



An
Bord
Pleanála

Inspector's Report

ABP-312753-22

Development	S254 street furniture licence.
Location	POG FRO-YO, Unit 2, Main Street, Malahide, Co. Dublin.
Planning Authority	Fingal County Council.
Planning Authority Reg. Ref.	SFL/007/22.
Applicant(s)	POG FRO-YO Ltd.
Type of Application	S254 Licence.
Planning Authority Decision	Grant.
Type of Appeal	Third Party.
Appellant(s)	Jonathan Law.
Observer(s)	None.
Date of Site Inspection	4 th day of April, 2022.
Inspector	Patricia-Marie Young.

Contents

1.0 Site Location and Description	3
2.0 Proposed Development	3
3.0 Planning Authority Decision	3
3.1. Decision	3
3.2. Planning Authority Reports	4
3.3. Prescribed Bodies	4
3.4. Third Party Observations	4
4.0 Planning History.....	4
5.0 Policy Context.....	5
5.1. National Planning Policy Provisions	5
5.2. Local Planning Policy Provisions.....	5
5.3. Natural Heritage Designations	7
5.4. EIA Screening	8
6.0 The Appeal	8
6.1. Grounds of Appeal	8
6.2. Applicant Response	10
6.3. Planning Authority Response	10
7.0 Assessment	10
8.0 Recommendation.....	22
9.0 Reasons and Considerations.....	22

1.0 Site Location and Description

- 1.1. The appeal site is located on the southern side of Main Street (R106), c48m to the west of Main Streets intersection with New Street and Church Street (R124) and c25m to the east of its intersection with Old Street, in the heart of Malahide, in north County Dublin. The site relates to an 4m² area of paved pedestrian footpath in public ownership for the outdoor dining use by POG FRO-YO, a restaurant that occupies the Unit 2, Main Street. The paved pedestrian footpath at this point is generous in its width, it has a slightly northerly slope and there is a telephone kiosk situated to the north east. Running parallel with the kerb and continuing is a loading bay. Main Street Malahide is a busy thoroughfare accommodating two-way traffic and containing a variety of retail through to commercial offer predominantly occupying the ground floor level of premises.

2.0 Proposed Development

- 2.1. By way of this application the applicant seeks approval for a Section 254 Licence. With this relating to a rectangular shaped 4m² (Note: with given dimensions of 1m – width and 4m – length) of the public domain immediately to the front of Unit 2's principal façade. Within this space three tables all with given measurements of 600mm by 600mm; 6 chairs and 1 fixed canopy with given measurements of 2.2m height and 1.5m width.

3.0 Planning Authority Decision

3.1. Decision

- 3.1.1. On the 4th day of January, 2022, the Planning Authority **granted** a Section 254 Licence, for a temporary duration of time expiring on the 31st day of May, 2022, subject to a minimum footpath clearance of 1.8m and subject to specific as well as general licence conditions pertaining to this licence as attached. Of note the licence is described as relating to 3 tables, 6 chairs, 1 parasol and related to a 4m² area (Note 4m by 1m). The permitted hours of the licence are stated as 11:00hrs to 21:00hrs.

3.2. Planning Authority Reports

3.2.1. Planning Reports

None.

3.2.2. Other Technical Reports

None.

3.3. Prescribed Bodies

3.3.1. None.

3.4. Third Party Observations

3.4.1. None.

4.0 Planning History

4.1. Site

- 4.1.1. **Licence No. SFCOVID1948** permitted a 4m² in area with a width of 1m and length of 4m outdoor dining area which within this area accommodated 3 Tables and 6 Chairs. The duration of this licence commenced on the 7th day of June, 2021 and expired on the 31st day of August, 2021. It was subject to a maximum occupancy of 12 persons and subject to a minimum footpath clearance of 1.8m and standard licence conditions.

4.2. Other

- 4.2.1. **ABP-312763-22 (P.A. Ref. No. SFL/016/22):** There is a concurrent appeal case with the Board for a Section 254 Furniture Licence for KOA restaurant which is located at the first-floor level of No. 4 Main Street, c8.5m to the east of the site, and relates to 9m² of the public domain in the immediate vicinity of its ground floor level access onto the public domain of Main Street.
- 4.2.2. There are also several concurrent Section 254 Furniture Licence appeal cases for the town centre for the Board for determination.

5.0 Policy Context

5.1. National Planning Policy Provisions

- **Project Ireland 2040 – National Planning Framework, 2018.** This framework includes National Policy Objective 17 which reads as follows: “*enhance, integrate and protect the special physical, social, economic and cultural value of built heritage assets through appropriate and sensitive use now and for future generations*”. Section 1.3 sets out a number of shared goals including but not limited to enhanced amenities and heritage.
- **Architectural Heritage Protection Guidelines for Planning Authorities, 2004, as amended.** These include guidelines for the protection of structures, or parts of structures and the preservation of the character of architectural conservation areas.

5.2. Local Planning Policy Provisions

- 5.2.1. The Fingal Development Plan, 2017 to 2023, is applicable and under which the site forms part of a larger parcel of land zoned with the stated objective to “*protect and enhance the special physical and social character of town and district centres and provide and/or improve urban facilities*” (‘TC’ – Town and District Centre).

The vision for TC zoned land is to: “*maintain and build on the accessibility, vitality, and viability of the existing Urban Centres in the County. Develop and consolidate these Centres with an appropriate mix of commercial, recreational, cultural, leisure and residential uses, and to enhance and develop the urban fabric of these Centres in accordance with the principles of urban design, conservation, and sustainable development. Retail provision will be in accordance with the County Retail Strategy, enhance and develop the existing urban fabric, emphasise urban conservation, and ensure priority for public transport, pedestrians and cyclists while minimising the impact of private car based traffic. In order to deliver this vision and to provide a framework for sustainable development, Urban Centre Strategies will be prepared for centres in accordance with the Urban Fingal Chapter objectives*”.

Chapter 4 of the Development Plan states in relation to Malahide that: *“there is a strong built heritage with four Architectural Conservation Areas (ACAs) in the town”*. The site lies within one of its designated Architectural Conservation Area (ACA).

Chapter 10 of the Development Plan defines ACAs as: *“a place, area, group of structures or townscape that is of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest or value, or contributes to the appreciation of Protected Structures”*. It further states that: *“ACAs could encompass, for example, a terrace of houses, a whole streetscape, town centre or a small cluster of structures associated with a specific building such as a mill or country house. Most structures in an ACA are important in the context of their contribution to the streetscape or character of an area and so the protection status generally relates only to the exterior of the buildings or the streetscape, except for Protected Structures within ACAs where the protection extends to the interior and curtilage of these properties. Any works that would have a material effect on the special character of an ACA require planning permission”*.

Table 12.11 of the Development Plan which provides direction for proposed developments within ACA's is relevant in that it indicates that changes and development within ACAs should be conducted in a manner sympathetic to its distinctive character and so the following should guide proposed new works within them in relation to public realm works:

- Any new street furniture: *“shall be of a high quality and consistent design with consideration given to their siting and location. Street furniture should be kept to a minimum and any redundant modern street furniture removed”*.
- *“In instances where the Council does not have direct control over street furniture, it will engage with the relevant agency/agencies, where possible to encourage them to comply with the Architectural Conservation Area policies”*.
- Works to improve the public realm shall respect and enhance the essential character of the ACA.

Objective DM158 of the Development Plan is also relevant as it requires: *“all planning applications for works in Architectural Conservation Area to have regard to the information outlined in Table 12.11”*.

Further, Chapter 12 of the Development Plan also states that: *“advertisements and signage on Protected Structures or on the exterior of structures within an Architectural Conservation Areas (ACAs) require planning permission (apart from very limited circumstances)”*.

Chapter 3 of the Development Plan deals with public realm and under Section 3.3 it notes that it has a key role to play and is a key component of a successful place. It states: *“the public realm acts as a stage upon which the life of the County is played out”* and that *“Fingal County Council is dedicated to enhancing and improving the unique built and natural heritage that the County boasts and to provide well designed sustainable places”*. It further defines public realm as *“those parts of the County where people can gain unrestricted access for the purpose of passing through, meeting, visiting and enjoying. It is where we come together as a community, not merely a place for functional movement”*. It further sets out that public realm strategies will be developed for different areas throughout the County including Malahide with such strategies seeking to strengthen and enhance the attributes of a town or village which contributes to the distinctive physical and social character of the area.

Chapter 3 provides the agreed Mission Statement for the Malahide Public Realm. With this mission statement reading in part as follows: *“the Council wish to engage with the citizens, businesses and visitors of Malahide through an informal, open and flexible process to develop a Public Realm Strategy for the town”*. It indicates that this is the starting point. Of relevance Objective PM26 of the Development Plan states that the Council shall: *“prepare Public Realm Strategies, where appropriate, liaising closely with residents and other relevant stakeholders”*.

5.3. Natural Heritage Designations

- 5.3.1. The nearest designated European sites are located in northerly from the site. This includes Malahide Estuary SPA (Site Code: 004025) which is located c257m to the north east at its nearest point and Malahide Estuary SAC (Site Code: 000205) which is located c273m at its nearest point to the north west.

5.4. EIA Screening

5.4.1. The development is not a class of development for which an EIA is required.

6.0 The Appeal

6.1. Grounds of Appeal

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

- The procedural handling of this licence, a licence which relates to an Architectural Conservation Area and Special Area of Conservation, by the Planning Authority is objected to on the basis of it denied public participation and prior to the decision being made.
- The Planning Authority handling of this licence is contrary to the principles of natural justice, in that decisions should not be made by a participant. In this case there is a conflict of interest due to the licence relating to public land. Alongside this and other licences within the centre of Malahide were explicitly granted and renewed to implement schemes devised by them.
- The Planning Authority approached and incentivised businesses within central Malahide to participate in the pedestrianisation of New Street.
- Objections that were made at the time of application setting out that these works were contrary to a wide range of specific provisions set out in the Development Plan, in particular in relation to Malahide's Architectural Conservation Area and Public Realm Strategy were not considered.
- Similar types of development in this area have been refused.
- The implementation of the licenses that were granted were marked by continuous non-compliance with the conditions of the licences. In terms of times of use, failure to remove furniture and apparatus from the street, music playing on street, failure to display valid licence, use of the footpaths and extended areas beyond that permitted under the licence. These non-compliances have been subject to numerous complaints by affected residents to the Planning Authority and Gardai.

- The issuing of the licence for this and other premises has facilitated unauthorised uses that contravened local planning provisions.
- The change of these roads to become outdoor hospitality areas is subject to legal proceedings (Byrne – v – Fingal Co Co).
- The Planning Authority has allowed the carrying out of major changes to the use of central Malahide without public participation, statutory consultation, planning permission, right of appeal or assessment of impacts on heritage, ecology, flooding, or residential amenity.
- None of these licences have been assessed in terms of effects on European sites or Architectural Heritage.
- No in-combination examination of these licences has been carried out.
- These licences have cumulative resulted in restriction and daily removal of road access from residences, businesses, and public institutions; the rearrangement of car parking; the consumption of takeaways in the public domain; the provision of additional fixtures and fittings outside of what approved under the licences; the re-location of a taxi-rank; through to the re-routing of Dublin bus services.
- The licences have had other adverse in-combination effects including: impacting on the capacity of the local road network; increased traffic congestion; increased endangerment of the public by reason of a traffic hazard and obstruction or road users; increased anti-social behaviour; injury to the amenities of the area; depreciation of property in their vicinity; endangerment to health and safety of occupants of properties in their vicinity; increased risk of flooding; material interference with the appearance and character of the areas designated for protection; contravention of conditions attached to grants of permission and the diminishment of architectural conservation area.
- These licences contravene the policies and objectives of the Development.
- The outdoor dining seriously injures the residential amenity of properties in their vicinity, by way of additional traffic nuisance, loss of privacy, noise, increased anti-social behaviour, littering and the like. On this point it is noted that there is a significant residential population living in the town centre of Malahide.

- These developments have diminished the character of the Architectural Conservation Area by way of obscuring structures through to the use of non-sympathetic additions that include additional advertising.
- No impact assessment has been carried out on the cumulative impact these developments have on traffic in Malahide's town centre. The Board is sought by way of this application and the other concurrent appeals in relation to S254 Licences to determine these as a comprehensive scheme.
- Concerns are raised in relation to the costs that have been burdened by the appellant in taking this and the other concurrent appeal cases in relation to a suite of S254 Licences granted at the same time by the Planning Authority for Malahide town centre.
- The granting of a licence for this development is objected to.

6.2. Applicant Response

6.2.1. None received.

6.3. Planning Authority Response

6.3.1. None received.

7.0 Assessment

7.1. This appeal is made under the provisions of Section 254 of the Planning and Development Act, 2000, as amended. This section of the Act relates to licensing of appliances, cables, signs, street furniture and other items on, under, over or along a public road. In this regard, Subsection 5 of the Act states that in consideration of an application for licence under 254 a planning authority, or Board on appeal, shall have regard to the following:

- a) The proper planning and sustainable development of the area,
- b) Any relevant provisions of the development plan, or local area plan,
- c) The number and location of existing appliances, apparatuses, or structures, on under, over or along the public road, and

d) The convenience and safety of road uses including pedestrians.

- 7.2. By way of this application the applicant seeks a licence for an outdoor dining area to be retained on a rectangular shaped 4m² (Note: with given dimensions of 1m – width and 4m – length) of the public domain immediately to the front of Unit 2 No. 1 Malahide's principal façade. Within this space three tables all with given measurements of 600mm by 600m; 6 chairs and 1 fixed canopy with given measurements of 2.2m height and 1.5m width.
- 7.3. There appears from the limited information provided by the Planning Authority with this application that they had no objection to the applicant seeking approval for an outdoor dining area, subject to safeguards of limiting its duration through to it not encroaching onto 1.8m width of the pedestrian footpath at this location (Note: this is summarised under Section 3.1.1 of this report above). With the Planning Authority having previously permitted such an application prior under Licence No. SFCOVID1948 for the same area and for a maximum allowed occupancy of 6 persons.
- 7.4. The planning history of the site in relation to outdoor dining on the public realm indicates that this 4m² outdoor dining area arose during the recent pandemic. During this time amendments were made to planning legislative provisions. With these amendments including planning measures that aimed at supporting Economic Recovery and Business Activity in urban areas, particularly aimed at supporting hospitality, restaurants, and tourism due to the impact that Covid restrictions were having on their future viability.
- 7.5. In order to maintain a level of viability restaurants like this, with Unit 2 of No. 1 Main Street, Malahide, having no access to a private outdoor amenity spaces for patrons for dining and/or the safe operations of takeaway, subject to caveats and subject to appropriate conditions being in place, were permitted to avail of measures enacted by the Government to provide as in the applicants case outdoor dining on the public domain adjoining their premises.
- 7.6. This exemption was provided for under the amendments made to the Planning and Development Act, 2000, as amended, (Note: S.I. 210 of 2021) and amendments to the Planning and Development Regulations, 2001, as amended (Note: 208 of 2021).
- 7.7. In tandem, the scope of amendments also made provision for amendments to street furniture fees under S.I. 209 of 2021 and as part of Circular PL06/2021 guidance was

provided on the consideration of Section 254 licences to facilitate outdoor dining. It is of relevance that these provisions expire on the 31st day of May, 2022, as did the licence which is currently is subject to this appeal case.

- 7.8. In relation to a letter received by the Planning Authority from the applicant on the 23rd day of December, 2021, sought the renewal of the licence up to the 31st day of May, 2022. Recent observations of the site shows that the outdoor seating area is *in situ* after this date and at the time this report has been prepared.
- 7.9. In relation to the planning history relating to Unit 2, planning permission was permitted under P.A. F01A/0874 for the change of use from a delicatessen to a coffee shop. This was subject to conditions and according to available information this application did not include planning permission or retention for outdoor dining on the public domain associated with the coffee shop on the adjoining stretch of Main Street. The conditions attached to the grant of permission included Condition No. 1 that required this development to be carried out in accordance with plans, particulars, specifications and information lodged with the application in the interest of ensuring effective control be maintained. There has been no planning permission sought since in relation to this particular unit though it would appear from publicly available information that the coffee shop ceased operating from this unit in recent years but prior to this the public domain to the immediate front of this unit was in use for outdoor dining. With this continuing upon its change to use by the applicants as a restaurant. Against this context I consider that the appellants concern in relation to unauthorised development is not without basis. However, I am cognisant that enforcement falls under the remit of the Planning Authority to deal with as they see fit.
- 7.10. Of further note is Board decisions in relation to similar developments on Main Street. In this regard, I refer the Board to their decision in relation to appeal case ABP-305347-19 (P.A. Ref. No. F19A/0257) which related to a development that included but was not limited to the provision of an outdoor seating area with 20 seat positions at the same mixed use building No.s 32 to 36 Main Street, that Unit 2, is located. In this case the Board refused planning permission for the following stated reason and consideration:

“Having regard to the planning history of the site, the existing character and the prevailing pattern of adjoining commercial and residential development in the area,

and the lack of clarity regarding the functional and commercial links between the permitted restaurant/ancillary takeaway to the rear (ABP-302577-18) of 32-36 Main Street and the proposed development comprising a seating area located at a remove from the restaurant in an under-croft area leading to the street, the board cannot be satisfied on the basis of the information on the file that the operation and servicing of the proposed development would not seriously injure the visual and residential amenities of the area. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.”

This decision was made on the 11th day of February, 2020, and as such was considered under the same local planning provisions that are currently in place and relevant to this type of application.

- 7.11. In the wider setting of Malahide’s town centre, I note to the Board that on the 26th day of April, 2018, that they refused planning permission for a development described as essentially consisting of the retention of the enclosure and canopy constructed at the outdoor seating area (Note: ABP-300166-17/P.A. Ref. No. F17A/0504). The stated reason and consideration of refusal reads:

“Having regard to the planning history of the appeal site, the existing character and the prevailing pattern of development in the area, the visually-prominent site location within an Architectural Conservation Area and the objectives and provisions of the Fingal Development Plan 2017-2023, it is considered that the development for which retention is sought, by reason of its siting forward of the established building line, would form an obtrusive, dominant and discordant feature in the streetscape and would not respect or complement the character of the shopfront on site. Furthermore, the development for which retention is sought fails to enhance the character of the Architectural Conservation Area and Malahide village centre, would seriously injure the visual amenities of the area and would set an undesirable precedent for similar development. The development for which retention is sought would, therefore, be contrary to the proper planning and sustainable development of the area.”

- 7.12. At the time this decision was made the current Development Plan was also applicable.
- 7.13. Against this context I consider that there is precedent set by the Board for refusing *ad hoc* outdoor dining developments on the basis of them failing to enhance the character

of the ACA and Malahide town centre, adverse amenity impact both residential and visual through to undesirable precedent for similar developments.

- 7.14. Having regard to the site's town centre location, its established commercial uses and to the land use zoning objectives as well as vision of the Development Plan for Malahide's town centre there is general support for proposals to bring greater vibrancy and vitality to streetscape scene by way of creation of outdoor seating areas which has potential to positively contribute to the attractiveness and amenities of the area. Notwithstanding, such facilities are supported where there is no significant interference with pedestrian movement and traffic safety and having regard to the considerations of visual impact, impact on architectural heritage and impact on the amenities of the area.
- 7.15. Whilst I generally consider that there is sufficient width along the adjoining stretch of Main Street to the front of Unit No. 2 No. 1 Main Street to accommodate outdoor dining. Notwithstanding, this is subject to a qualitative design resolution that does not impede the free flow of users of the pedestrian footpath at this location but also that it demonstrates that it is of appropriate quality in terms of its design and materials that is respective of and harmonises with its Architectural Conservation Area streetscape scene.
- 7.16. The drawings and details submitted with this application do not demonstrate that this is the case in relation to the outdoor dining area sought.
- 7.17. I therefore consider permitting any continuation of outdoor dining at this location based on the information provided with this application alone would be contrary to Development Plan Objective DM158 that requires all planning applications for works in an Architectural Conservation Area to accord with Table 12.11 of the said plan.
- 7.18. In this regard, Table 12.11 of the Development Plan requires any new street furniture to be of a high quality and consistent design with consideration gives to their siting and location and that works to improve the public realm shall respect and enhance the essential character of the ACA.
- 7.19. The documentation provided with this application for a S254 licence is limited in the information it provides and does not support any qualitative use of tables, chairs, and canopy.

- 7.20. Further, the documentation provided provides no contextual relationship for the outdoor dining area in terms of its streetscape context. With this including no information showing how it would impact on the frontage of the commercial unit it relates to.
- 7.21. Moreover, during my inspection of the site and its setting there appears to be an *ad hoc* and qualitatively variable approach to street furniture within the vicinity of the streetscape scene. The outdoor dining area as proposed under this application has the potential to add to this lack of coherence, piecemeal and lack of qualitative approach for this type of development on what is an attractive, vibrant, and vital townscape centre. It also when taken together with the substantial canopy would obscure part of the principal façade of No.1 Main Street in a manner that would be at odds with the quality and pattern of development that characterises this streetscape scene. A streetscape scene whose period character and quality are afforded protection by way of its designation as an Architectural Conservation Area.
- 7.22. I also raise a planning context concern that not only would this proposal add to *ad hoc* and piecemeal streetscape clutter in this built heritage rich and visually attractive streetscape scene.
- 7.23. As such I raise a concern that if permitted it has the potential to be inconsistent with achieving a high-quality public realm for the town centre of Malahide and the Public Realm Strategy for Malahide which is advocated to be implemented under the current the Development Plan.
- 7.24. In my considered opinion in the absence of this Public Realm Strategy and taken together with the lack of demonstration that this outdoor dining area would positively contribute to the public realm without giving rise to unnecessary clutter to permit this application would be contrary to Objective PM27; Objective MALAHIDE 5 and Objective CH36 of the Development Plan.
- 7.25. In this regard I note that Objective PM27 of the Development Plan which states that the Council shall: “*enhance the visual amenity of existing town and village centres, minimising unnecessary clutter, and provide guidance on public realm design, including wirescape, shopfront design, street furniture and signage*”; Objective MALAHIDE 5 of the Development Plan states that the Council will: “*implement and progress the Public Realm Strategy for Malahide, including measures related to car-*

parking, in order to facilitate a vibrant retail and commercial and residential core”; and Objective CH36 which states: “sensitively design, locate and rationalise modern street furniture and elements”.

7.26. I therefore consider that this development is premature pending the adoption of the Public Realm Strategy for Malahide.

7.27. Conclusion:

7.27.1. Based on the above considerations I recommend to the Board that this Section 254 licence is refused and to permit it would be contrary to the proper planning as well as sustainable development of the area based on the concerns set out above.

7.28. Other Matters Arising

7.28.1. Appropriateness of Section 254:

Given the potential for adverse impact of the development sought under this licence to the ACA streetscape context and setting it forms part of it is my opinion that this development would be more appropriately dealt with under a planning application.

7.28.2. Adequacy of the Documentation:

I am of the view that the documentation submitted with this application are inadequate to make an informed decision on this Section 254 Licence.

On this matter I am cognisant that Section 254(3) of the Planning and Development Act, 2000, as amended, sets out that: *“a person applying for a licence under this section shall furnish to the planning authority such plans and other information concerning the position, design and capacity of the appliance, apparatus or structure as the authority may require”.*

Whilst I note that this is not raised as an issue by the Planning Authority in their determination of this licence application, I consider that given that this application will be determined by the Board at a time where the expanded exemptions for such developments have expired, should the Board be minded to grant permission for this application for a Section 254 licence for temporary or permanent duration I advise that the adequacy of documentation issue is first addressed given the built heritage and visual amenity sensitivity of the site setting.

This I consider is necessary and reasonable to allow the Board to make an informed decision in terms particularly of potential impact on the ACA; the visual amenities of the streetscape scene that is informed by an attractive, accessible and vibrant public realm; that the outdoor dining area is of a width along its entire length that maintains a minimum of 1.8m width public footpath; full details including materials of all structures to be placed on the public footpath; hours in which the outdoor dining would be in situ; whether any undue hinderance arises to adjoining property on what is a busy pedestrian domain through to that it accurately sets out its spatial and contextual relationship within its immediate streetscape scene of Main Street.

I also consider that such information is also necessary for clarity for making any informed decision and should any enforcement issue arise after such an application is permitted.

7.28.3. *Setting of Protected Structures:*

This streetscape scene contains a number of Protected Structures as well as period buildings that whilst not designated specifically as Protected Structures; notwithstanding, they positively contribute to visual setting in terms of its intrinsic character, qualities, and attributes. I observed that there is an evident absence of a coherent approach to street furniture and structures placed on the public realm. I also observed that there is a large variation in terms of quality of design through to materials and finishes used. In this context I consider that to permit this licence has the potential to add to the cumulative adverse impacts arising within the setting of Protected Structures and other ACA buildings not benefitting from specific protection but whose setting has also been eroded by inappropriate additions and insertions to their public realm setting.

7.28.4. *Nuisances and Anti-Social Behaviour:*

The appellant raises concerns in relation to the nuisances arising from the use of the public realm as extensions of restaurants, public houses, and the like. They contend that the nuisances that have arisen include increased incidents of anti-social behaviour. Together resulting in diminishment of the residential amenity for those who live within the centre of Malahide town.

I accept that there is potential for outdoor dining areas like that sought under this licence has the potential to give rise to a change in context that could if no reasonable

balance is reached could despite the town centre location diminish residential amenity by way of noise nuisance particularly into the evening and night time hours.

It would be standard practice that conditions that deal with noise, music, litter through to hours of operation is imposed where this is a concern.

On the matter of anti-social behaviour, I consider that this is generally a matter for the Gardai and also the operator of the restaurant premise granted such a licence. Notwithstanding, I also accept that planning can play a role in ensuring high quality public open spaces that include in their design, treatment, and maintenance consideration for lessening potential for anti-social behaviour.

7.28.5. *Material Contravention:*

As discussed in the assessment above this application as proposed does not demonstrate compliance with a number of the Development Plan objectives. Notwithstanding this conclusion, the development sought under this Section 254 licence is a type of development that is generally deemed to be acceptable in town centre locations like this subject to safeguards. Therefore, I do not concur with the appellant that to permit this application would materially contravenes the provisions of the Development Plan as is contended would be the case by the appellant.

7.28.6. *Traffic Safety:*

At this location there is ample width on the pedestrian footpath to accommodate the Planning Authority's required 1.8m minimum public footpath width free of obstruction. This outdoor dining area does not seek to incorporate any on-street car parking spaces and publicly provided pay and display demarcated on-street car parking/loading area separates runs parallel with the roadside kerb.

The town centre is a low-speed environment and contains ample road safety signs, public lighting, different surfacing with bollards also present in areas where pedestrians are more vulnerable.

There is no evidence provided to support that the outdoor dining space proposed under this application would give rise to any significant additional traffic inconvenience or other road safety issue for road users, including those using the adjoining stretch of pedestrian footpath that would support its refusal.

Notwithstanding this conclusion there is some merit to consider the cumulative increase in dining area from such developments in an area where car parking provision could be put under additional strain over and above its current circumstance.

7.28.7. Procedural:

I am cognisant that the appellant raises a number of procedural concerns in relation to the Planning Authority's handling of this application in their appeal submission. Notwithstanding, the Board does not have an ombudsman's role on such matters and as such it would not be appropriate for the Board who does not have any authority on such matters to pass comment on them.

7.28.8. Flooding:

The development sought under this application proposes no amendments to the ground levels and consists of structures that are easily moved into place during the hours of business operations of the restaurant. It is usual that these structures are removed outside of business hours from the public domain. Such structures and the use of the outdoor dining area itself would not give rise to any flooding issues nor would they exacerbate any flooding issues in this locality. Further the site lies outside of land indicated in the OPW Maps as being vulnerable to flooding and there is no record of a flood event at this location or within its immediate vicinity.

7.28.9. Conflict of Interest:

Section 254 of the Planning and Development Act, as amended, sets out provisions for Section 254 licences which are required for the placement of appliances, cables, signs, street furniture or other items on public roads. A common example is applications like that applied for under this application, i.e., the placement of tables, chairs, parasols, and other related structures related to facilitating outdoor dining outside of a restaurant on public roads which includes pedestrian footpaths they may contain.

Section 254(4) of the Act states inter alia that: *"a licence may be granted under this section by the Planning Authority for such period and upon such conditions as the authority may specify, including conditions in relation to location and design, and where in the opinion of the planning authority by reason of the increase or alteration of traffic on the road or of the widening of the road or of any improvement of or relating*

to the road, the appliance, apparatus or structure causes an obstruction or becomes dangerous, the authority may by notice in writing withdraw the licence and require the licensee to remove the appliance, apparatus or structure at his or her own expense."

In addition, the Act makes provision for oversight of these decisions by Planning Authority's by way of appeal to the Board by any person, in relation to the granting, refusing, withdrawing or continuation of a licence under this section or to the conditions specified by the planning authority for such a licence.

This is provided for under Section 254(6)(a) of the Act. Moreover, Section 254(b) of the Act provides that: "*where an appeal under this section is allowed, the Board shall give such directions with respect to the withdrawing, granting or altering of a licence under this section as may be appropriate, and the planning authority shall comply therewith*".

On this basis and having regard to the documentation on file I do not concur with the Appellant that there is a conflict in interest in the Planning Authority. Who in this incident case is the roads Authority for Main Street, in them making a determination on this application for a Section 254 Licence, given the legislative provisions for this type of development.

7.28.10. *Examination of this case alongside other concurrent S254 Licence appeals for the Town Centre of Malahide:*

Whilst I consider that there is merit in the Board having regard to the similar issues that arise from the applications noted by the Appellant in their appeal submission, I am also of the view that this appeal case should be considered on its individual merits given that it occupies a streetscape scene that is visually remote from the main concentration of licences which centre around New Street. In addition, this licence relates to a section of Malahide's town centre whose public domain attributes and intrinsic character are different. Through to the public realm being impacted by the outdoor dining sought under this application is also different to the majority of the other licence appeal cases where once on-street car parking spaces, road carriageways through to a cul-de-sac lane are the locations sought for the other concurrent licences that are raised as concern by the appellant.

What is appropriate for the Board to have regard to in relation to the significant number of S254 Licences applications determined by the Planning Authority in the town centre

of Malahide and now subject to Third Party Appeals is the potential for cumulative impact on this built heritage rich; highly vibrant in function as well as attractive town centre. Through to the consistency in approach in ensuring that such developments do not conflict with the positive enhance of this town centre's public realm in a manner that is consistent with the proper planning and sustainable development of the area, in particular having regards to the local planning policy provisions. The latter as said is provided for in the Development Plan by way of the preparation and implementation of a public realm strategy.

In addition, it would be appropriate for the Board to have regard to concurrent appeal case ABP-312763-22 which relates to a licence for an outdoor dining space for KOA restaurant at No. 4 Main Street which is situated c8.5m to the east of this site as part of its determination. This in my view shares similar planning considerations to this appeal site due to proximity on the same stretch of pedestrian footpath.

7.28.11. Advertising/Signage:

The drawings do not indicate that the design resolution of the outdoor dining area would include any advertising. Should the licence be granted and given that the Development Plan seeks to minimise visual clutter as well as visual diminishment of the streetscape scene from advertising, signage and the like this matter should be dealt with as part of the limitations placed on this development. This is reasonable to ensure that the site's ACA setting is not seriously injured by such insertions and that within this context advertising as well as signage is minimised.

7.28.12. External Lighting:

Should the Board be minded to grant this licence additional external lighting, save with prior agreement with the Planning Authority, should not be permitted in the interests of safeguarding residential and visual amenities of the area.

7.28.13. Financial Costs:

The financial burden of making this appeal case alongside the concurrent appeal cases relating to Section 254 Licences is not a matter that the Board can adjudicate upon as part of its *de novo* consideration of this case.

7.29. Appropriate Assessment

7.29.1. The nearest designated European sites are located in northerly from the site. This includes Malahide Estuary SPA (Site Code: 004025) which is located c257m to the north east at its nearest point and Malahide Estuary SAC (Site Code: 000205) which is located c273m at its nearest point to the north west. Having regard to the modest nature and scale of the development sought under this application which relates to on street furniture and associated structures and the nature of the receiving environment together with the separation distance to the nearest European site, no appropriate assessment issues arise, and it is not considered that the development sought under this application would be likely to have a significant effect individually or on combination with other plans or projects on a European site.

8.0 Recommendation

8.1. I recommend that a licence be **refused**.

9.0 Reasons and Considerations

1. Having regard to the provisions of Section 254 of the Planning & Development Act, 2000, (as amended); the Fingal County Development Plan, 2017 to 2023; the planning history of the site and its setting, the existing character and the prevailing pattern of development in the vicinity; the site location on Main Street which forms part of a designated Architectural Conservation Area with the site also forming part of the visual setting of a number of Protected Structures, it is considered that the development sought under this application has the potential to result in a piecemeal form of development that would not respect or complement with the character of its Architectural Conservation Area in a manner consistent with Table 12.11.

It would also be inconsistent in achieving a high quality public realm for the town centre of Malahide in a manner that would when taken together with the *ad hoc* placement of structures in this stretch of public footpath be inconsistent with Objective PM27 of the Development Plan which seeks to enhance the visual amenity of existing town and village centres by minimising unnecessary clutter, and seeks to provide guidance on public realm design which in turn is further added to in the case of ACA locations by the requirements of Table 12.11 which seeks street furniture qualitative design approach. In tandem, it would also be inconsistent with

Objective CH36 of the Development Plan which also requires sensitive in design, location through to rationalisation of street furniture.

Moreover, in the absence of the proposed Public Realm Strategy for Malahide this outdoor dining area is premature. The provision of such a strategy is provided for in the Development including under Objective MALAHIDE 5.

Furthermore, based on the information submitted with this application the Board which in itself fails to demonstrate that the development would not seriously injure the visual amenities of the area as a standalone outdoor dining area or cumulatively in combination with other such installations in the public realm. Nor does the information submitted with this application demonstrate that it would not give rise to any under deterioration of established levels of residential amenity for properties in its vicinity or that it would not give rise to any undue hinderance of adjoining commercial properties.

The development sought under this application would, if permitted, also set an undesirable precedent for similar developments.

On the basis of the above considerations, it would be inappropriate to consider this application under the provisions of Section 254 of the Planning and Development Act, 2000, as amended, due to the development sought having the potential to give rise to material adverse impact on the ACA it forms part of and the Protected Structures in its vicinity that it forms part of their visual setting.

For these reasons it is therefore considered that the proposed development would be contrary to the proper planning and sustainable development of the area.

Patricia-Marie Young
Planning Inspector
11th day of August, 2022.