



An  
Bord  
Pleanála

## Inspector's Report ABP-314051-22

<b>Development</b>	Change of use from takeaway to a restaurant and construction of a side and rear extension and all associated site works.
<b>Location</b>	45 Old Kilmainham, Dublin 8, D08 P3VR.
<b>Planning Authority</b>	Dublin City Council.
<b>Planning Authority Reg. Ref.</b>	3817/22.
<b>Applicant(s)</b>	Dermot Smithers.
<b>Type of Application</b>	Permission.
<b>Planning Authority Decision</b>	Refuse Permission.
<b>Type of Appeal</b>	First Party versus decision.
<b>Appellant(s)</b>	Dermot Smithers.
<b>Observer(s)</b>	<ol style="list-style-type: none"><li>1. Jean Murnane.</li><li>2. Orla Hopkins.</li><li>3. Kathy Byrne.</li><li>4. Kathleen Seagrave.</li></ol>

5. Jacqueline Carroll (Lady's Lane Residents Association).
6. Catriona Kenny.
7. Suzanne Kenny.
8. Aaron Groom.
9. Niamh Campbell.
10. Maria O'Brien.
11. Eleanor Methven.

**Date of Site Inspection**

4 May 2023.

**Inspector**

Stephen Rhys Thomas.

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## **1.0 Site Location and Description**

- 1.1. The appeal site is located at 45 Old Kilmainham and can be accessed from the rear at Carrickfoyle Terrace. The immediate area is characterised by old historic single and two storey properties along Lady's Lane and Carrickfoyle Terrace. Old Kilmainham combines a variety of one to three storey residential units. Eateries, retail and other commercial uses are to be found a little distance to the west at the junction of Old Kilmainham, Emmett Road and South Circular Road.
- 1.2. The terraced building presents a single storey south elevation with frontage to Old Kilmainham and a two storey element to the rear at Carrickfoyle Terrace. The southern elevation has round headed windows and a profusion of planting to the back of the footpath. To the rear, the building is somewhat dilapidated with round headed windows and some boxy vent structures and an external water tank. The rear yard area appears to be built or covered over, and no commercial activity was observed. The rear access to the site is from a narrow and constricted residential laneway from which houses overlook and open out onto.

## **2.0 Proposed Development**

- 2.1. Permission is sought for:
  - The change of use from takeaway to cafe/restaurant for the sale and consumption of hot and cold food on and off the premises.
  - The construction of a single storey side and rear extension at ground floor level.
  - Alterations to the existing roof including the insertion of roof lights.
  - Internal changes.
  - Signage.
  - All ancillary site development works.

## **3.0 Planning Authority Decision**

### **3.1. Decision**

3.1.1. Dublin City Council recommend refusal for the following reason:

1. The subject site is located in a residential area with the zoning objective Z1 'Sustainable Residential Neighbourhoods' with the land use objective 'to protect, provide and improve residential amenities' under the Dublin City Development Plan 2016 – 2022. The proposal would result in the introduction of a restaurant/café use which is considered an unacceptable use at this location as it would have an undue and unacceptable impact on the amenities of adjoining properties. The proposed development would therefore result in an unacceptable use that would materially contravene a development objective indicated in the development plan for the zoning of land and would therefore be contrary to the proper planning and sustainable development of the area.

### **3.2. Planning Authority Reports**

3.2.1. Planning Reports

The Planning Authority decided to refuse permission for a single reason, the basis of their decision can be summarised as follows:

- A similar proposal was recently refused permission, 3137/21 refers.
- Significant documentary evidence was submitted by local residents which demonstrated that the property was in residential use. The application was therefore considered on its own merits i.e. the introduction of a restaurant use into a residential area.
- The current application is accompanied by a planning statement that states the present use of the property is residential. It is submitted that this use is unauthorised as the DCC Reg Ref. 4830/04 permitted a take-away use. As there have been no intervening applications relating to the site since 2004, the applicant considers that a takeaway constitutes the lawful use of the site. It is

considered that Reg. Ref: 4830/04 was never implemented, it has therefore expired.

- No details on noise and odour nuisance have been submitted.
- A new restaurant/cafe use within a residential terrace would conflict with the zoning objective and, would not be in keeping with the pattern of development or the character of the area. The Development Plan policies on restaurants acknowledge the potential conflict between such uses and resultant potential impacts on residential amenity.

Permission was refused, based upon the issues outlined above and in accordance with the recommendation of the Planner.

### 3.2.2. Other Technical Reports

1. Drainage: No objections subject to conditions.
2. Traffic Planning Department: Further information required (access/delivery and cycle parking)
3. Archaeology: No objections subject to conditions.

### 3.3. Prescribed Bodies

None.

### 3.4. Third Party Observations

13 third party submissions were received by the planning authority and the main issues can be summarised as follows:

- The house has been in residential use, not a takeaway use.
- A café takeaway use would contravene the land use zoning and impact upon privacy and residential amenity.
- Traffic safety, deliveries, car parking and pedestrian safety will all issues.
- Opening hours would impact residential amenity.
- There would be vermin, noise and odours because of the development.

- There are already enough cafes and takeaways in the area.
- There will be additional pressure on the sewerage system in the area.

## 4.0 Planning History

### 4.1. Subject Site:

Planning Authority reference: 3137/21 Permission refused for the construction of side and rear extensions to the commercial property. The proposed extensions will be at ground floor level relative to Old Kilmainham Rd to the front and at first floor level relative to Carrickfoyle Terrace to the rear. Other minor elevational changes, external signage and all associated site works.

1. The subject site is located in a residential area with the zoning objective Z1 'Sustainable Residential Neighbourhoods' with the land use objective 'to protect, provide and improve residential amenities' under the Dublin City Development Plan 2016 – 2022. The submitted plans show that the proposed extensions and modifications would facilitate the operation of a restaurant/café from the site which is considered an unacceptable use at this location as it would have an undue and unacceptable impact on the amenities of adjoining properties. The proposed development would therefore result in an unacceptable use that would materially contravene a development objective indicated in the development plan for the zoning of land and would, therefore, be contrary to the proper planning and sustainable development of the area.

Planning Authority reference: 4830/04: Permission granted for: (a) extension of 18.4sqm to rear of ground floor of existing takeaway food shop, (b) excavation of part of existing basement to provide 14.4sqm of additional storage space, (c) refurbishment of the premises including new roof and new shopfront.

## 5.0 Policy Context

### 5.1. Development Plan

- 5.1.1. The site is governed by the policies and provisions contained in the Dublin City Development Plan 2022-2028.

The subject site is governed by zoning objective Z1 Sustainable Residential Neighbourhoods, with the objective to protect, provide and improve residential amenities. Restaurant and café/tea room are uses that are open for consideration.

Policy CCUV30 - Cafés / Restaurants

To promote and facilitate the provision of cafés / restaurants in the city and support their role in making the city more attractive for residents, workers, and visitors and in creating employment.

- 5.1.2. Relevant considerations include:

Section 15.14.7.2 Restaurants/Cafes

The positive contribution of café and restaurant uses and the clusters of such uses to the vitality of the city is recognised.

In considering applications for restaurants, the following will be taken into consideration:

- The effect of noise, general disturbance, hours of operation and fumes on the
- amenities of nearby residents.
- Traffic considerations.
- Waste storage facilities.
- Hours of operation.
- The number/frequency of restaurants and other retail services in the area.
- The contribution to the vitality and viability of the area.

For proposals relating to outdoor dining, applicants will be required to demonstrate whether temporary or permanent outdoor dining facilities are provided. These areas should be fully contained within the site boundary. Temporary dining should ensure



all fixtures and fittings are fully removable outside operating hours and should not impede access or create undue clutter or trip hazard in the streetscape.

Permanent structures should be included in all plans and elevations submitted with the application. Details of ventilation and heating of the area will also be required.

#### Section 15.14.7.4 Noise, Odour, Ventilation for Restaurant / Café / Take – Away

Café, restaurant and take away uses should be designed having regard to the appropriate noise and ventilation guidelines. All ventilation proposals should avoid direct extracts at street level, where possible. Where extract odour and ventilation is required on main street frontages, careful design solutions should be provided to extract does not interfere with pedestrians and road users in terms of noise and odour.

Similarly, noise associated with the use of a café / restaurant / take away should be minimised as to ensure no overspill to street level occurs.

Café and restaurant proposals should include an engineering statement to address, noise, ventilation and odour as part of any planning applications.

## **5.2. Natural Heritage Designations**

5.2.1. None relevant to this site.

## **5.3. EIA Screening**

5.3.1. Having regard to the nature and scale of the proposed development, comprising a change of use from a takeaway to a café/restaurant, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environment impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

## **6.0 The Appeal**

### **6.1. Grounds of Appeal**

6.1.1. The applicant has appealed the decision of the planning authority to refuse permission, the grounds of appeal can be summarised as follows:

- The premises has operated as a takeaway since the 1970s and was granted permission for an extension in 2004. Since 2009, the lower ground floor level has been used for food preparation to be used in a mobile food truck. The commercial operations stopped around 4 or 5 years ago, since then the street level floor has been in unauthorised residential use. There is a PTRB registration number for the premises and it has been used for residentially purposes, but without planning permission.
- The current and draft development plan both support café and restaurant use on zoning objective Z1.
- A use as a restaurant/café is far more preferable than a takeaway and this forms the basis for the application. As the premises has permission to operate as a takeaway, then this use can resume at any time.

The appeal is supported by documentation that refers to businesses that occupied the site, drawings, photographs and a signed assertion from local residents that the premises was in use as a takeaway in the past.

### **6.2. Planning Authority Response**

None on file.

### **6.3. Observations**

There are 11 observations on file and they reiterate the issues and concerns raised in their initial submissions to the planning application. All observations oppose the development.

## **6.4. Further Responses**

None.

## **7.0 Assessment**

### **7.1. Introduction**

7.1.1. The main issues in this appeal are those raised in the grounds of appeal, and I am satisfied that no other substantive issues arise. The issue of appropriate assessment also needs to be addressed. The issues can be dealt with under the following headings:

- Principle of Development
- Longstanding Use
- Residential Amenities
- Other Matters
- Appropriate Assessment

### **7.2. Principle of Development**

- 7.2.1. The appeal site is located on lands that are subject to zoning objective Z1 Sustainable Residential Neighbourhoods in the Dublin City Development Plan 2022-2028, the objective of which is to protect, provide and improve residential amenities. Restaurant and café/tearoom are open for consideration in the Z1 zoning objective and are supported by policy CCUV30 that highlights their role in making the city more attractive for residents, workers, and visitors and in creating employment. There are safeguards to establishing such uses in residential areas such as the appeal site and section 15.14.7.2 and 15.14.7.4 of the Development Plan lists the issues that should be given consideration if such a proposal should arise in a residential area.
- 7.2.2. I note that observers are concerned that the imposition of a café/restaurant would be a contravention of the Development Plan. However, I am satisfied that a change of use to a café/restaurant can be considered under the Z1 zoning and so no

contravention of the plan arises. Naturally, there are a number of issues to take into account when assessing if the area is a good fit for the proposal and I consider these issues, if relevant, in the following sections of my report.

### **7.3. Longstanding Use**

- 7.3.1. A significant issue has arisen in the planning application and this appeal as to whether the proposed development is a change of use from a residential unit to a café/restaurant or if a takeaway use, carried out since the 1970s is the transition to consider. The argument is made by the applicant, that the proposed development is a change of use from a takeaway, a permitted use, to a more desirable use as café/restaurant. The planning authority and all observers to the appeal, disagree and state that the premises has been in residential use for some time and that a change to a café/restaurant would be a very different set of circumstances and permission should be refused.
- 7.3.2. A lot of information and documentation on both sides of the argument have been put forward to strengthen each case. With many local residents adamant that the premises has been in use for residential purposes and that the effect of a change of use to a café/restaurant would be a very disruptive one. The planning authority are of the view that the most recent permission to extend the takeaway use has not been implemented and so has lapsed, reg ref 4830/04 refers. These are important matters up to a point, and the appellant's view that the takeaway use can be reactivated at any time is probably a matter best explored with the planning authority. This appeal can offer no clarity on that matter.
- 7.3.3. In my view, it is evident that the premises in question has operated in the past as a takeaway, the documents on file and a permission to extend seem to show this. However, there is no actual planning permission documentation for the longstanding takeaway use on the file. In addition, it is apparent that in recent years the premises has been in use as a residence. This more recent use, acknowledged by the appellant, heightens the level of opposition to the development and ultimately resulted in permission being refused by the planning authority. In any case, the planning application refused by the planning authority was for a change of use from takeaway to café/restaurant. It is this development description that I have had regard

to, together with all of the relevant issues that arise in such a change of use in a primarily residential area.

- 7.3.4. In summary, I note the planning history of the site and its bearing on the refusal of permission and the grounds of appeal. I also note the observations received and that their content generally revolves around the proposed use rather than the physical changes proposed. Finally, I note the bearing that the long standing though recently interrupted use as a takeaway has on the outcome of this appeal.

#### **7.4. Residential Amenity**

- 7.4.1. The appellant has made the case that the premises has been in use as a takeaway since the 1970s, permission to extend was granted in 2004 and up until four or five years ago it was in use to prepare food for a food truck. The appellant also acknowledges that for the past number of years, the premises has also been in use for residential purposes, but they state that this might be an unauthorised use. According to the appellant, it is better to have an operating café/restaurant rather than a takeaway and remedy the unauthorised residential use currently going on. The conclusion reached is that the transition from takeaway to café/restaurant is less abrupt than from a residential use and so permission should be granted.
- 7.4.2. The planning authority in their assessment differentiate between the most recent refusal of permission (3137/21) that took little account of the previous takeaway use and the current case that acknowledges but discounts it in planning terms. The planning authority go on to assess the introduction of an entirely new use into the area and permission is refused.
- 7.4.3. Section 7.3 above, of my report, discusses the planning history of the site. There are issues of detail that may require further engagement between the appellant and the planning authority and these may entail enforcement considerations. However, I am satisfied that the principle of a café/restaurant at this location is one that is open for consideration and this requires assessment of the issues highlighted in sections 15.14.7.2 and 15.14.7.4 of the current Development Plan. All of these issues impact to varying degrees on the residential amenity enjoyed by residents and which the land use zoning seeks to protect. I shall take each consideration listed in section 15.14.7.2 in turn, as follows:

- 7.4.4. The effect of noise, general disturbance, hours of operation and fumes on the amenities of nearby residents – the appellant points back to the planning report prepared for the initial planning application, in which all these matters are addressed. I find that the appellant dismisses the impact of noise, disturbance and fumes, because in their mind, the premises has always operated as a takeaway and so those impacts are not an issue. The hours of operation are set out, 7am to 11pm.
- 7.4.5. Whether the premises is in operation as a takeaway or not, I would still expect to find information on the current level of noise and fumes emitted by the current or most recent operation and what improvements will result from the change in use sought. I would also expect some analysis of the current level of disturbance, either patron noise within the premises or those crowded around outside. All of this kind of information is lacking both in the application documentation and the appeal itself. Though, it is likely that the premises operated as a takeaway, it has not done so over the last number of years and some analysis or discussion around noise, disturbance and fumes would have been instructive. Of course, such matters can be controlled by condition, but there are no internal reports on file to guide me as to what would be reasonable in this respect.
- 7.4.6. Traffic considerations – I note that the Transportation Planning Division of the Council required further information with respect to a service and delivery management strategy, and the provision of cycle parking for staff. These are matters that could be sought by condition and matters agreed between the applicant and the planning authority before development commences.
- 7.4.7. Waste storage facilities – Drawings show that waste storage facilities (bins) are located on the lower ground floor area to the rear of the premises, adjacent to the food preparation area. The proposed facilities may or may not be acceptable, but could be controlled by an appropriately worded condition, regarding ventilation etc. It would of course be preferable to have to hand the report of the Environmental Health Office of the Council to ensure that the facilities proposed are up to the standards required.
- 7.4.8. Hours of operation – The applicant has set out that the premises will be open from 7am to 11pm, if this is acceptable an appropriately worded condition can be attached. However, I would point out that the premises has not operated as a

takeaway for a number of years and because no real analysis of factors like noise, general disturbance and fumes have been addressed, I am concerned that residential amenities would be unduly impacted upon.

- 7.4.9. The number/frequency of restaurants and other retail services in the area – Many observers have listed out a vast array of cafes, restaurants and takeaways in the immediate and wider area. The appellant has also defined the character of the area and the number of similar units to be found locally. I note that the development plan encourages the growth of restaurants and cafes as they support the viability of local areas and support employment. It is fair to say that there are a number of similar establishments in the area, however, I am satisfied that an additional offering of another café/restaurant would not in itself go against the overriding policy of the Development Plan to support the growth of such businesses.
- 7.4.10. The contribution to the vitality and viability of the area – Given the point above, I am satisfied that the proposed development would add to the vitality and viability of the area.
- 7.4.11. Section 15.14.7.4 of the current Development Plan addresses the issue of noise, odour and ventilation for a restaurant, café or takeaway. The plan highlights the issue of noise and odour and that café and restaurant proposals should include an engineering statement to address, noise, ventilation and odour as part of any planning application. I note that no such engineering statement has been prepared and this is a defect in the application. Notwithstanding, any previous use as a takeaway, the Development Plan is clear, an engineering statement should be prepared and it has not. The planning authority noted the lack of information with regard to noise and odour.
- 7.4.12. I am not satisfied that there is sufficient information on the file to make a complete and balanced assessment as to whether a café/restaurant at this location is appropriate. The appellant has made the point that a takeaway has operated at this location since the 1970s and a permission from 2004 to extend that longstanding use could be implemented still. The planning authority disagree and state that the legitimacy of the longstanding takeaway use is questioned and that the permission for its extension of use cannot now be implemented. I have explained how these matters are not for the appeal on hand, rather it is the acceptability of a

café/restaurant at this location, in a residential enclave that is in question. I find that the lack of information about the impacts of the proposed development from an operational perspective, to be a fault in the overall proposal. I can see from the observers to the appeal that there is much local opposition to the proposal. This is a primarily residential area in character, the immediate properties are private homes and the location for servicing the premises would be within a constricted residential laneway. The proposed use for café/restaurant would therefore be detrimental to the residential amenities of the area and work against the objective of the Development Plan to protect such areas and permission should be refused.

#### **7.5. Other Matters**

- 7.5.1. The appellant has noted that the physical amendments to the building have been adjusted since the previous refusal of permission and do not form part of the current appeal. The planning authority have not raised any significant concerns about the internal and rear elevation changes proposed. I note that observers have not raised issues with the physical changes that are proposed, and I am satisfied that no significant residential amenity issues would arise. I note that neighbouring properties have either historic or more recent two storey rear extensions and I would anticipate that issues, if they arise, can be addressed by condition.

#### **7.6. Appropriate Assessment**

- 7.6.1. Given that the development is already connected to the public water supply and drainage networks, and having regard to the nature and scale of the proposed development and its location relative to Natura 2000 sites, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect, either individually or in combination with other plans or projects, on a European site.

### **8.0 Recommendation**

- 8.1. I recommend that planning permission should be refused for the reasons and considerations as set out below.



## 9.0 Reasons and Considerations

1. The appeal site is located in a residential area with the zoning objective Z1 'Sustainable Residential Neighbourhoods' with the land use objective 'to protect, provide and improve residential amenities' under the Dublin City Development Plan 2022-2028. The introduction of a café/restaurant as proposed, is considered an unacceptable use at this location and would result in an undue and negative impact on the residential amenities of neighbouring properties. The proposed development would be contrary to the Development Plan objective to protect, provide and improve residential amenities. and so would not be in accordance with the proper planning and sustainable development of the area.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

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Stephen Rhys Thomas  
Senior Planning Inspector

24 May 2023