



An  
Bord  
Pleanála

## Inspector's Report

### ABP-312757-22

---

<b>Development</b>	S254 street furniture licence.
<b>Location</b>	'Cape Greko', New Street, Malahide, Co. Dublin.
<b>Planning Authority</b>	Fingal County Council.
<b>Planning Authority Reg. Ref.</b>	SFL/009/22.
<b>Applicant</b>	Cape Greko.
<b>Type of Application</b>	S254 Licence.
<b>Planning Authority Decision</b>	Grant.
<b>Type of Appeal</b>	Third Party.
<b>Appellant(s)</b>	Jonathan Law.
<b>Observer(s)</b>	None.
<b>Date of Site Inspection</b>	4 <sup>th</sup> & 30 <sup>th</sup> day of April, 2022.
<b>Inspector</b>	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
4.0 Planning History.....	4
5.0 Policy Context.....	5
5.1. National Planning Policy Provisions .....	5
5.2. Local Planning Policy Provisions.....	6
5.3. Natural Heritage Designations .....	8
6.0 The Appeal .....	8
6.1. Grounds of Appeal .....	8
6.2. Applicant Response .....	11
6.3. Planning Authority Response .....	11
6.4. Observations .....	11
7.0 Assessment.....	11
8.0 Recommendation.....	25
9.0 Reasons and Considerations.....	25

## 1.0 Site Location and Description

1.1. This application for a Section 254 Licence relates to a restaurant called 'Cape Greko' which is located at Unit 1, New Street, c8m to the south of New Street's junction with 'The Strand', in the historic heart of Malahide town, in north County Dublin. This restaurant occupies part of the ground floor for access with the main restaurant located on the second floor of a modern two-storey building that has zero setback from the public domain of New Street. New Street accommodates a mixture of commercial land uses. Many of which offer various food and beverages with similar outdoor dining areas on the public domain of New Street.

## 2.0 Proposed Development

2.1. The applicant seeks to renew a S254 Licence for 'Cape Greko' restaurant. The licenced area as described under this application relates to a 12.5m<sup>2</sup> stated area (Note: 5m length and 2.5m width) on which 4 tables (Foldable Tables 600mm by 600mm), 10 chairs (Foldable black chairs), 2 parasols (1 black with given dimensions of 4m by 4m and 1 cream with given dimensions of 4m by 4m), 4 windbreakers (Green with given dimensions of 2.5m by 1.5m) and 2 heaters located on the public domain on the western side of New Street.

## 3.0 Planning Authority Decision

### 3.1. Decision

3.1.1. **P.A. Ref. No. SFL/009/22:** The Planning Authority **granted** a Section 254 Licence, for a temporary duration of time commencing on the 1<sup>st</sup> day of January and expiring on the 31<sup>st</sup> 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 4 tables, 10 chairs, 2 parasols, 4 windbreakers and 2 heaters in an area given as 12.5m<sup>2</sup> area (Note: 5m by 2.5m). 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.
- 3.2.3. **Prescribed Bodies:** None.
- 3.2.4. **Third Party Observations:** None.

## 4.0 Planning History

### 4.1. Site: Relevant Planning History

- 4.1.1. **P.A. Ref. No. SFCOVID1937/2:** This S254 Licence permitted a 12.5m<sup>2</sup> (2.5m by 5m) outdoor dining area accommodating 4 Tables, 10 Chairs, Awnings, Coverings, 2 Parasols, Shades, 4 Windbreakers and 2 Heaters. The duration of this licence commenced on the 1<sup>st</sup> day of September, 2021 and expired on the 31<sup>st</sup> day of December, 2021. It was subject to a minimum footpath clearance of 1.8m and standard licence conditions.
- 4.1.2. **P.A. Ref. No. SFCOVID1937:** This S254 Licence permitted a 12.5m<sup>2</sup> (2.5m by 5m) outdoor dining area accommodating 4 Tables and 10 Chairs. The duration of this licence commenced on the 7<sup>th</sup> day of June, 2021 and expired on the 31<sup>st</sup> day of August, 2021. It was subject to a minimum footpath clearance of 1.8m and standard licence conditions and a maximum allowed occupancy of 10.

### 4.2. Setting: Concurrent S254 Licences with the Board for New Street.

- 4.2.1. **ABP-312759-22 (P.A. Ref. No. SFL/014/22)** - 1 Rosses Lane, New Street, Malahide, Co. Dublin (Note: c29m to the south east).
- 4.2.2. **ABP-312755-22 (P.A. Ref. No. SFL/021/22)** - 7 New Street, Malahide, Co. Dublin (Note: c33m to the south).
- 4.2.3. **ABP-312754-22 (P.A. Ref. No. SFL/005/22)** – 5, 6 & 7 New Street, Malahide, Co. Dublin (Note: c58m to the south east).
- 4.2.4. **ABP-312761-22 (P.A. Ref. No. SFL/015/22)** – ‘A Do’, Rosses Lane, New Street, Malahide, Co. Dublin (Note: c42m to the south east).

4.2.5. **ABP-312656-22 (P.A. Ref. No. SFL/019/22)** – ‘Fowlers’, 12 New Street, Malahide, Co. Dublin (Note: c79m to the south).

4.2.6. **ABP-312760-22 (P.A. Ref. No. SFL/009/22)** – ‘Al Fresco’, New Street, Malahide, Co. Dublin (Note: c71m to the south).

#### 4.3. **Relevant Board Decisions on New Street**

4.3.1. **ABP-300166-17 (P.A. Ref. No. F17A/0504):** On appeal to the Board permission was **refused** for a development described as the retention of the enclosure and canopy constructed at the outdoor seating area. The development for which retention was sought consisted of removable glazed side and front panels and frames, fabric roof structure and frame enclosing the outdoor seating area facing The Green. The enclosure and canopy provide protection for the outdoor seating area off the café at Donnybrook Fair, Malahide, for the following stated reasons and considerations:

*“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.”*

Decision date: 26<sup>th</sup> day of April, 2018.

## 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 c128m to the north east of the subject site at its nearest point and Malahide Estuary SAC (Site Code: 000205) which is located c170m to the north east of the subject site at its nearest point.

## **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 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 cumulatively 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.

## 6.3. Planning Authority Response

6.3.1. None.

## 6.4. Observations

6.4.1. None.

## 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 12.5m<sup>2</sup> area of the public domain on the western side of New Street. Within this rectangular shaped outdoor dining area 4 tables, 10 chairs, 2 parasols, 4 windbreakers and 2 heaters are proposed. The public domain on which the outdoor dining area would be positioned adjoins the kerbside of the pedestrian footpath that 'Cape Greko' restaurant opens onto and also relates to the area that lies alongside the kerbside that stretches in a southerly direction to the front of a retail unit called 'Robyn's Nest'.

- 7.3. Historically the public domain to which this outdoor dining area relates contained double yellow lines with its southern most part forming part of an on-street car parking space.
- 7.4. There appears from the information provided by the Planning Authority with this licence application that they had no objection to the applicant seeking approval for an outdoor dining area, subject to safeguards of limiting it to a temporary grant, limiting the hours of duration through to the outdoor dining area not encroaching onto 1.8m width of the adjoining pedestrian footpath (Note: this is summarised under Section 3.1.1 of this report above). The precedence for this outdoor dining area relating to the subject premises was established under Licence No. SFCOVID1937/2.
- 7.5. Prior to Licence No. SFCOVID1937/2 an examination of the planning history of the site and its setting as part of Malahide's town centre would suggest that the outdoor dining spaces like that pertaining to the subject premises arose during the Covid pandemic. Historically photographs of the subject restaurant that appears to be operational prior to the Covid pandemic show no formal outdoor dining area present on the public domain associated with the applicant's restaurant use.
- 7.6. During the period of the Covid pandemic amendments were made to various planning legislative provisions, including those relating to exempted development. With these amendments including other planning measures aimed at supporting economic recovery and business activity in urban areas. With specific amendments aimed at supporting hospitality, restaurants, and tourism due to the impact that Covid restrictions were having on the viability of such enterprises with the view of supporting and ensuring as far as practical under the difficulty of these times their on-going future viability.
- 7.7. In order to maintain a level of viability restaurants like 'Cape Greko', having no access to private outdoor amenity space for patrons for dining and/or the safe operations of their takeaway offer, subject to caveats and subject to appropriate conditions being in place, were permitted to avail of measures enacted by the Government to provide outdoor dining. Including on the public domain adjoining their premises with the exemptions of such developments having been temporarily amended with less stringent exempted development conditions and limitations applicable to them.

- 7.8. The relevant exemption development provision was provided for under the amendments made to the Planning and Development Act, 2000, as amended, (Note: S.I. 210 of 2021) and the amendments made to the Planning and Development Regulations, 2001, as amended (Note: 208 of 2021).
- 7.9. In tandem, the scope of amendments to planning legislation 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 for Planning Authorities on the matter of consideration of Section 254 licences to facilitate outdoor dining.
- 7.10. Alongside the measures set out above it is of note that the Planning Authority, in compliance with Section 38 of the Road Traffic Act, 1994, as amended, and Section 95 of the Road Traffic Act, 1961, as amended, gave public notice of its intention that it had prepared a proposal for the pedestrianisation of New Street from June of 2021. The public notice pertaining to the same reads that: *“it is proposed to reinstate the pedestrian zone in the centre of the village which will reintroduce the open air, safe space for people to enjoy the heart of the village once again”* and *“that this will permit the safe use of outdoor space for outdoor dining, commercial and safe social activity during Covid 19”*.
- 7.11. Prior to this traffic on New Street was similarly also temporarily banned in June, 2020 until September, 2020. The reason for this was to facilitate outdoor dining during the Covid 19 pandemic.
- 7.12. Historically however, New Street accommodated two traffic lanes, on-street car parking, on-street loading/unloading through to a taxi pick-up and drop off facilities with the pedestrian footpath being tree lined and containing utilities such as light standards, bins and the like.
- 7.13. In most recent times, publicly available information on New Street from Fingal County Council website clearly sets out that it is their intention to permanently pedestrianize this public road. It also suggests that there is public consultation currently ongoing. With this having commenced on the 9<sup>th</sup> day of July, 2022 and running until the end of August, 2022.
- 7.14. In terms of the Planning Authority’s vision for New Street, it is indicated that it is their intention to provide an expertly designed public area that complements the Village

Green and enhances the heart of Malahide town centre for the benefit of residents, businesses and visitors alike.

- 7.15. In recent times also a Third-Party High Court challenge of the pedestrianisation of New Street by the Planning Authority was refused an application for an injunction to reverse the pedestrianisation of New Street in Malahide. The judicial review proceedings related to this High Court case appears to not yet be concluded.
- 7.16. The overall measures put in place in relation to safe outdoor dining which facilitated social distanced outdoor dining in line with Government policy and NPHE recommendations in place during the Covid Pandemic period appears to have been supported by the Council by way of temporary pedestrianisation of New Street. With many food and beverage enterprises on this street not having the benefit of any private outdoor amenity space in order to trade during this time. Therefore, these measures together provided an opportunity for these local businesses to operate during the difficult and unique economic trading times that Covid brought. Alongside providing what the Council described was a 'Pedestrian Friendly', 'Age Friendly', 'Family Friendly' and 'Cyclist Friendly Zone' in the heart of Malahide town centre during these times.
- 7.17. Avail information suggests that these measures helped to maintain business operating along New Street in a different manner during what was highly challenging times for businesses and in turn maintaining a level of vibrancy as well as vitality for town centres like Malahide with the hope of businesses making it through to the endemic and times thereafter.
- 7.18. Also, with the wide array of food, beverage and entertainment offer on New Street this offered a unique opportunity for this historic streetscape scene to have a change in its function. This was by way of limiting vehicle access and prioritising the public domain for the use of these businesses whilst still allowing pedestrian through to cyclist access and connectivity in a safe environment that prioritised this alongside outdoor dining areas for business to operate from.
- 7.19. It would appear that the overall strategy for New Street, though temporary in nature, and though also contested, ensured many businesses survived through Covid but also allowed businesses along this street to ensure the vitality and vibrancy of this street as a place for safe dining and a destination in its own right for this.

- 7.20. At the time this report has been prepared and at the point the Board makes their decision on this case these special planning legislative provisions that provides exemptions for outdoor dining are expired. But it would appear that there are still many of the food and beverage businesses along New Street providing *ad hoc* outdoor dining facilities for their patrons on the public domain.
- 7.21. In addition, as noted above in this assessment above that it is the current circumstance that in the case of New Street that the Planning Authority are in the public consultation period of permanent pedestrianisation measures for New Street. This process by them in my view is consistent with the Development Plan which under Chapter 3 sets out that the Planning Authority: “*is dedicated to enhancing and improving the unique built and natural heritage that the County boasts and to provide well designed sustainable places*”. This is reiterated in Objective PM26 of the Development Plan states.
- 7.22. Against this planning context it is my considered opinion that to permit the outdoor dining space within the public domain of New Street associated with this licence would be premature. It would also give rise to an *ad hoc* precedent for outdoor dining in the centre of Malahide town where limited information has been provided to demonstrate that the design resolution of this space would be a qualitative and appropriate response to its streetscape scene as part of an Architectural Conservation Area (Malahide Historic Core). This is despite the subject premises relating to a restaurant that is in a modern building and located on a section of New Street that has a more diluted character in terms of the presence of period buildings and associated features. Notwithstanding the site forms part of an urbanscape whose built heritage is afforded protection from inappropriate developments by way of its ACA designation.
- 7.23. Of concern, the Development Plan in a manner consistent with planning legislation clearly sets out that any works that would have a material effect on the special character of an ACA requires planning permission.
- 7.24. In addition, Table 12.11 of the Development Plan sets out a guide to proposed works within the public realm of ACA’s including that any new street furniture: “*shall be of a high quality and consistent design with consideration give to their siting and location*”.

- 7.25. Of general note it is a requirement of Objective DM158 of the Development Plan that: “*all planning applications for works in Architectural Conservation Area to have regard to the information outlined in Table 12.11*”.
- 7.26. It is my considered opinion that the outdoor dining area as proposed under this licence, if permitted, would add to the cumulative erosion and diminishment of this attractive period Architectural Conservation Area streetscape scene by way of the dilution of the public realm by similar *ad hoc* insertions that lack consistency as well as quality in their overall design resolution. Alongside, the applicant has failed to demonstrate that the various structures proposed for such outdoor dining area would be qualitative and consistent with other high-quality insertions in the public domain of this ACA.
- 7.27. On this basis I question that given the potential of the outdoor dining area sought under this licence application to have a material adverse impact on its ACA visual amenities and setting the appropriateness of a S254 licence for considering the planning merits and demerits of this development.
- 7.28. In relation to planning precedent for outdoor dining in New Street, as set out in Section 4 of this report above, the Board refused of permission under ABP-300166-17 for the retention of the enclosure and canopy constructed at the outdoor seating area. This particular appeal case related to Donnybrook Fair premises located within the visual curtilage of subject site, i.e., it is located on the opposite side of New Street c15m at its nearest point.
- 7.29. In this appeal case the Board considered that the outdoor dining component due to 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.
- 7.30. The Board also considered that the development for which retention was sought would fail to enhance the character of the Architectural Conservation Area and Malahide village centre; it would seriously injure the visual amenities of the area; and it would set an undesirable precedent for similar development.
- 7.31. On this basis the Board concluded that this development would be contrary to the proper planning and sustainable development of the area.



- 7.32. Given the proximity of the subject site to the Donnybrook Fair premises, the fact that the outdoor dining area would form part of this premises wider New Street visual setting and that the Donnybrook Fair also operates from a building that is not of any particular architectural merit being a more recent addition to this streetscape scene, I consider that it is not unreasonable to conclude that this licence gives rise to similar concerns to those raised by the Board in its determination of appeal case ABP-300166-17.
- 7.33. In relation to planning precedent of relevance in the wider town centre vicinity I note to the Board that under appeal case ABP-305347-19 they refused permission for an outdoor seating area with 20 seat positions at No. 32 to 36 Main Street on the basis that they could not be satisfied that the operation and servicing of the proposed development would not seriously injure the visual and residential amenities of the area.
- 7.34. Whilst 32 to 36 Main Street also related to an ACA town centre setting, notwithstanding I consider this subject premises to be remote and not part of the visual setting of the subject premises. I also consider that Main Street is a different site context with its own unique set of factors that require consideration. With these ranging from but not being limited to its physical as well as spatial function and characteristics; land use pattern; the nature of the public domain through to proximity of the site to Protected Structures.
- 7.35. Further, unlike New Street, Main Street was not subject to any temporary pedestrianisation scheme during the Covid Pandemic and during these endemic times. Nor is there any evidence to suggest that the Planning Authority at this point in time have any specific plans for its pedestrianisation or any significant modifications to its public realm.
- 7.36. It is likely in my view that as one of the principal streets and thorough fares of Malahide town that consistency in treatment of the public realm. Including temporary and/or permanent insertions like outdoor dining areas will in time be achieved through the adoption of the proposed public realm strategy which should provide a coherent approach for such additions in order for the character of this highly attractive period town centre with a collection of period buildings and features of merit to enhance and not detract from the visual quality and character.

- 7.37. 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.
- 7.38. 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”*.
- 7.39. I therefore consider that a grant of this licence would be premature pending the adoption of the Public Realm Strategy for Malahide town centre. This is despite the town centre location and zoning of the subject public domain that would be impacted through to the established pattern of land uses which could be described as being defined at ground floor level by a variety of food and beverage offers that subject to safeguards a level of outdoor dining could add positively to the vibrancy and vitality of its streetscape scene. Notwithstanding, this is subject to safeguards including those set out in the Development Plan which clearly sets out guidance and requires that such facilities not giving rise to any significant interference with visual and built heritage amenities. Through to that they do not give rise to adverse impacts on pedestrian movement or any adverse traffic safety issues.
- 7.40. I also accept that in the context of New Street town centre location and zoning through to the established pattern of land uses which could be described as being largely defined at ground floor level by a variety of food and beverage offers that subject to safeguards a level of outdoor dining could add positively to the vibrancy and vitality of its streetscape scene. Notwithstanding, this is subject to safeguards including those set out in the Development Plan which clearly sets out guidance and requires that such facilities not giving rise to any significant interference with visual and built

heritage amenities. Through to that they do not give rise to adverse impacts on pedestrian movement or any adverse traffic safety issues.

- 7.41. I have already raised concerns in terms of the outdoor dining area sought under this licence on the visual amenity and the ACA streetscape setting the site forms part of.
- 7.42. In relation to the matters of pedestrian and traffic safety the presence of outdoor areas on the public domain, I consider that this development has the potential to give rise not only to obstruction of the free flow of users of the pedestrian footpath due to customers and staff moving from the shopfront to it via the pedestrian footpath.
- 7.43. With this concern added to the fact that the applicant's restaurant would have an increased capacity to cater for dining by its patrons. With this application seeking seating for a stated 10 persons in addition to the unspecified in-door dining capacity.
- 7.44. As such not only would there be an intensification of use; the nature, scale and extent of the outdoor dining arrangement would in my view give rise to additional movements over the adjoining stretch of pedestrian footpath that separates the shopfront of the subject premises from the proposed outdoor dining area by customers and staff. The direction of movement would be in a general east west direction. Whereas the pedestrian footpath has a north south orientation which historically determined the predominant direction of pedestrian movements along it. This footpath also contains a number of items placed by the applicants on it.
- 7.45. In addition, the placement of the outdoor space relative to the retail unit of the 'Robyn's Nest' has the potential to obstruct customers of this adjoining premises due to the outdoor dining area's location being situated alongside the kerbside stretch of footpath adjoining it. As access to the 'Café Greko' and Shopfront is limited on the western side of New Street due to the restaurant operating at first floor level. As a result, the direction of customer and staff movements are likely to be more oblique across the adjoining stretch of footpath with greater potential for obstructing general pedestrian movements and customers access as well as egress to this adjoining retail unit.
- 7.46. The placement of the outdoor dining area also results encroachment and loss of on-street car parking in the public domain. As such it has the potential to impact on loading and deliveries to both 'Cape Greko' and 'Robyn's Nest' as well as a loss of publicly provided on street car parking at a location where there is significant demand for such spaces.

- 7.47. The additional dining capacity of the restaurant also places a strain on remaining public on-street car parking with Table 12.8 of the Development Plan requiring 1 car parking space per 15m<sup>2</sup> gross floor area.
- 7.48. Of additional note 1 bicycle space is also required per 200m<sup>2</sup> gross floor area. There are bicycle spaces present in the public realm of New Street, but it is unclear what the overall gross floor area of this café is and whether cumulatively there is sufficient bicycle space provisions to absorb and meet the cumulative needs of the recent expansion of outdoor dining within the town centre of Malahide.
- 7.49. In the absence of a properly informed traffic impact assessment and in the absence of a high quality as well as expertly designed public realm strategy for how this is to be achieved on New Street. Together with an expertly informed assessment of the impact that any public domain changes to New Street that curtails through to limits vehicle movements. It is not possible in my view in the absence of such information to make adequate and well-informed decision that no adverse impacts would arise on pedestrian movements through to that no traffic safety issues would arise from this development alone and/or in-combination with other similar developments.
- 7.50. Moreover, pedestrianisation of New Street would also require consideration of pedestrian and traffic movement as a whole through the town centre of Malahide given the central location of New Street. Alongside how busy this town is in terms of its public domain footpath, roads, parking, through to loading facilities. The latter is a recognised fact though like any other town centre during the Covid pandemic would have experienced a reduction in all levels of through traffic due to the array of restrictions that were put in place during this time.
- 7.51. I am therefore not convinced that the information as provided with this application and that which is publicly available is sufficient in its own right to support that the outdoor dining area would not give rise to any undue pedestrian and/or traffic road safety issues.
- 7.52. On this basis to permit the licence, even subject to strict safeguards, including for a temporary duration would give rise to piecemeal and uncoordinated development.
- 7.53. In terms of residential amenity impact and impact on other businesses in New Street there is credence to the appellants concerns that permitting this outdoor dining area, even subject to safeguards, could give rise to diminishment of established residential

amenity, either alone or in-combination with other such applications. This concern is not unreasonable in my view given the expansion of outdoor dining area on New Street alongside the fact that Malahide town centre also contains within its modest confines established residential developments. Against this context there is potential for residential properties within the vicinity of these outdoor dining areas to have their established residential amenities diminished by way of associated nuisances arising from outdoor dining areas. Including but not limited to blocked access to premises by emergency service, noise, litter, vibrations, additional light overspill, and the like. With this concern added to by the fact that the main hours of opening of this establishment is Monday to Friday 5pm to 10pm; Saturday 12:30pm to 12am and Sundays 12:30pm to 10pm.

7.54. Therefore, in the absence of a high quality expertly designed and expertly informed public realm strategy for the pedestrianisation of New Street which ideally would be informed in part by consideration of how to mitigate adverse impact on property owners of New Street. And as such seek to achieve a reasonable balance between the pedestrianisation and protection of established amenities from serious diminishment of amenity. I am not satisfied based on the information on file and that publicly available that despite the town centre location and town centre zoning of the site as well as setting that the outdoor dining area sought under this licence would not add to the cumulative adverse impact of established residential amenity of properties in the immediate vicinity, like residential, that are sensitive to change.

7.55. In conclusion, based on the above consideration, it is my considered opinion that the outdoor dining area as sought under this application would be contrary to the proper planning and sustainable development of the town centre of Malahide and should be refused.

#### 7.56. **Other Matters Arising**

7.56.1. ***Adequacy of the Documentation:*** While I am of the view that the determination of the outdoor dining area by way of a S254 licence is not appropriate for the reasons and considerations set out in my assessment above. Notwithstanding, the Board may reach different conclusions. Should they do so 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 through to the lack of demonstration by the applicant that they have the necessary right and/or consents in place to carry out such a development at this location.

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 it does not interfere or cause undue obstruction to other users of the cul-de-sac lane; full details including materials of all structures to be placed on the public footpath through to that it accurately sets out its spatial and contextual relationship within its immediate streetscape scene of New 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.

7.56.2. **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, 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 contravene the provisions of the Development Plan.

- 7.56.3. **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.
- 7.56.4. **Enforcement:** In relation to the issue of alleged ongoing non-compliance planning legislation and the manner in which the Planning Authority have dealt with enforcement issues arising from outdoor dining areas as a whole within the town centre of Malahide, this matter is raised by the appellant as a concern. On this matter I note that the Board does not have a role in enforcement. In this respect, I note the content of Section 10.1 of the Development Management Guidelines, 2007, which provides that enforcement of planning control is the responsibility of the Planning Authority.
- 7.56.5. **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.
- 7.56.6. **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 New Street, in them making a determination on this application for a Section 254 Licence, given the legislative provisions for this type of development.

7.56.7. **Advertising/Signage:** The information submitted with this application does not indicate that the design resolution of the outdoor dining area would include any advertising or particular signage. Notwithstanding, should a licence be granted and given the local planning context that the Development Plan seeks to minimise visual clutter as well as visual diminishment of the streetscape scene from advertising, signage and the like. I consider that this matter should be dealt with as part of the limitations placed on this licence. This is reasonable and appropriate in my view 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.

7.56.8. **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.

7.56.9. **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 decide upon as part of its *de novo* consideration of this case.



## 7.57. **Appropriate Assessment**

7.57.1. The nearest designated European sites are located in northerly from the site. The nearest designated European sites are located in northerly from the site. This includes Malahide Estuary SPA (Site Code: 004025) which is located c128m to the north east of the subject site at its nearest point and Malahide Estuary SAC (Site Code: 000205) which is located c170m to the north east of the subject site at its nearest point. 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 permission 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 absence of a public realm strategy for Malahide Town Centre; the current on-going public consultation in relation to the pedestrianisation of New Street; the lack of comprehensive and expertly informed assessments of the potential impacts such pedestrianisation would have on New Street and the public domain of Malahide's town centre; the lack of such documents to be carried out to the requirements of the appropriate authorities, it is considered that the development would be premature and it would give rise to uncoordinated piecemeal development that would seriously injure the amenities of property in the vicinity by reason of obstruction of access through to diminishment of established amenities by way of noise and other associated nuisances.

Moreover, this development in itself and in combination with other similar development by reason of their nature, scale, extent, *ad hoc* and variable design quality, would materially affect the character of the Architectural Conservation Area New Street form's part and in turn would seriously injure the visual amenities of the area.

Furthermore, in the absence of a coherent public realm response to the pedestrianisation of New Street and a co-ordinated plan to manage traffic related issues arising from the same the proposed development has the potential to endanger public safety by reason of traffic hazard and could result in conflict with other road users, including pedestrians and cyclists.

---

Patricia-Marie Young  
Inspector

11<sup>th</sup> day of August, 2022.