Planning Authority Response**

There was no further response to the appeal.

7.0 **Assessment**

7.1 This is an unusual planning application which is to remove or amended conditions of a planning permission granted in 2020 as described above. There is no provision in the planning legislation to remove or amend conditions of a permitted development. In short, the applicant considers the two stated conditions are unreasonable and will impact negatively on the viability of the entire premises. The appeal cannot be assessed in the manner the applicant has presented the planning application. I will therefore consider the two substantive issues which are the subject of the planning application currently under appeal and these are the rear yard area to be used as a dining area, and the restriction of the operating hours of the entire restaurant area. I will address each of these issues separately.

7.2 **The Rear Yard Area**

The use of the yard area to rear of the proposed extension and the store building was omitted from the permission granted by the Board under planning reference ABP Ref. 307372 which also included access/ exit off William Street (an existing gated entrance to the rear of the building). On appeal, the applicant has presented the more robust case regarding the modest scale of the yard area dining, the management of same during the operational phase, and an assessment of the adjoining residential properties (which includes only one apartment at first floor level).

7.3 The drawings submitted on appeal indicate the footprint of existing restaurant floor area, the permitted extension to the restaurant area (reference ABP307372) and permitted new store preparation area located at the western boundary of the yard area (reference ABP307372), and a Noise Management Report. It is proposed to provide an outdoor courtyard/ dining area with seating for thirty persons in the rear yard area. Restaurant facilities must be laid out spaciouly in light of the Covid-19 requirements. The proposed outdoor seating area is to enhance existing amenities, and provide optional extra dining space, but it does not represent an intensification of

the permitted trading area. It is intended to use the space throughout the year, with appropriate covers/ blankets/ heaters during the colder months.

7.4 The site and yard area must be examined in the context of its location which is in the heart of Kilkenny City. The site is zoned in the current development plan for **General Business** use. Under the General Business zoning objective, restaurants and public houses are permissible land uses. The site is an established restaurant located in a busy commercial part of the city. I examined the adjoining William Street, and I found there are all commercial properties backing onto the rear yard area. According to the appeal file, there is one residential apartment at first floor level in one of the buildings backing onto the site. The neighbouring area is not a residential area, it's a multifunctional city centre neighbourhood. There are a multitude of licenced premises and restaurants located in Kilkenny City Centre, most of which operate under the relevant licencing laws and currently under the Covid restrictions. The subject site with its existing and proposed late night land use, is a normal activity associated with City Centre locations. The opening of a modest yard area to the rear of the restaurant is unlikely to make a material change to noise levels or the existing amenities of the immediate area.

7.5 The modest outdoor dining area will result in negligible material impact to the existing amenities of the area. The First Party appeal includes a Noise Management Plan and suggested amended wording relevant to the rear yard area. I have considered the Noise Management Plan, which is a non-technical document. It includes basic management and responsibility issues for the staff during the operational phase of the restaurant. The Plan advises the outdoor rear yard area to closed from 23:00 hours each day which is reflected in the wording as follows:

The outdoor garden area shall be closed to patrons from 23:00 to 12:00 seven days a week. The noise mitigation measures indicated in the 'Noise Management Plan' submitted to the Board shall be fully implemented.

Reason: In the interests of orderly development.

7.8 **Time Restrictions**

The hours of the operation of the restaurant shall be restricted to between 0700 hours and 2330 hours Monday to Sunday, unless otherwise authorised in a subsequent planning permission.

Reasons: In the interests of orderly development.

7.9 The site is located in the City Centre location, and it is not a residential area. The general neighbourhood character is mixed use commercial developments. Without sounding repetitive one must question restricting the hours of the permitted restaurant is reasonable having regard to case presented by the applicant on appeal where he states there is no basis for limiting the hours of the operation of the restaurant having regard to:

- The long-established restaurant/ takeaway use on the site;
- The City Centre location of the site;
- The General Business zoning associated with the subject site under the current Kilkenny City and Environs Development Plan;
- The adjoining commercial land uses;
- The relevant and appropriate licencing laws associated with bars and restaurants;
- The trading hours of similar businesses in the City Centre which have no opening hours restricted by their respective planning permissions (as demonstrated in Appendix A of the appeal documentation).

7.10 On the basis of the appeal submission, I consider the restricted opening hours of the premises are unjustifiable and inconsistent with the planning permissions for similar licensed premises in Kilkenny City. The sale of alcoholic drink is controlled by different laws. These laws include strict age limits and specific hours when alcoholic drink can be sold and is dependent upon the type of alcohol licence associated with the premises. On this basis I recommend a condition should be attached as follows:

The hours of the operation of the restaurant shall be in accordance with the relevant licencing and government restrictions..

Reasons: In the interests of orderly development.

7.11 **Appropriate Assessment**

Having regard to the nature of minor extension permitted development assessed under planning permission reference ABP 307372-20 which was screened for Appropriate Assessment, no appropriate assessment arise, and it is not considered

that the proposed development would 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 the Board grant planning permission subject to conditions.

9.0 Reasons and Considerations

Having regard to the established and permitted restaurant use on the site, the General Business zoning objective governing the site in the current development plan for the area, the City Centre location and mixed use neighbourhood character, the prevalence of similar land uses in the City Centre and their associated planning histories, it is considered that use of the rear yard area within prescribed time restrictions and removal of the time restrictions for the entire premises, would be in keeping with the proper planning and sustainable development of the area.

Condition No. 1

The outdoor garden area shall be closed to patrons from 23:00 to 12:00 seven days a week and the noise mitigation measures indicated in the 'Noise Management Plan' submitted to the Board shall be fully implemented.

Reason: In the interests of orderly development.

Condition No. 2

The hours of the operation of the restaurant shall be in accordance with the relevant licencing and government restrictions.

Reasons: In the interests of orderly development.

Caryn Coogan
Planning Inspector

23/11/2021