



An
Bord
Pleanála

Inspector's Report

ABP-311940-21

Development	Permission for temporary retention of development for a period of two years for development. The development to be retained comprises a single storey takeaway coffee kiosk, (c.11m ²) and associated signage.
Location	Lands at Church of the Ascension of Our Lord, Hawthorns Road, Dublin 16.
Planning Authority	Dun Laoghaire Rathdown County Council.
Planning Authority Reg. Ref.	D21A/0824.
Applicant(s)	FIVE6MAX Coffee Limited.
Type of Application	Retention Permission.
Planning Authority Decision	Grant with conditions.
Type of Appeal	Third Party.
Appellant(s)	Frank Finnegan.
Observer(s)	Observers.
Date of Site Inspection	21 st day of January, 2022.
Inspector	Patricia-Marie Young.

Contents

1.0 Site Location and Description	3
2.0 Proposed Development	4
3.0 Planning Authority Decision	5
3.1. Decision	5
3.2. Planning Authority Reports	5
3.4. Prescribed Bodies	7
3.5. Third Party Observations	7
4.0 Planning History.....	7
5.0 Policy & Context	7
5.1. Development Plan.....	7
5.3. EIA Screening	8
6.0 The Appeal	8
6.1. Grounds of Appeal	8
6.2. Applicant Response	8
6.3. Planning Authority Response	8
6.4. Observations	9
6.5. Further Responses.....	9
7.0 Assessment.....	9
8.0 Appropriate Assessment.....	13
9.0 Recommendation.....	14
10.0 Reasons and Considerations	14
11.0 Conditions	14

1.0 Site Location and Description

- 1.1. The appeal site has a given site area of 0.45ha and it appears to comprise an area located on the western boundary of the curtilage of the lands associated with the Balally Parish Pastoral Centre and the Church of the Ascension of Our Lord, in Dublin 16. The parcel of land associated with Balally Parish Pastoral Centre and the Church of the Ascension of Our Lord has frontage onto Hawthorns Road on its northern side boundary and Maples Road on its southern side with its westernmost end of its southern boundary adjoining Cedar Road and Maples Road intersection. It is at this corner of this parcel land that the subject kiosk is situated. To the south east of the kiosk and on the opposite side of Cedar Road and Maples Road is Balally Shopping Centre.
- 1.2. The subject single storey timber in construction kiosk is located to the north of the Cedar Road and Maples Road intersection just over 100m by road to the north west of Blackthorn Drive's intersection with Drummartin Link Road. It is accessed via a pedestrian sized opening that is situated towards the southern end of the western boundary of said parcel of land associated with Balally Parish Pastoral Centre and the Church of the Ascension of Our Lord. It contains a hatch opening onto the laneway that runs alongside the western boundary of the said parcel of land. There is a door opening on the eastern side of the kiosk. Both were closed at the time of inspection and the serving of coffee was from the hatch on the kiosk's southern elevation. To the immediate east of the kiosk the land falls sharply away and a number of steps provide access to the Balally Parish Pastoral Centre building that lies between the kiosk, a soft landscaped garden area, the Church of the Ascension of Our Lord and a car parking area.
- 1.3. To the south and occupying the south westernmost portion of the said parcel of land are a number of benches and seats that were in use at the time of inspection by patrons of the coffee kiosk.
- 1.4. On the western most end of the southern boundary the word coffee has been painted on the timber fence boundary in large letters and similarly on the western boundary the applicant's signage logo has been painted. I also observed a number of free-standing A-frame signage board associated with the Kiosk operations.

- 1.5. The surrounding area to the immediate north is predominantly residential in function, to the east, west and south east the immediate setting has a mixed-use character.

2.0 Proposed Development

- 2.1. By way of the subject application permission for temporary retention of development for a period of two years for a development described as consisting of the retention of a single storey takeaway coffee kiosk with a given c.11m² floor area, its associated signage and works. According to the submitted drawings the kiosk structure has a given maximum height of 2375m² and external dimensions of 3.7m by 3.14m. It contains two serving hatches with one opening onto the adjoining lane (west) and the principal serving hatch opening on its southern side addressing what is described as a garden area with the accompanying Site Plan showing four benches of seating.
- 2.2. This application is accompanied by a letter of consent from the landowner and a covering letter which includes the following comments:
- The applicant is a small local coffee business established 1 year ago due to the co-founder's respective work closing as a direct result of the Covid-19 pandemic.
 - Since its inception the applicant's intention was to create a hub for the community to come, have a chat and have a high-quality coffee.
 - It is contended that in May 2020 the Balally Pastoral Centre invited them to open a dedicated kiosk in their rear garden that was open in 2013.
 - The kiosk opened in June 2020 and the applicants were unaware of the need for planning permission until enforcement action was taken by the Council.
 - On foot of enforcement this temporary retention permission application has been made.
 - The kiosk is a moveable timber structure and is similar in scale to a garden shed.
 - Services to and from the Kiosk are connected directly with the Pastoral Centre.
 - An overview of the waste arrangements is provided.
 - An overview of the advertising is provided.

- Historically the lane was subject to anti-social behaviour and the placement of the kiosk has increased footfall along it.
- The applicants are open to closing the hatch that opens onto the lane. It is considered that this hatch creates additional passive surveillance and therefore adds to the safety of the lane.

3.0 Planning Authority Decision

3.1. Decision

- 3.1.1. On the 5th day of November, 2021, the Planning Authority granted retention permission for the development set out in Section 2.1 above subject to six number mainly standard conditions. Of particular relevance to this appeal case are the requirements of Condition No. 2. This sets out that permission is granted for a period of 2 years from the date of the Managers Order and states that: “*the structure shall be removed on the expiration of this period and the site reinstated unless, prior to the end of the period, permission for its retention shall have been granted by the Planning Authority or An Bord Pleanala on appeal*”. The stated reason reads: “in the interest of visual amenity”. I also note to the Board the following conditions:

Condition No. 3: Sets out requirements for waste storage.

Condition No. 4: Requires the provision of cycle parking spaces.

Condition No. 6: Restricts the signage and advertisement structures.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Planning Officers report is the basis of the Planning Authority’s decision. It includes the following comments:

- Enforcement Action relating to the placement of the subject coffee shed and the erection of signage under ENF 15821 is noted.
- It is noted that a tea room/café is open for consideration on lands zoned Objective A and it is considered that the principle of the development due to it not giving rise

to any undue undesirable effects would be consistent with the proper planning and sustainable development as provided for under the said land use zoning objective.

- The retention of the coffee kiosk would not give rise to any adverse effect on the commercial environment of Balally Shopping Centre.
- The temporary nature of the signage is reflective of the use being sought.
- There is good availability of car parking on-street and off-street within the vicinity.
- The location of the kiosk is sufficient distance away from Cedar Road such that it would not give rise to a traffic hazard.
- This development would not give rise to high volume of traffic.
- Due to the limited size and scale of the subject development, the health measures in place due to the Covid 19 pandemic and associated restrictions on dine-in capabilities, the temporary arrangement of the takeaway kiosk is acceptable within this setting.
- Concern is raised in relation to the ground associated with this development.
- No AA or EIAR issues arise.

3.3. Other Technical Reports

3.3.1. **Municipal Services Department:** No objection.

3.3.2. **Transportation Planning:** No objection subject to a condition that reads:

“The applicant shall provide the minimum 2 no. long stay (staff) secure covered cycle spaces and 2 no. short stay (visitor) cycle parking spaces in accordance with the minimum requirements of Dún Laoghaire-Rathdown County Council’s Standards for Cycle Parking and associated cycling facilities for New Developments (January 2018).”

3.3.3. **Environmental Health Officer:** No objection, subject to the provision of suitable waste facilities for storage, collection, segregation of waste for recycling and recovery. In addition, subject to the waste facilities being pest proof, secure and located in an area so as not to give rise to nuisance.

3.4. Prescribed Bodies

3.4.1. None.

3.5. Third Party Observations

3.5.1. During the course of the Planning Authority's determination of this application one Third Party submission was received. It gives rise to the same substantive planning concerns to that set out in their appeal submission.

4.0 Planning History

4.1. Site and Setting

4.1.1. No recent and/or relevant previous planning application or appeal at this site or within its setting.

5.0 Policy & Context

5.1. Development Plan

5.1.1. The site is Zoned 'A': *"to protect and/or improve residential amenity"* in the Dun Laoghaire Rathdown County Development Plan 2016-2022. The lands to the west, north and east are similarly zoned. The lands associated with the Balally Shopping Centre are zoned 'NC'. The stated land use zoning objective for 'NC' lands is: *"to protect, provide for and-or improve mixed-use neighbourhood centre facilities"*

5.1.2. Section 8.3.2 of the Development Plan deals with the matter of Transitional Zonal Areas and it states that: *"it is important to avoid abrupt transitions in scale and use in the boundary areas of adjoining land use zones"*. It further states that: *"in dealing with development proposals in these contiguous transitional zonal areas, it is necessary to avoid developments which would be detrimental to the amenities of the more environmentally sensitive zone"*.

5.2. Natural Heritage Designations

5.2.1. The site is not located within the setting of a designated Natura 2000 site. There are no Natura sites within the immediate or wider setting. The nearest Natura sites are

South Dublin Bay & River Tolka Estuary SPA (Site Code: 004024) and South Dublin Bay SAC (Site Code: 000210) which are located c4.1km to the north east of the site.

5.3. EIA Screening

- 5.3.1. Having regard to the modest nature and scale of the development comprising a retention permission for a coffee kiosk and its associated works, the site's location in a built-up serviced area, lateral separation distance between the site and the nearest Natura 2000 site and the intervening heavily developed urban landscape in between, the need for environmental impact assessment can be excluded at preliminary examination and a screening determination is not required.

6.0 The Appeal

6.1. Grounds of Appeal

- 6.1.1. The grounds of this Third-Party Appeal can be summarised as follows:

- The applicant is subject to an agreement with the owner of the subject site which allows for its tenancy of the subject lands for a period which expires on the 14th day of August, 2022. It is therefore disingenuous of the applicant company to seek permission for a time for which it knows it has no legal entitlement.
- It is requests that the Board change the requirements of Condition No. 2 so that the temporary duration of permission to a period no longer than the 14th day of August, 2022.
- The Planning Authority's procedural handling of this application is flawed.
- Reference is made to the appellants submission to the Planning Authority.

6.2. Applicant Response

- 6.2.1. None received.

6.3. Planning Authority Response

- 6.3.1. The Planning Authority Response can be summarised as follows:

- The grounds of appeal do not raise any new matter which would justify a change in attitude to the proposed development.

6.4. **Observations**

6.4.1. None.

6.5. **Further Responses**

6.5.1. None.

7.0 **Assessment**

7.1. *Preliminary Comment*

7.1.1. Having inspected the site and its setting, having had regard to the information presented by the parties to this appeal and all relevant planning provisions, I consider the key planning appeal case are those raised by the Third-Party Appellant in their appeal submission to the Board. I therefore proposed to deal with these matters under the following broad headings:

- Procedural Concerns
- Civil Matters
- Principle of the Development

7.1.2. The matter of 'Appropriate Assessment' also requires examination.

7.1.3. Prior to commencing my assessment, I note that this application relates to retention of development and retention of use. The Development Management Guidelines for Planning Authorities, 2007, make it clear that, in dealing with applications for retention, they must be considered "*as with any other application*". This is in accordance with planning law and with proper planning practice, in that all applications for retention should be assessed on the same basis as would apply if the development in question were proposed.

7.1.4. Therefore, no account can, or should, be taken of the fact that the development has already taken place.

7.1.5. Further, the current Development Plan indicates where a development is neither listed as being 'permitted in principle' or 'not permitted' it should be assessed in terms of its contribution towards the achievement of the applicable zoning objective, the vision for the zoning objective and its compliance as well as consistency with the policies and objectives it contains as a land use which the applicable Development Plan indicates is one which is open for consideration.

7.2. Procedural Concerns

7.2.1. The appellant in their grounds of appeal submission raises concerns in relation to the Planning Authority's handling of this application during its determination with them. They argue that the details provided are insufficient in their nature to comply with the relevant Planning and Development Regulations, 2001, as amended, which sets out the requirements for making a valid application.

7.2.2. The Planning Authority in their response to the Board make no comments in relation to the procedural concerns raised by the appellant in their appeal submission to the Board.

7.2.3. I am cognisant that it is the Planning Authority's remit to validate planning applications and the applicant has made this application with the consent of the landowner to do so with the redline area clearly relating to the legal interest of the subject landowner. With the Site Plan clearly setting out the location of the kiosk on the landowner's parcel of land as well as indicating access from the public domain, seating through to waste storage.

7.2.4. The details provided do not however clearly illustrate the advertisement and general signage that has been provided by the applicants. Notwithstanding, this matter is one that could be dealt with by way of an appropriately worded condition in the event of a grant of retention for the development sought.

7.2.5. The Board does not have an ombudsman type role on such matters, and I consider that the information contained with this application together with the photographs taken during my site inspection are adequate to allow the Board to make a determination on this application.

7.2.6. I also consider that in these circumstances I consider that subject to the provisions of Section 34(13) of the *Planning & Development Act, 2000*, as amended, the appeal before the Board relates to a valid planning application.

7.3. **Civil Matters**

7.3.1. The appellant in this case raises concerns in relation to the duration of lease between the applicant and the landowners with this lease ending prior to the 2-year duration for which retention permission is sought under this application, i.e., the 14th day of August, 2022. They request that the Board amend Condition No. 2 of the grant of temporary grant of retention permission to cease on this date.

7.3.2. In the current instance, I consider that it is not necessary or appropriate for the Board to investigate the bone fides of the lease contract and its duration that has been entered into between the applicant and the landowner of the subject site. As said the landowner has provided consent for them to have made this application and with the description of development clearly seeking it is for a temporary period of two years.

7.3.3. I also refer to Section 34(13) of the Planning and Development Act, 2000 as amended. It indicates that “*a person shall not be entitled solely by reason of a permission or approval under this section to carry out a development*” and that any temporary grant of retention permission would not in itself confer any right over private property.

7.3.4. In these circumstances I consider that the Board has no statutory power to adjudicate upon the matters relating to, lease contracts and ownership of property raised in the grounds of appeal. These matters constitute civil matters that can only be resolved by agreement between the parties or in the civil courts. The Development Management Guidelines make this clear with it stating under Section 5.13 that the: “*planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land*” and that: “*these are ultimately matters for resolution by the court*”.

7.3.5. Based on the above, I do not consider the civil concerns raised by the appellant are reasonable basis upon which to amend Condition No. 2 of the Councils Managers Order.

7.4. **Principle of Development**

7.4.1. This appeal site is zoned under the Dun Laoghaire Rathdown County Development Plan, 2016-2022, as Objective A with the stated land use objective for lands subject

to this zoning is: *“to protect and/or improve residential amenity”*. Café type land uses are open for consideration on such lands.

- 7.4.2. In relation to open for consideration uses Section 8.3.4 of the Development Plan states that these: *“are uses which may be permitted where the Planning Authority is satisfied that the proposed development would be compatible with the overall policies and objectives for the zone, would not have undesirable effects and would otherwise be consistent with the proper planning and sustainable development of the area”*.
- 7.4.3. In this regard I concur with the Planning Authority that this proposal is modest in its development and use nature as well as scale. It is setback from sensitive land uses forming part of the grounds of Balally Parish Pastoral Centre, it is setback from Iqra Islamic School and Queen of Angels Primary School which lies on the opposite side of the lane, and it is set back from the residential properties that align the northern and southern side of Hawthorns Road to the north. The lateral separation distance between the nearest property rear boundary and the placement of the kiosk is c45m.
- 7.4.4. The placement of the kiosk which has a given floor space of 11m² is placed up to the western boundary of the parcel of lands that make up the Balally Parish Pastoral Centre and the Church of the Ascension of Our Lord with a hatch on this and its southern elevation providing for passive surveillance over this lane which provides connection to the Balally Shopping Centre which is situated on the opposite side of Maples Road and Cedar Road. As well as Blackthorn Drive which is situated to the south east.
- 7.4.5. The structure is also modest in its height of 2375mm, and its external finishes marry in with the picket fencing that bounds the subject parcel of land at this location.
- 7.4.6. At the time of inspection there was no music or any other noise nuisance arising from the site.
- 7.4.7. I observed a small seating area for patrons which was located in the south westernmost corner of the site. With this consisting of four modest park type timber benches and seating.
- 7.4.8. To the rear of the kiosk there was a random placement of waste storage bins. These are not highly visible from the public domain as their height is below that of the timber fence boundary but a more organised waste storage arrangement with mitigation

measures for pests and odours would ensure that the management of waste arising from this kiosk is such that it does not give rise to any significant nuisance.

7.4.9. I also observed that the majority of patrons both their coffee on the go and were on foot generally heading in the direction of Blackthorn Drive.

7.4.10. I am also cognisant in land use zoning terms the site setting is one that could be described as having a transitional character with the neighbouring Balally Shopping Centre zoned 'NC' – Neighbour Centre where this type of land use is listed as a permissible land use.

7.4.11. Overall, I concur with the Planning Authority that the retention development sought under this application for a temporary period of 2 years is consistent with the proper planning and sustainable development of the area, due to no significant residential, visual, or other adverse amenity arising from it. This however is subject to safeguards that are mainly standard in nature for this type of land use. With the safeguards including provisions for waste, control of signage, the provision of staff and visitor parking recommended by way of condition by the Planning Authority's Transportation Planning Section through to the appropriate reinstatement of the site after the temporary duration of permission has ceased and where no extension has been permitted for this use to continue being achieved by way of appropriately worded conditions. I also concur with the Planning Authority that there is ample car parking in the vicinity of the site to meet any car parking arising from this modest in nature and scale development. This I observed to be the case during my inspection, and I also observed during this time the patrons arrived on foot.

8.0 Appropriate Assessment

8.1. Having regard to the modest nature and scale of the development sought under this application, the brownfield and serviced nature of the site's setting, the significant lateral separation distance between the site and the nearest European site, the lack of any connectivity between the two together with the nature of the receiving environment, 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.

9.0 Recommendation

- 9.1. I recommend that retention permission be **granted** for the temporary duration of 2 years sought under the public notice description of development.

10.0 Reasons and Considerations

- 10.1. Having regard to the transitional character of the site setting, the separation distance between the development sought and the nearest dwelling, the design, scale and layout of the development and to the provisions of the Dún Laoghaire-Rathdown County Council Development Plan, 2016-2022, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the visual amenities of the area or the character of the streetscape and would not seriously injure the amenities of nearby dwellings or would it give rise to any traffic hazard or road safety issue. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

11.0 Conditions

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application and as amended by the further plans and particulars, 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 within three months of the date of the Decision Order and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

2. This permission shall be for a period of 2-years from the date of the Decision Order. The structure shall be removed on the expiration of this period and the site reinstated, including boundary treatments, unless prior to the end of this date, permission for retention shall have been granted by the Planning Authority or An Bord Pleanála on appeal.

Reason: In the interests of visual amenity and in the interests of orderly development.

3. (a) Suitable and sufficient refuse facilities and screening must be provided for the storage of waste material. Waste material must be correctly segregated, recycled and disposed of under waste management legislation. Such storage facilities must be pest proof and secure. They shall be provided in a manner that does not give rise to nuisance, by way of smell, noise, attraction of vermin or otherwise.

(b) Within three months of this order the applicant shall agree in writing the provision of screening and controlled access of the refuse facilities serving the coffee kiosk with the Planning Authority.

Reason: In the interests of public health and the proper planning and sustainable development of the area.

4. The applicant shall provide the 2-no. long stay (Staff) secure cycle parking spaces and 2 no. short stay (visitor) cycle parking spaces in accordance with the minimum requirements of Dún Laoghaire-Rathdown County Council's Standards for Cycle Parking and associated Cycling Facilities for New Development (January 2018).

Reason: In the interest of public health and proper planning and sustainable development of the area.

5. Notwithstanding the exempted development provisions of the Planning and Development Regulations, 2001, or any statutory provision amending or replacing them, any change to the display panel, including any increase in the number of posters to be displayed, the scrolling mechanism or the internal/external illumination, shall be the subject of a separate application for permission to the planning authority.

Reason: To enable the planning authority to assess the impacts of any such changes on the amenities of the area.

6. The noise level shall not exceed 55 dB(A) rated sound level (that is, corrected sound level for a tonal or impulsive component) at the nearest Hawthorns Road property to the north and from the Balally Pastoral Care Centre/Church of the Ascension of Our Lord between 0800 and 2000 hours, Monday to Friday inclusive, and shall not exceed 45 dB(A) at any other time. Procedures for the purpose of determining compliance with this limit shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

Reason: To protect the amenities of property in the vicinity of the site.

Patricia-Marie Young
Planning Inspector

31st day of January, 2022.