



An
Bord
Pleanála

Inspector's Report

ABP-312762-22

Development	S254 street furniture licence.
Location	Church Road, Malahide, Co. Dublin.
Planning Authority	Fingal County Council.
Planning Authority Reg. Ref.	SFL/013/22.
Applicant(s)	Scotch Bonnet.
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	4
3.1. Decision	4
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.....	5
5.3. Natural Heritage Designations	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.....	11
8.0 Recommendation.....	22
9.0 Reasons and Considerations.....	23

1.0 Site Location and Description

- 1.1. The subject site is located on the north western corner of the Church Road and Saint Margaret Avenue junction, c76m to the south of Church Roads junction with 'The Mall' and New Street, in the town centre of Malahide, in County Dublin. It contains a modest single and part two storey building which is in use as a restaurant called the 'Scotch Bonnet – Grill House and Pizzeria'. It is located at a point where the town centre land uses of Malahide's town centre transitions into being predominantly residential in function and character.
- 1.2. There is a modest semi-private railed in open space on the southern and eastern side of the site. In this area there are provisions for outdoor dining. Adjoining the pedestrian footpath that runs along the eastern boundary of the site there is an outdoor dining enclosure which also accommodates outdoor dining in what appears to have been up to recently a disabled car parking bay.
- 1.3. Double yellow lines bound the roadside edge at the corner of Church Street and Saint Margaret Avenue. With the adjoining land to the west along and bounding Saint Margaret Avenue being predominantly residential in function and character.
- 1.4. The adjoining stretch of Church Street is a busy two-way carriageway with publicly provided car parking aligning either side of the street. In addition, there are a significant number of Protected Structures to the south and south east of the subject premises. Church Road also has a sylvan character due to it being aligned by mature trees.

2.0 Proposed Development

- 2.1. By way of this application the applicant is seeking approval for a Section 254 Licence. With this comprising of a licence to place and maintain 4 Tables; 16/18 Chairs; 1 Awning; 2 Parasols and 2 Windbreakers in an area given as 12.6m² and having the given dimensions of 6m by 2.1m. The submitted drawings indicate that the spaces the outdoor dining relates is a 'Parklet' ; 'Garden No. 1' and 'Garden No. 2'.

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, commencing on the 11th day of February, 2022, and 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 a 18m² area as well as 5 tables, 12 chairs, 2 parasols and relating to a stated area of 18m² (Note: (9m by 2m). In addition, the daily hours of operation of the licence are specified as being permitted during the hours of 11.00hrs to 21.00hrs (Note: Licence No. SFL/013/2022). (Note: The street furniture permitted under this licence is different to that applied for in the application for the licence).

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. **Licence No. SFCOVID1955/2** permitted a 18m² in area with a width of 2m and length of 9m outdoor dining area which within this area accommodated 4 Tables, 16 Chairs, 0 Awnings, 0 Coverings and 2 Parasols. The duration of this licence commenced on the 1st day of September, 2021, and expired on the 31st day of December, 2021. It was subject to a minimum footpath clearance of 1.8m and standard licence conditions. The specified daily hours of the licence were from 11.00hrs to 21.00hrs.
- 4.1.2. **Licence No. SFCOVID1955** permitted a 12.6m² in area with a width of 2m and length of 6m outdoor dining area which within this area accommodated 4 Tables and 16. 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 18 persons and subject to a minimum footpath clearance of 1.8m and standard licence conditions. The specified daily hours of the licence were from 09.00hrs to 21.00hrs.

- 4.1.3. **P.A. Ref No. F18A/0229:** On the 26th day of June, 2018, the Planning Authority **granted** permission for the placement of an awning to the southern gable side of the subject premises.

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 give 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)*”.

Section 10.3 of the Development Plan is of relevance given the proximity of the subject premises to a several designated Protected Structures.

Objectives CH20 and CH21 of the Development Plan are relevant. Objective CH20 states that the Planning Authority will: “*ensure that any development, modification, alteration or extension affecting a Protected Structure and/or its setting is sensitively sited and designed, is compatible with the special character, and is appropriate in terms of the proposed, scale, mass, height, density, layout, materials, impact on architectural or historic features, and junction with the existing Protected Structure*”; and, Objective CH21 indicates that the Planning Authority will seek to conserve the integrity of any complex of adjoining buildings, designed views or vistas.

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 283m to the north at its nearest point and Malahide Estuary SAC (Site Code: 000205) which is located 290m at its nearest point to the north.

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.

6.3. Planning Authority Response

6.3.1. 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. During the recent pandemic 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.
- 7.3. In order to maintain a level of viability restaurants like this, 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 applicant's case outdoor dining on the public domain adjoining their premises. As well as the areas described as 'Garden No. 1' and 'Garden No. 2' modest areas located between the building line of the subject premises and the public domain of Church Road and Saint Margaret's Avenue.
- 7.4. 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).
- 7.5. 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.

- 7.6. By way of this application the applicant seeks approval for a Section 254 Licence to place and maintain 4 Tables; 16/18 Chairs; 1 Awning; 2 Parasols and 2 Windbreakers in an area given as 12.6m² and having the given dimensions of 6m by 2.1m. The submitted drawings indicate that the spaces the outdoor dining relates is a 'Parklet' ; 'Garden No. 1' and 'Garden No. 2'. It would appear that the parklet is situated over an on-street disabled/mobility impaired space.
- 7.7. 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). Alongside the omission of various items sought under the applicant's licence to them as well as increasing the size of the outdoor dining area to 18m². A size that is 5.4m² larger than the 12.6m² area indicated in the application for this licence. The documentation provided by the Planning Authority with this appeal case provides no explanation as to why these changes were made and how the 18m² area was derived.
- 7.8. I note that the planning history of the site in relation to outdoor dining and as set out in Section 4.1 of this report above permitted varying in sizes outdoor dining area and varying array of street furniture.
- 7.9. Of further note under P.A. Ref. No. F18A/0229, the Planning Authority granted permission subject to conditions for the placement of an awning to the gable side of the subject premises (Note: Decision Date – 02/06/2018). The drawings submitted with this application show the awning on the southern side of the premises and no tables through to chairs within the space or within the areas which are indicated under this application as 'Garden No. 1' and 'Garden No. 2'. It shows persons standing in underneath the awning and in proximity to the railing.
- 7.10. Condition No. 1 of this grant of permission required that this development be carried out in its entirety in accordance with the plans, particulars and specifications lodged with the application in the interests of ensuring that the development was carried out in accordance with the permission and to ensure that effective control be maintained.

- 7.11. In addition, Condition No. 2 of this grant of permission required in part more qualitative materials through to it did not permit logos or emblems in the interest of the proper planning and sustainable development of the area.
- 7.12. There are no other relevant planning permissions relating to the site and considering the deviation between what is on site, what has been permitted at the subject site, through what is being sought under this licence I consider that there is merit in the appellants concerns in relation to unauthorised development and in turn unauthorised development. With this concern predating the Covid pandemic. Notwithstanding, enforcement of unauthorised development is a matter that falls within the jurisdiction of Fingal County Council to deal with as they see fit.
- 7.13. What is however is a concern is the lack of clarity in what is sought from the documentation submitted with this application and whether permitting this licence would consolidate and intensify the level of unauthorised development that has occurred at the subject premises. In particular those relating to the outdoor dining provision through to the additional level of banners, signage and the like associated with the more intensive in nature, scale and extent outdoor dining area that is in place would add to the visual clutter in a streetscape scene, that is afforded protection in terms of its built character, visual attributes, and intrinsic quality as an Architectural Conservation Area. With this built heritage and visual amenity sensitivity and quality further added to by the presence of several Protected Structures in the immediate vicinity of the subject premises.
- 7.14. In relation to the site's setting forming part of an Architectural Conservation Area I note that Objective CH36 of the Development Plan sets out that the Planning Authority will require sensitive design, location and rationalising of modern street furniture and other such elements. With this reinforced by Objective PM27 which relates to the public realm in general and states: "*enhance the visual amenity of existing town and village centres, minimising unnecessary clutter*" through to providing guidance on shopfront design, street furniture and signage.
- 7.15. I also note that Table 12.11 of the Development Plan indicates that changes and development within ACAs should be conducted in a manner sympathetic to its distinctive character. It sets out guidance that it indicates should guide proposed new works within the public realm. Including but not limited to any new street furniture

being of a high quality and consistent design with consideration given to their siting and location and that street furniture should be kept to a minimum. It also sets out that in circumstances where the Council does not have direct control over street furniture it will engage with relevant parties to encourage them to comply with the Architectural Conservation Area policies set out in the Development Plan.

- 7.16. The Development Plan also highlights under Chapter 12 that: *“any works that would have a material effect on the special character of an ACA requires planning permission and so the normal exemptions from planning will no longer apply where they are considered to impact on the unique or special features and elevations of an ACA”*.
- 7.17. Given the applicants lack of demonstration that the outdoor dining areas as sought would be of a design, layout and quality that accorded with the above guidance and principles for such works in ACA. Together when taken with the significant level of visual clutter that is present on this site. It is considered that, if permitted, as proposed it would materially and adversely diminish the appreciation of the subject premises by way of obscuring this period building and its associated boundaries from view as part of the ACA. In so doing the development as sought would also obscure views in a southerly and northerly direction along Church Road due to the visual robustness of built form of the Parklet structure. This outcome would not be consistent with the above stated objectives for development within the ACA, the public realm through to the guidance for such developments. The impact of the works sought under this licence given the built heritage sensitivity of this period building within an ACA streetscape context the material adverse impact that would arise is one that in my opinion requires more detailed assessment and consideration under a planning application and not a Section 254 Licence.
- 7.18. In terms of potential impact on Protected Structures, I note that Chapter 12 of the Development Plan sets out that: *“a sensitive design approach is also required for development that adjoins or is in close proximity to a Protected Structure as it could have a detrimental visual on it, adversely affecting its setting and amenity”*. It also sets out that any development in close proximity to a Protected Structure needs to respect and compliment the structure as well as it’s setting through to that any works that would have a material effect on the character of such structures requires planning permission.

- 7.19. Objective CH20 of the Development Plan requires that developments that affect the setting of a Protected Structure is sensitively sited and designed, is also compatible with its special character and is appropriate to this setting.
- 7.20. While I note that the subject premises is located in an urban landscape with a transitional character due to it being located on the southern edge of the land zoned 'Town Centre' and with the land to the immediate south and east zoned residential (Note: 'R2') under the Development Plan. This change is physically evident in the pattern of development with the buildings to the south and east being setback from Church Road with more generous semi-private front gardens through to these buildings which are not just attractive period buildings in their own right sharing a high degree of homogeneity in their architectural expression, built form, overall design, and layout. They are also highly legible within their sylvan streetscape setting as being residential in their functional use.
- 7.21. Of concern is the proximity of No.s 1 and 2 Church Road, a semi-detached pair of a group of highly coherent surviving period semi-detached period properties. This semi-detached pair bounds the opposite side of the Saint Margaret's Avenue and Church Road junction and like the group they form part of are afforded protection and safeguarding by way of their designation as Protected Structures under the Development Plan and under national planning guidance from development within their setting where permitted is to be of a high quality of design through to would not give rise to adverse visual amenity diminishment of their setting.
- 7.22. Against this context the outdoor dining areas as proposed under this licence together with the existing development on the external façade of the subject premises addressing Church Road and Saint Margaret's Avenue as well as the semi-private outdoor open space between these facades and the public domain of these streets. As said the applicant has failed to demonstrate not only has regard been had to achieving a high-quality design resolution in the context of the subject premises itself. But equally in terms of its siting as part of the visual setting from which No.s 1 and 2 Church Road, Protected Structures, and the group of semi-detached period Protected Structures these structures form part of.

- 7.23. If permitted the outdoor dining area would give rise to further visual diminishment of this setting by way of visual clutter through to the lack of qualitative design resolution for a setting of such built heritage and visual amenity sensitivity as well as merit.
- 7.24. With these Protected Structures including the plethora of period and historic buildings of merit that together positively contribute the visual quality through to unique sense of place and identity of Church Road.
- 7.25. This reinforces my previous comments stating that a Section 254 Licence is not an appropriate route for the assessment of the outdoor dining area sought by the applicant in this application.
- 7.26. Examination of recent publicly available photographs of the subject premises and the adjoining public domain indicate that the Parklet is situated in what was a disabled/mobility impaired on-street within the public domain car parking space. Thus, resulting in a loss of a scarce public provided resource that is of public benefit within this town centre location where there is limited availability of parking spaces in general relative to the hinterland Malahide Town Centre serves. Of further concern is that this application would also permit a significant increase in customer capacity for this restaurant with this in turn having the potential to put additional demands on the car parking provision in its vicinity.
- 7.27. In addition, I also raise it as a concern that the parklet outdoor dining area relative to the main entrance of the subject premises would give rise to additional movements from the porch entrance serving this business that opens directly onto Church Road. Given the fact that the pedestrian footpath at this point does is of limited width customers and staff using the parklet as well as overspilling from the parklet and the outdoor dining area provided in areas labelled as Garden No. 1 and Garden No. 2 which are also dependent upon separate pedestrian gates accessed from Church Road has the potential to result in conflict and obstruction of movement for those using the pedestrian footpath in its vicinity.
- 7.28. In addition, there is also pedestrian access from the southern boundary of the site onto Saint Margaret's Avenue. This opens immediately onto the public carriageway at a point where despite the low-speed environment is at a junction and where views are restricted particularly for vehicles journeying in an easterly direction in order to exit Saint Margaret's Avenue onto Church Road.

- 7.29. Given these concerns I am of the view that if permitted, the outdoor dining as sought under this application is poorly considered and one which has the potential to cause obstruction of the free flow of a modest in width section of Church Roads pedestrian footpath as well as give rise to a road safety and traffic hazard issues for road users of Church Road and Saint Margaret's Avenue.
- 7.30. In relation to the other Section 254 Licences that are concurrently with the Board for its determination I consider that this particular licence, like for example those sought for Main Street and Townyard Lane relate to areas of Malahide's town centre that despite being zoned town centre land have different streetscape character and attributes. I also consider that this is the case for other appeal cases determined by the Board in recent times relating to the provision of outdoor dining within the public or private domain but legible from their immediate and wider streetscape scene. Notwithstanding this it is of note that the Board under appeal cases ABP-302577-18 and ABP-300166-17 refused similar developments for reasons and considerations that included the failure of these particular development in positively enhancing the character of the Architectural Conservation Area and Malahide village centre through to concerns that they would, if permitted, seriously injure the visual and residential amenities of the area.
- 7.31. Of further note concern was also raised in terms of appeal case ABP-300166-17 the Board raised concern that, if permitted, it would give rise to precedent for other similar developments in the area.
- 7.32. In this case there are a number of parklets that are ad hoc and of variable quality. There are also a number of *ad hoc* and of variable quality outdoor seating and dining provision on the pedestrian footpath. Against this context I consider that this application, if permitted, would give rise to precedent for other similar developments that would cumulatively diminish the visual amenities of the ACA alongside would impair the safe function of this town centres pedestrian and parking domain.
- 7.33. In relation to the public realm of Malahide town centre it is also my view that this application would, if permitted, 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.

7.34. 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.

7.35. 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”*.

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

7.37. **Conclusion:**

7.37.1. 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.

7.38. **Other Matters Arising**

7.38.1. ***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 issued 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 Church Road.

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.

7.38.2. *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. Particularly given the prevalence of residential properties in the immediate vicinity of the Scotch Bonnet.

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.

7.38.3. 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.

7.38.4. 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.

7.38.5. 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. 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.

7.38.6. 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 Church Road, in them making a determination on this application for a Section 254 Licence, given the legislative provisions for this type of development.

7.38.7. Advertising/Signage:

The drawings do not indicate that the design resolution of the outdoor dining area would include any advertising, signage, logos, or the like. Should the licence be granted, given the planning history of the site which restricted the provision of the same, and given that the provisions of the Development Plan seek to minimise visual

clutter as well as visual diminishment of the streetscape scene from such additions. Alongside the Development Plan also provides protection and safeguards to ensure that new developments in ACA's and in the visual setting of Protected Structures do not give rise to any undue built heritage and visual amenity impact.

7.38.8. **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.

7.38.9. **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 adjudicate upon as part of its *de novo* consideration of this case.

7.39. **Appropriate Assessment**

7.39.1. 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 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 site location at a highly visible location on the southern edge of Malahide's town centre at the corner of Church Road and Saint Margaret's Avenue; the subject premises forming part of a designated ACA and the visual setting of Protected Structures, including No.s 1 and 2 Church Road; the planning history of the site and its setting; the pattern of development that characterises the area; 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 three standalone outdoor dining areas serving the subject premises 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.

The development sought under this application, would therefore, be contrary to the proper planning and sustainable development of the area.

Patricia-Marie Young
Planning Inspector

11th day of August, 2022.