



An
Bord
Pleanála

Inspector's Report ABP-316120-23

Development	Refurbishment and change of use to aparthotel (8 Short Stay Apartments).
Location	38/39 Abbey Street Upper, Dublin 1
Planning Authority	Dublin City Council North
Planning Authority Reg. Ref.	5510/22
Applicant(s)	Middle Abbey Properties Limited
Type of Application	Permission
Planning Authority Decision	Refuse Permission
Type of Appeal	First Party
Appellant(s)	Middle Abbey Properties Limited
Observer(s)	None
Date of Site Inspection	19 th August 2024 (external)
Inspector	Joe Bonner

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1.0 Site Location and Description

- 1.1. The subject site has a stated area of 353.8sqm and is located on the southern side of Abbey Street Upper, immediately south of its junction with the pedestrianised Liffey Street Upper and c12m west of its junction with Liffey Street Lower, which in turn leads to the quays and the Ha'penny Bridge. The Luas Red line runs along Abbey Street Upper immediately to the north of the building.
- 1.2. The building consists of connected but offset rectangular and square buildings. The rectangular section has 12.077m of frontage along Abbey Street Upper and a depth running southwards of just over 20m. The square section at the rear is offset to the west and has 10.904m street of frontage facing west onto Abbey Cottages, at a distance of c16.3m from Abbey Street. Abbey Cottages is a narrow lane running along the west of the site. The maximum depth of the building is 27.45m.
- 1.3. A separate building is located between the sites Abbey Street frontage and the junction with Abbey Cottages, while a recently constructed hostel of between 9 and 11 storeys in height extends the full length of the opposite side of Abbey Cottages. The seating area of a ground floor coffee shop in the hostel building overlooks the sites frontage on Abbey Cottages. Several vehicles were parked on the lane on the occasion of the site visit.
- 1.4. The section fronting Abbey Street is made up of two separate buildings with the easternmost building (No 39) being two storey with a flat roof and c5m of street frontage, while the western side of the building (No 38) is five storey over basement level. The top floor set back slightly from the street and has a mansard roof and two dormer windows. The existing floor plans indicate that this section of the building contains 6 apartments with one no 1 bed and two no. 2 bed apartments at first floor level, one no. 2 bed apartment at each of the second and third floor levels and a 3 bed apartment at fourth floor level.
- 1.5. The rear section is two storey in height and the existing floor plans indicate that this area is non-residential and consists of meeting rooms and a store.

2.0 Proposed Development

- 2.1. The proposed development is described in the public notices, as consisting of:

- The refurbishment and change of use of the upper floors of Nos. 38-39 Abbey Street from its permitted use as storage and office ancillary to the restaurant use, but currently in use as residential, to 8 no. short stay apartments comprising 4 no. studio apartments and 4 no. 1 bedroom apartments.
- A new access from Abbey Street Cottages.
- A new lightwell to the roof along with 6 no. windows to the south elevation, 2 at each of the first, second and third floors.

2.2. As well as standard plans, elevations and sections, the application was supported by the following documents:

- Planning Statement
- Architectural Design Statement
- Civil Engineering Report (Mechanical, Electrical and Energy Efficiency Strategy)
- Structural Condition Report
- Construction Management Plan
- Energy Statement
- Management Plan for Short Stay Accommodation
- AA Screening Report

3.0 Planning Authority Decision

3.1. Decision

3.1.1. On the 23rd of February 2023, Dublin City Council issued a decision to refuse permission for one reason, which stated:

The proposed development, by itself and by the precedent for which a grant of permission for it would set, would be contrary to the stated provisions of the City Development Plan 2022-2028 where the core principles of the Dublin Housing Strategy and Policy QHSN38 are to encourage the establishment of sustainable residential communities by ensuring a wide variety of housing typologies and tenures is provided throughout the city in accordance with the Housing Need Demand Assessment (HNDA). The HNDA recognises a high

demand for long term residential rental properties such as apartments in Dublin City where the emerging trend shows an increase of rental demand for this type of residential accommodation. The proposed development, resulting in the permanent loss of 6 apartment units for residential use, would be contrary to Section 15.14.3 where there is a general presumption against the provision of dedicated short term tourist rental accommodation in the city due to the impact on the availability of housing stock. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.

3.2. Planning Authority Reports

3.2.1. Planning Report

- The planning authority decided to refuse permission in accordance with the recommendation of the planning officer.
- The planning officer stated that the permitted use of the 5 storey No 38 is restaurant at ground and first floor levels and storage/office ancillary at second third and fourth floors. No 39, which is two storey in height, has a permitted use as retail.
- The applicant's planning report states that the existing residential uses do not benefit from any planning permission. P.A Reg. Ref. 4087/17 indicated that the 1st floor was in residential use on the 17th of October 2017. The proposed change of use would regularise the current unauthorised residential use of the site.
- The proposed development intends to increase the number of units from 6 to 8 (4 no 1 beds, and 4 studios), with two of the studio units failing to meet the required minimum storage space requirement set out in the Apartment Guidelines. No private or communal open space is provided, but this may be relaxed due to the sites inner city location.
- The target market is persons who would need to stay longer than a few days and would require cooking and work facilities.

- The applicant states that the ratio of short to long-term bedspaces within 1km of the site is 1:11, so this development would not be detrimental to the provision of permanent housing in the area.
- The applicant states the site is unsuited for residential use as they cannot meet residential standard, but the planning authority does not accept that argument as the number of first floor units could be reduced, layouts changed and elevations altered by additional windows, while the upper floor units exceed the minimum requirements for 1 bed apartments.
- The planning authority has serious reservations regarding the loss of long term and secure accommodation to the short stay rental market.
- While it is acknowledged that the current upper floor residential use is unauthorised and the current layout requires modifications, policy QHSN7 actively seeks to support proposals to retain or bring upper floors into residential use to revitalise the social and physical fabric of the city. The proposed development would be inconsistent with this policy.
- Section 5.1 of the development plan seeks to create sustainable neighbourhoods and there is a high demand for long term residential rental properties and the loss of six apartments is a concern with regard to the existing housing shortage in the city. The proposal would be inconsistent with section 15.14.3 of the plan where there is a general presumption against the provision of dedicated short term tourist residential rental accommodation, due to the impact of the availability of housing stock.
- The proposed development would set an unwanted precedent for similar developments.

3.2.2. Other Technical Reports

Transportation Planning – 13th February 2023 – Recommended Further Information regarding 1) concerns about the location of the residential guest entrance onto Abbey Street Cottages, given its current use as a service lane with limited pedestrian activity and a lack of public light and footpath and 2) to provide details of ways to improve the security and lighting if the Abbey Street Cottages access is the primary 24 hour access for guests.

Engineering – Drainage Division – 30th January 2023 – No objection subject to conditions.

EHO – 30th January 2023 – Recommended the attachment of conditions relating to noise control during both the construction and operation phases of the development as well as air quality control, during the operation phase.

3.3. Prescribed Bodies

- 3.3.1. **TII** – 31st January 2023 – No objection subject to conditions 1) applicant to enter an access and maintenance agreement with TII; 2) deliveries to limit interference with Luas; 3) developer to be responsible for loss of Luas revenue as a construction related suspension of service or amendments to Luas infrastructure; 4) Adhere to TII code of practice; 5) Works permit required; 6) Demolition and Construction Method Statement to be submitted for written agreement of PA and TII; 7) Plans of protections for overhead cables to be submitted for written agreement of PA; 8) The imposition of a S49 Development Contribution in respect of LUAS Cross City.
- 3.3.2. Submissions were invited but not received from Irish Water and the National Transport Authority (NTA).

3.4. Third Party Observations

- 3.4.1. Neasa Hourigan TD and Councillor Janet Horner submitted a joint observation to the planning authority stating:
- There is a severe scarcity of long term residential accommodation for rent and purchase in Dublin City and to grant permission for additional short stay apartment would be unwise, on a site suitable for longer term residential use.
 - Notwithstanding the permitted use, as the units are currently in use as residential accommodation, it would be a violation of policies QHSN1 and QHSN38 to evict tenants in order to convert the units to short stay apartments.

4.0 Planning History

Appeal Site (application lodged since this appeal was submitted)

- 4.1.1. **P.A Ref. Reg 4722/23** – On the 1st of November 2023, an application was submitted to Dublin City Council by ‘D1 Collection’ for the following development:
- Revisions to existing elevation at 39 Abbey Street Upper.
 - New 3 floor extension at 39 Abbey Street Upper.
 - New 2 floor extension and a communal roof terrace (total 4 levels) at the rear of 38 and fronting onto Abbey Cottages, together with associated site works, providing 3 no. 1-bedroom units and 4 no. studio units.
- 4.1.2. The planning officer’s first report highlighted that there were inconsistencies between the ‘existing floor plans’ submitted with the application, when they were compared to the ‘existing floor plans’ of the application that is the subject of this application (ABP-316120-23). The inconsistency was that the existing plans in 4722/23 indicated that the works which are subject to this current application (ABP-316120-23) had already been carried out by November 2023, 7 months after this appeal was submitted. The applicant responded to a request for further information, indicating that the works that had been carried out under the exemptions provided in S.I. 30 of 2018 and S.I. 75 of 2022 and the submitted existing floor plans included a note stating, ‘Existing layouts in accordance with S.I. 30 Notification (S.I. 05.23)’.
- 4.1.3. The planning authority granted permission on the 7th of May 2024 and at the time of the site visit, the grant of permission had not been put into effect. Although the applicant company name is different, to the current applicant, the single director of the applicant ‘D1 Collection’ is of the same name as the director in the current application/appeal (ABP-316120-23).
- 4.1.4. **P.A Ref. Reg 4087/17** – Permission granted on the 30th of January 2018, on the current application site, for an 88 bed space hostel development including i) A three storey extension to the rear of 38 Abbey Street Upper (including above the first floor of the existing building facing onto Abbey Cottages) and above and to the rear of 39 Abbey Street Upper; ii) The change of use of part of the ground floor and the first floor of 38 Abbey Street Upper from restaurant to hostel use; iii) The change of use of the existing second, third and fourth floors of 38 Abbey Street Upper from residential to hostel use. The grant of permission was not put into effect and has expired.

Adjacent site to immediate west across Abbey Cottages Lane

- 4.1.5. **ABP-305853 (P.A. Reg. Ref. 3804/19)** – Permission granted by the board on the 20th of March 2020 for modifications to previously permitted developments at 35-36 Abbey Street Upper and Abbey Cottages, c4m west of the current application site, for a 9-11 storey building accommodating a hostel with 151 rooms. This development is now constructed and operational as Clink Hostel.

Site c18m west of the application site adjacent to Clink Hostel

- 4.1.6. **ABP-314298-22 (P.A. Reg. Ref. 4009/22)** – Permission granted by the board on the 27th of October 2023 for an 11 storey over basement hotel building at 31-34 Abbey Street Upper with 252 bedrooms and a 10 storey aparthotel with 222 bedrooms fronting onto Great Strand Street. A commencement notice submitted to the BCMS website in respect of the site indicated that the development would commence on the 19th of August 2024, while compliance submissions have also been submitted to the planning authority, in respect of the development.

Site c15m to north east on corner of Liffey Street Upper & Middle Abbey Street

- 4.1.7. **P.A. Reg. Ref. 3697/17**

Permission granted on the 27th of July 2018 for a nine storey 310 bedroom hotel, across the road from the current application site. The hotel is operating as Hotel Motel One Dublin.

Local Precedents for similar development (2016-2022 Development Plan period)

- 4.1.8. **ABP-305120-19 (P.A. Reg. Ref. 3064/19)** – Permission granted by the board on the 26th of November 2019, for change of use of existing first, second and third floors from office to nine number apartments for use as short term letting, at No's 60 and 61 Abbey Street Middle, following the decision of DCC to refuse permission. In granting permission, the board's reasons and consideration stated that 'The proposed development would not adversely impact on the character or the sustainable mix of uses in the area, would not result in the loss of long-term residential stock within the inner city and would increase the provision of tourist accommodation in this inner-city location. The site is c140m east of the application site.
- 4.1.9. **ABP-306157-19 (P.A. Reg. Ref. 4068/19)** – Permission granted by the board on the 20th of May 2020, for a change of use from office to short-term commercial residential letting to provide 6 no studio units at 41 Abbey Street Upper & 18 Liffey

Street Lower, following the decision of DCC to refuse permission. This site is located c5m from the application site.

5.0 Policy Context

5.1. Dublin City Development Plan 2022 - 2028

- 5.1.1. The relevant Development Plan is the Dublin City Development Plan 2022-2028, which came into effect on the 14th of December 2022. The site is zoned 'City Centre - 'Z5'', the objective for which is 'To consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity'. 'Residential' is a permissible use in Z5 zoned areas, as are bed and breakfast guesthouse, hostel (tourist), hotel, and student accommodation. Build to Rent residential is 'Open for Consideration'.

The following policies are considered relevant to the application.

- 5.1.2. It is a policy of CEE26 – 'Tourism in Dublin' To promote and facilitate tourism as one of the key economic pillars of the city's economy and a major generator of employment and to support the appropriate, balanced provision of tourism facilities and visitor attractions.
- 5.1.3. Under Policy CEE28 – 'Visitor Accommodation' it is a policy of Dublin City Council to consider applications for additional hotel, tourist hostel and aparthotel development having regard to particular matters.
- 5.1.4. Section 5.5.2 Regeneration, Compact Growth and Densification contains Policy QHSN7, seeks in respect of 'Upper Floors':
- To resist and where the opportunity arises, to reverse the loss of residential use on upper floors and actively support proposals that retain or bring upper floors into residential use in order to revitalise the social and physical fabric of the city through measures such as the Living City Initiative.
 - Dublin City Council will actively engage with property owners and other stakeholders at a national level to investigate other alternative measures in addition to the Living City Initiative to expedite bringing upper floors into residential use, and will be actioned by the City Recovery Task Force and its successor.
- 5.1.5. Policy QHSN38 – 'Housing and Apartment Mix' seeks:

- To encourage and foster the creation of attractive, mixed use, sustainable residential communities which contain a wide variety of housing and apartment types, sizes and tenures, in accordance with the Housing Strategy and HNDA, with supporting community facilities and residential amenities.

5.1.6. Policy CA6 – ‘Retrofitting and Reuse of Existing Buildings’ seeks:

- To promote and support the retrofitting and reuse of existing buildings rather than their demolition and reconstruction, where possible. See Section 15.7.1 Re-use of Existing Buildings in Chapter 15 Development Standards.

5.1.7. Policy CA6 – refers to ‘Energy Efficiency in Existing Buildings’.

5.1.8. Section 15.7.1 – ‘Re-use of Existing Buildings’ states:

- Where development proposal comprises of existing buildings on the site, applicants are encouraged to reuse and repurpose the buildings for integration within the scheme, where possible in accordance with Policy CA6 and CA7.

5.1.9. Section 15.8.1 – Seeks to encourage and foster living at sustainable urban densities through the creation of attractive sustainable neighbourhoods which promote and facilitate the provision of the 15-minute city through healthy placemaking and the delivery of high quality housing served by local services.

5.1.10. Section 15.14 Commercial Development/Miscellaneous includes separate subsections on ‘Hotels and Aparthotels’, ‘Hotel Development’, ‘Aparthotels’, ‘Bed and Breakfast/Guesthouses’, and ‘Short Term Tourist Rental Accommodation’

5.1.11. Section 15.14.3 – Short Term Tourist Rental Accommodation states:

- There is a general presumption against the provision of dedicated short term tourist rental accommodation in the city due to the impact on the availability of housing stock.
- Applications for Short Term Tourist Rental Accommodation will be considered on a case by case basis in certain locations that may not be suitable for standard residential development such as tight urban sites where normal standards or residential amenity may be difficult to achieve. Applications may also be considered in locations adjacent to high concentration of night / time noisy activity where standard residential development would be unsuitable.

5.2. National Guidelines

5.2.1. Circular Letter PL04/2019 – New Regulation of Short Term Letting

- Provides guidance in relation to Section 38 of the Residential Tenancies (Amendment) Act 2019 that introduced Section 3A of the Planning and Development Act 2000, and the Planning and Development Act 2000 (Exempted Development) (No. 2) Regulations 2019 (S.I. 235 of 2019), which regulate the short-term letting of residential accommodation.
- The aim of these regulations is to address pressures in the private rental market and regulate the loss of long-term rental properties in rent pressure areas (including in Dublin City) for use as tourism-related, short-stay accommodation.

5.3. Natural Heritage Designations

- 5.3.1. The subject site is located c2.6km west of the nearest part of the South Dublin Bay and River Tolka Estuary SPA (Code 004024), while South Dublin Bay SAC (Code 000210) lies c3.65km to the southeast of the site.

5.4. EIA Screening

- 5.4.1. The proposed development is not a type of development that constitutes an EIA project and environmental impact assessment is not required.

6.0 The Appeal

6.1. Grounds of Appeal

- 6.1.1. The applicant's grounds of appeal dated March 2023 include background information including that the upper floors of the building were last in residential use as 6 apartments and do not have the benefit of planning permission. They also state that 1) the lawful use of the upper floor of No 38 is office and storage; 2) that the residential use existed prior to the applicants purchase of the site and 3) that the building is currently vacant and had been for 2 years at the time that the appeal was submitted (March 2023), but is fitted out as its last residential use, pending the outcome of the appeal.

- 6.1.2. The grant of permission for a hostel with 88 bed spaces on this site in 2018 is significantly relevant, as it sets a precedent for tourism accommodation in the building, in place of residential development.
- 6.1.3. Relevant precedents are cited where permission has been granted in the immediate area, including on appeal, for short stay and tourism accommodation. The reason for refusal issued in the current application is not consistent with the granting of permission in the precedent cases.

Importance of Tourism

- 6.1.4. The development plan places significant emphasis on the importance of tourism as a product, and visitor/tourism accommodation in the Z5 area. The proposed development accords with Policies CEE8 (The City Centre), CEE26 (Tourism in Dublin) and CEE28 (Visitor Accommodation).

Compliance with Section 15.14.3 of the Development Plan

- 6.1.5. While Section 15.14.3 sets out that there is a general presumption against the provision of dedicated short term tourist rental accommodation in the city, the applicant considers that the application meets the locational exception provided for in the policy, as it is located in an area of high concentration of night time and noisy activity, where standard residential would be unsuitable, including on account of early morning deliveries.
- 6.1.6. The development would provide less than ideal residential accommodation as it would not comply with private open space requirements and would have low levels of natural light. The second, third and fourth floors can only accommodate 1 bed apartments, excluding the potential for family accommodation. There is an inability to place windows, in either the first floor eastern or western elevations. There is a lack of communal open space and private open space and no external space for bin storage or cycle parking.
- 6.1.7. For these reasons, the building cannot comply with the Apartment Guidelines and relevant standards in the development plan and the proposed use for short term tourist rental accommodation should be favorably considered under 15.14.3.

Precedent

- 6.1.8. The unique circumstances of this site would not apply to other sites and would not set a precedent, as is expressed in the refusal reason.

- 6.1.9. The lawful and permitted use of the upper floors is office/storage. The loss of the unlawful, former residential use of the site was previously accepted, when permission was granted in 2018 for an 88 bed hostel in the building. The building has been vacant for more than 2 years, and the six units do not meet building or fire regulations and could not be brought up to standard without significant work. Therefore, the proposal does not constitute a loss of six apartments.

Future Changes to Short Term Accommodation in the City

- 6.1.10. Up to 12,000 apartments in short term let will revert from AirBNB or similar to long term residential use, as soon to be implemented measures will require them to have express permission for short term letting.

Regularisation of the Planning Position

- 6.1.11. The council is seeking to protect an unpermitted use, while the applicant is seeking to regularise the planning status of the building after purchasing it, as it was in unlawful residential use when they purchased it, and this use has now ceased.

6.2. Planning Authority Response

- None

6.3. Observations

- An observation was received by TII in respect of the appeal, but was deemed to be invalid, as it was received by the board outside of the time period provided by the Planning and Development Act 2000 (as amended) to submit an observation on the appeal. The observation is not on the file and has not been taken into consideration in the assessment of this appeal.

6.4. Further Responses

- After submitting the appeal, the applicant submitted further written comments which were deemed to be an uninvited elaboration of the grounds of appeal and the submission/comments were returned to the applicant. The submission is not on the file and has not been taken into consideration in the assessment of this appeal.

7.0 Assessment

- 7.1.1. Since the decision to refuse permission was issued by the planning authority in February 2023, works have been carried out to the building, both internally and externally, that mean that the building has been modified and is no longer consistent with the 'existing plans and elevations' that were submitted with the application. In addition, a separate application was submitted in November 2023 and was granted permission on the 7th of May 2024 for an extension to the existing buildings to provide for seven new apartments, in addition to the 8 existing apartments at the first to fourth floors of the existing building, that the applicant explained were developed on foot of exempted development works carried out on foot of S.I. 30 of 2018 and S.I. 75 of 2022. These matters are all relevant to and will form part of this assessment.
- 7.1.2. Having reviewed the documents on the file and undertaken a site visit and having regard to the relevant policies and zoning objective pertaining to the subject site, the nature and scale of the proposed development and the nature of existing and permitted development in the immediate vicinity of the site, as well as the matters set out in paragraph 7.1.1 above, I consider that the main issues pertaining to the proposed development can be assessed under the following headings: -
- Principle of development
 - Authorised and Actual Use of Upper Floors
 - New Issue - P.A. Reg. Ref. 4722/23 – (lodged since this appeal was submitted)
 - Site Visit
 - Section 15.14.3
 - Conclusion
- 7.1.3. It should be noted that because of the particular circumstances of this application, much of what is addressed in this assessment is considered to constitute new issues. It was not possible to gain access to the interior of the building, but I am satisfied that the planning history file for P.A. Reg. Ref. 4722/23, which was received from Dublin City Council, contains sufficient information to permit a comprehensive assessment of the proposed development, that is subject to this application, to be carried out.

7.2. Principle of Development

- 7.2.1. The application is seeking permission for the refurbishment and change of use of the upper floors of the building from its permitted use as storage and office ancillary to the ground floor restaurant use, but currently in use as residential, to residential use in the form of 8 no. short stay apartments, while the proposed refurbishments are to include a new access door from Abbey Street Cottages and a new lightwell in the roof, along with 6 no. windows to the south elevation, 2 at each of the first, second and third floors. I note that the descriptions of the permitted, existing and proposed uses in the public notices, are very precise.
- 7.2.2. The site is zoned 'City Centre - 'Z5'', the objective for which is 'to consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity'. 'Residential' is a permissible use in Z5 zoned areas and I note that the development plan does not distinguish between short and long term residential use, whereas it does refer to other similar and specific land use types, namely bed and breakfast, guesthouse, hostel (tourist), hotel, and student accommodation, which are also permissible uses, while Build to Rent residential is 'Open for Consideration'.
- 7.2.3. As detailed in the planning history set out in Section 4.0 above, there are numerous examples of permission having been granted on Z5 zoned lands in Abbey Street Middle and Upper, all within c150m of the site, for hotels and hostels as well as two grants of permission for similar short stay tourist accommodation in the form of changes of use of offices to apartments for short term letting, including one located immediately adjacent to the east of the site. The change of use permissions, which are similar to what is proposed in this application, were both granted under the previous development plan covering the years 2016-2022, while this application was lodged with Dublin City Council on the 21st of December 2022, one week after the 2022-2028 development plan came into effect. The Z5 zoning objective in the 2022-2028 development plan has remained the same as in the 2016-2022 development plan and Residential is a 'Permitted Use' in both plans, indicating that, subject to all other considerations, that the principle of the proposed development is acceptable.
- 7.2.4. The one key change introduced into the 2022-2028 development plan is Section 15.14.3, which states that there is a general presumption against the provision of dedicated short term tourist rental accommodation in the city due to the impact on the availability of housing stock. It continues to state that applications for short term tourist rental accommodation will be considered on a case by case basis in certain

locations that may not be suitable for standard residential development such as tight urban sites where normal standards or residential amenity may be difficult to achieve, while applications may also be considered in locations adjacent to high concentration of night/time noisy activity their standard residential development would be unsuitable.

- 7.2.5. From a land use zoning perspective, I am satisfied that a change of use from storage and office to short stay tourist residential use, is acceptable in principle. However, the acceptability of the proposed development, as it is described in the public notices, must be assessed in more detail, particularly against the provisions of Section 15.14.3 of the development plan and in the context of works that have been carried out to the building since this appeal was submitted to the board, the external aspects of which are evident from an external inspection of the building, while the internal works to the building are detailed in the drawings submitted with application P.A. Reg. Ref. 4722/23, which was submitted to the planning authority on the 1st of November 2023, was the subject a request for further information and was granted permission on the 7th of May 2024. Changes to the building, which are highlighted in the drawings submitted with that application are relevant to this application and will be addressed below.

7.3. Authorised and Actual Use of Upper Floors

Authorised use on lodgement of application and appeal

- 7.3.1. While the application includes the ground floor, as it would provide the means of access to the upper floors, via an existing entrance from Abbey Street Upper and a proposed entrance from Abbey Cottages, the proposed change of use would apply at 1st to 4th floor levels in No. 38 and at first floor level in No. 39 Abbey Street Upper.
- 7.3.2. A key element of the reason for refusal is that the planning authority expressed concern that the development of 8 short stay tourist accommodation apartments, would result in the permanent loss of 6 apartment units for (long term) residential use, which suggests, as the public notices do, that the upper floors were in active residential use at the time the application was submitted, as they describe the 'permitted use of the floors as storage and office ancillary to restaurant use, but currently in use as residential'. The applicant's Planning's Statement and the Architects Design Statement, both state that the upper floors of both No's 38 and 39 are in residential use, without having the benefit of any planning permission. The

grounds of appeal state at paragraph 4.9 that the lawful use of the building is office and storage associated with the ground floor commercial uses and office, while paragraph 4.20 states that ‘the lawful and permitted use of the upper floors is office/storage’ and continues by stating ‘the building has been vacant for in excess of two years.

- 7.3.3. On the basis of the information of the planning file, I am satisfied that on the date of the lodging of this appeal with the Board in March 2023, the authorised use of the upper floors of the building was as storage and office.

Status of residential use on lodgement of the application

- 7.3.4. As well as the authorised use of the upper floors, it is necessary to examine the actual/active use of the upper floors as there are inconsistencies between the description of the actual/active use of the upper floors in the public notices and the documents submitted with the application when compared to the use cited in the grounds of the appeal.
- 7.3.5. As previously mentioned, the public notices, dated December 2022, state that the buildings were ‘currently in use as residential’ as do the applicant’s Planning’s Statement and the Architects Design Statement, which both added that the residential use was without the benefit of any planning permission. This suggests that the residential units were occupied at the time the application was submitted and no information was provided to confirm or even indicate that the ‘residential’ use had ceased when the application was lodged. My interpretation of the public notices is consistent with the planning officer’s assessment, and the decision to refuse permission, which refers to the ‘permanent loss of 6 apartment units for residential use’. In my opinion, had the unauthorised residential use cease at the time of lodging the application, the public notice would not have referred to the upper floors being ‘currently in use as residential’.
- 7.3.6. Paragraph 3.3 of the planning appeal, dated March 2023, introduced a new issue, when it stated that ‘the building is currently vacant (and has been for the last two years) but is fit out as its last residential use pending the outcome of this appeal process’. This statement indicates that the unauthorised residential use had ceased long before the application was submitted, which, if correct, would mean the description of the development as stated in the public notices would be incorrect, as there is a difference between a build being laid out for residential use and in

residential use. I am satisfied that the application indicated that the residential use was ongoing on the lodgement of the application in December 2022, as the specific wording used in the public notices was 'currently in use as residential'.

7.3.7. I have considered the existing floor plans submitted with the application, which show that, the existing first floor contained three apartments at the front and two meeting rooms at the rear, the existing second and third floors each contained 1 no. two-bedroom apartment and the 4th floor contained a three bedroom apartment. This would give a total of six apartments, which is reflected in the wording of the refusal reasons.

7.3.8. Other than statements in the grounds of the appeal, no evidence has been provided by the applicant to confirm that the residential use had ceased more than 2 years before the appeal was submitted, i.e. before March 2021, and while this may not appear entirely relevant to the matter under consideration in this application, it is relevant in the context of application 4722/23, which was submitted after this appeal was lodged and has been granted permission for 7 apartments as an extension to the same site/building that is subject to this application. 4722/23 is addressed below.

7.3.9. I consider that the contradictory descriptions of the actual use of the building in the application and the appeal means that it is not possible to definitively determine, on the basis of available information, whether the residential use of the upper floors of the building was ongoing or had ceased on the date that the application was lodged.

7.4. New Issue - P.A. Reg. Ref. 4722/23 – (lodged since this appeal was submitted)

7.4.1. On the 1st of November 2023, more than seven months after this appeal was received by the board, a new application was submitted to the planning authority under P.A Ref. Reg. 4722/23, seeking permission for revisions to existing elevation, 2 and 3 floor extensions to the existing building, to included a communal roof terrace and provide 3 no. 1-bedroom units and 4 no. studio units, as an extension to the existing building that is the subject of the current appeal.

7.4.2. In assessing application 4722/23, the planning officer's first report highlighted that there were inconsistencies between the existing upper floor layouts in the plans submitted with the application (4722/23), when they were compared to the existing floor plans in the application that is the subject of this appeal (P.A. Reg. Ref. 5510/22 & ABP-316120-23). The inconsistencies included that the existing first floor plans in application 4722/23 indicated that it contained 5 residential units, whereas the

existing first floor plans in the current appeal (P.A. Reg. Ref. 5510/22 & ABP-316120-23) indicated that the first floor included three apartments at the front and two meeting rooms at the rear. From my review of all plans, it appears that the difference in the internal layouts between the two sets of 'existing plans' can be explained by a reference in the 'existing plans' in 4722/23, (Drawing No's PA-101, PA-102 and PA-103 dated September 2023), all of which include a note stating 'existing layouts in accordance with S.I 30 Notification (S.I. 05.23)'.

- 7.4.3. Page 4 of the architectural design statement, which is dated November 2023 and formed part of application 4722/23, elaborated on the note in the drawings and stated that 'there are ongoing development works under S.I. 30 legislation to convert the first floor of Abbey Cottages to 2 studio units, the first floor of 39 to a studio and one bed unit and the 1st, 2nd, 3rd and 4th floor of No 38 to 4 x 1 bed units'. The planning history section of the architectural design statement refers to the current application that is subject to this appeal (ABP-316120-23 and P.A. Reg. Ref. 5510/22) but makes no reference to the potential impact of the works being carried out on the status of this appeal.
- 7.4.4. Item 2 of the request for further information stated that 'under Article 10 (6) of the Planning and Development Regulations 2001 (as amended) and the Dublin City Development Plan, rooms for use, or intended for use as habitable rooms, shall have adequate natural lighting. In addition, it is also a requirement under S.I 75 of 2022 to notify the Planning Authority in writing that the change of use will occur for record purposes. The Applicant is requested to confirm that notification has been made to the Planning Authority for the intended change of use and any change to residential use adheres to the relevant planning guidelines'.
- 7.4.5. As part of the response to the request for further information in 4722/23, the applicant stated that Unit 3 is an existing apartment built under a S.I. 75 exemption that was lodged with the planning authority on the 6th of April 2023. They also included a letter of acknowledgement from DCC, dated the 19th of April 2023, that specifically referenced 38 & 39 Abbey Street Upper and Dublin City Council's reference S.I. 30 Notification (S.I. 05.23), which is the same reference cited in the 'existing floor plans' submitted with the application. The DCC issued letter continues by referring to the recent notification under S.I. No. 75 of 2022 (Formerly S.I. No 30 of 2018) and it stated that the letter was not confirmation of the proposed

developments compliance with the conditions and limitations of the aforementioned S.I.'s, which amended Article 10 of Principal Regulations.

- 7.4.6. The applicant has relied upon S.I. No. 30 of 2018 and S.I. No. 75 of 2022, in responding to the request for further information regarding the changes that have already been made to the building prior to a decision being issued in respect of this appeal (ABP-316120) and I do not propose to engage whether or not the works carried out to the existing building are or are not compliant with the many requirements of S.I. No. 75 of 2022. The planning authority has accepted in the course of assessing P.A. Reg. Ref. 4722/23 that the works carried out to create 8 apartments in the existing building were acceptable, with the exception of Unit 3 at first floor level, which is lit by a lightwell. A condition has been attached requiring Unit 3 to be used as storage only. I refer the board to the drawings of P.A. Reg. Ref. 4722/23, which form part of this appeal file.
- 7.4.7. The key conclusion from 4722/23 is that works have been carried such that the use of the building is now considered to be residential, meaning that the subject matter of the application/appeal in this case, being a change of use from its permitted use as storage and office ancillary to the restaurant use, but currently in use as residential, to 8 no. short stay apartments i.e. residential, is in my opinion a moot point as the use of the building is now residential by virtue of the works carried out in accordance with S.I. 75 of 2022, regardless of the grant of permission issued under 4722/23 and the applicant could not give effect to the change of use described in the public notices.

7.5. Site Visit

- 7.5.1. Following from 4722/23, on the occasion of the site visit, I noted that works had been carried out to the exterior of the building that were inconsistent with the submitted existing elevations including:
- The proposed new door from Abbey Cottages had been installed.
 - The front elevation onto Abbey Street Upper had been improved and new windows had been installed.
 - A number of the window opes facing east towards Liffey Street has been reduced from 5 to 2.

- 7.5.2. These changes are however consistent with the existing elevations submitted to the planning authority with P.A Ref. Reg 4722/23 and indicated that much of the works for which permission is sought in this application have already been carried out.
- 7.5.3. In addition, part of the interior of the first floor above No. 39 was visible from the street on the occasion of the site visit and I note by reference to the floor plans, that the first floor Unit 2 appears to be laid out in accordance with the proposed first floor plan in the current application (ABP-316120-23) and not the existing first floor plan. In particular the proposed acute angled wall on the north facing living/dining/bed was clearly evident from the street and that wall is also shown in the plans submitted with 4722/23.
- 7.5.4. I also noted the presence of four number heat pumps and lengths of ducting on the exterior of the western elevation onto Abbey Cottages. These are not shown in any of the existing or proposed elevations that were submitted to the planning authority. I note the contents of the engineering report submitted with the application, which focuses on mechanical and electrical systems and energy performance, which states that in order to comply with Part L and seeking to achieve the NZEB standard, the application will include air heat pump technology, high performance glazing mechanical heat recovery ventilation and LED lighting. The external inspection of the building would indicate that air heat pumps have already been installed, Directly outside of the windows of the first floor studio units four and five, that front onto Abbey Cottages.
- 7.5.5. The Architects Design Statement (ADS) in P.A Ref. Reg. 4722/23 includes a photograph of the front and part of the eastern side of the building and it is evident from an inspection of the exterior of the building that the windows on the Abbey Street facade have been replaced and a number of the windows/openings on the western side elevation (facing Liffey Street) have been closed up since the Design Statement was prepared in November 2022.
- 7.5.6. It is a basic principle of planning that while development may be exempt from the requirement to obtain planning permission, it is within the rights of any person to apply for permission for any particular type of development, even if it is a form of development that is expressly deemed to be exempted development by virtue of the Planning and Development Act or Regulations, and this may apply to the works that

have been carried out respect of the subject buildings at No's 38 and 39 Abbey Street Upper.

- 7.5.7. While it was not possible to inspect the interior of the structure, available evidence on this Planning file and on planning file P.A Reg. Ref. 4722/24 suggest that the works that have been carried out to the interior to the building in a manner that is not entirely consistent with the floor plan submitted with this application, although they are substantially of the same manner and layout.

7.6. Section 15.14.3

- 7.6.1. The applicant argued in this application and appeal that the existing building is not suitable for permanent residential use and it was for that reason that they sought permission for short term accommodation use. The also argued that the reliance in the refusal reason on section 15.14.3 was incorrect as the existing use was not residential as it was office and storage ancillary to restaurant use and no actual long term residential units would be lost. Their actions in converting the units to residential use by way of exemptions provided for in S.I 30 of 2018 and S.I. 75 of 2022 now mean that a grant of permission would result in the loss of 8 residential units (7 if Unit 3 was to be omitted as per condition No. 3 of the grant of permission issued on 4722/23) and the applicant's claims that the existing layout could not be adapted was incorrect. Section 15.14.3 of the development plan states that there is a general presumption against the provision of dedicated short term tourist rental accommodation in the city due to the impact on the availability of housing stock.
- 7.6.2. I am satisfied that the proposed change of use to short term tourist accommodation would be contrary to the provision of Section 15.14.3 of the development plan and that a refusal of permission should be issued in that regard.

7.7. Conclusion

- 7.7.1. Three of the four elements of this application have already been carried out being:
- A new proposed access onto Abbey Cottages has been constructed.
 - A new lightweight at the rear of the building, according to the information provided in 4722/23, that is on the appeal file, has already been installed.
 - Internal refurbishment works and a change of use of the upper floors from storage and office ancillary to resultant, to residential.

- 7.7.2. The fourth element of the proposed development, in the form of a number of new windows, has not been carried out yet.
- 7.7.3. Whether the works carried out since this appeal was submitted, comply with S.I's 30 of 2018 and 75 of 2022 are a matter for the planning authority. For the purposes of this application, I am satisfied that the majority of the matters before the board for consideration are no longer relevant, due to the nature of the works that have been carried out to the building and I consider that the board is precluded from considering this application any further.

8.0 AA Screening

- 8.1.1. Having carried out Screening for Appropriate Assessment of the project in accordance with Section 177U of the Planning and Development Act 2000 (as amended), I conclude that that the project individually or in combination with other plans or projects would not be likely to give rise to significant effects on either South Dublin Bay and River Tolka Estuary SPA or South Dublin Bay SAC or any other European Sites within Dublin Bay in view of the sites Conservation Objectives, and Appropriate Assessment (and submission of a NIS) is not therefore required.
- 8.1.2. This determination is based on:
- The nature and scale of the proposed works, some of which have already been carried out by way of an exemption provided for in S.I.75 of 2022.
 - The distance from the nearest the European site and the absence of meaningful pathway to any European site.
 - Objective information presented in the AA Screening Report.
- 8.1.3. No measures intended to avoid or reduce harmful effects on European sites were taken into account in reaching this conclusion.

9.0 Recommendation

I recommend that board should DISMISS this appeal in accordance with the provisions of Section 138(b)(ii) of the Planning and Development Act, 2000 (as amended) for the reason set out below.

10.0 Reasons and Considerations

1 Since this appeal was submitted to the board, a separate planning application has been granted permission for an extension to the building under P.A. Reg. Ref. 4722/23. On the basis of the information available on the planning file the following works for which permission is sought I this application have already been carried out:

- internal alterations to the layout to create 8 apartments, that gives effect to a change of use of the building from its previously permitted use as storage and office ancillary to restaurant use, to residential use;
- a new access onto Abbey Cottages;
- a lightwell;

in these circumstances, the board is satisfied that the majority of the works and the change of use that are the subject to this application have already been carried out and is further satisfied that the applicant could not give effect development subject to this application. Therefore, the board is satisfied that it cannot consider this application further and dismissed this appeal in accordance with the provisions of Section 138(b)(ii) of the Planning and Development Act, 2000 (as amended).

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.

Joe Bonner
Senior Planning Inspector

30th September 2024

Appendix 1 - Form 1

EIA Pre-Screening

[EIAR not submitted]

An Bord Pleanála Case Reference	ABP-316120-23			
Proposed Development Summary	Refurbishment and change of use to aparthotel (8 Short Stay Apartments).			
Development Address	38/39 Abbey Street Upper, Dublin 1			
1. Does the proposed development come within the definition of a 'project' for the purposes of EIA? (that is involving construction works, demolition, or interventions in the natural surroundings)		Yes		
		No	X	
2. Is the proposed development of a class specified in Part 1 or Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) and does it equal or exceed any relevant quantity, area or limit where specified for that class?				
Yes			EIA Mandatory EIAR required	
No	X		Proceed to Q.3	
3. Is the proposed development of a class specified in Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended) but does not equal or exceed a relevant quantity, area or other limit specified [sub-threshold development]?				
		Threshold	Comment	Conclusion
No	X	N/A	Not a specified class of development.	No EIAR or Preliminary Examination required
Yes				Proceed to Q.4
4. Has Schedule 7A information been submitted?				

No	X	Preliminary Examination required
Yes		Screening Determination required

Inspector: _____ **Date:** _____

Appendix 2 – AA Screening

Screening the need for Appropriate Assessment Finding of no likely significant effects

Appropriate Assessment: Screening Determination (Stage 1, Article 6(3) of Habitats Directive)

I have considered the proposed development consisting of the change of use of the upper floors of No'2 38 and 38 Abbey Street Upper to residential use, in light of the requirements S177U of the Planning and Development Act 2000 as amended.

A detailed description of the site is presented in section 1.0 of my report and a description of the proposed development is presented in section 2.0.

The application was accompanied by a Screening Report for Appropriate Assessment prepared by a consultant Ecologist. However, the planning officer's report and assessment does not address or refer to the Screening Report and they did not carry out a Screening Determination.

The applicant's Screening Report identified the nearest Natura 2000 site to be South Dublin Bay and River Tolka Estuary SPA, which is 2.6km from the site in a straight line, and 6km hydrologically. It lists the features of interest in North Bull Island SPA and South Dublin Bay and River Tolka Estuary SPA, and notes that they also incorporate the geographical areas of South Dublin Bay SAC and North Dublin Bay SAC. It lists the bird species present in the SPA's and provides a short description of the population status of each species. It notes that the SPA's have a 'maintain population' conservation status, while the habitats in the SAC's are classified as having 'favourable status'.

It notes that the site has connections to one or more Natura 2000 Site via wastewater, surface water and freshwater supply.

The Screening Report states that water quality with Dublin Bay is classes as 'Good Status' and while declines in bird numbers have been recorded, this decline is not linked to water quality. References are made to potential impacts of overflows from the Ringsend Wastewater treatment plant in the event that it is not upgraded.

It notes that the development would not result in any direct habitat loss, and given its distance from Natura 2000 sites, its built form, no new sources of light or noise, the development would not disturb any habitats of have any ex-situ impacts.

Hydrological pathways or connections were noted between the site and Dublin Bay via the surface water sewer and Ringsend WWTP. It followed on to state that there would be no negative effect from surface water as there would be no change in the area of hard surfacing and that no significant effects are likely to arise. While the loading on Ringsend WWTP would be slightly increased, the impact would not be significant and there is no evidence that pollution through nutrient input is affecting the conservation objectives of any Natura 2000 sites in Dublin Bay and that no significant effects are likely to arise to any Natura 2000 site from this source. No effects were predicted during the construction phases from pollutants entering the surface water system.

The report does not refer to any nearby projects, other than the Ringsend WWTP upgrade in terms of in-combination effects and concluded that the upgrade works

would see greater compliance with quality standards of effluent so it is expected that water quality will improve in Dublin Bay.

The conclusion of the AA screening report is that 'significant effects' are not likely to arise, either individually or in combination with other plans or projects to the Natura 2000 network.

European Sites

The proposed development site is not located within or immediately adjacent to any site designated as a European site, comprising a Special Area of Conservation or Special Protection Area (SPA). Two Natura 2000 sites are located within 3.6km of the potential development site being:

- South Dublin Bay and River Tolka Estuary SPA (Code 004024), the nearest point of which is located c2.28km to the north east.
- South Dublin Bay SAC (Code 000210) the nearest part of which lies c3.65km to the south east of the site.

Given that the site is entirely built up and the proposed development consists of a change of use of the upper floors of an existing building, with limited works proposed to the buildings external fabric, including the creation of a new door opening, a lightwell and the changing of windows, I am satisfied that it would not be necessary to examine the potential for significant effects on any European Sites beyond those of the two sites referred to above.

Natura 2000 Site	Qualifying Interests (summary)	Distance	Connections
South Dublin Bay and River Tolka Estuary SPA (Code 004024)	<u>Species</u> Light-bellied Brent Goose; Oystercatcher; Ringed Plover; Grey Plover; Knot; Sanderling; Dunlin; Bar-tailed Godwit; Redshank; Black-headed Gull; Roseate Tern; Common Tern; Arctic Tern; <u>Habitats</u> Wetland and Waterbirds	2.28km	No direct
South Dublin Bay SAC (Code 000210)	Mudflats and sandflats not covered by seawater at low tide; Annual vegetation of drift lines; Salicornia and other annuals colonising mud and sand; Embryonic shifting dunes	3.65 km	No direct

There are no direct hydrological links connecting the project site to the European Sites, while there are no ex situ habitats within the application site that the species of conservation interest would feed upon. There are indirect connections to the European Sites via the public on street surface water drainage system and via the Ringsend Wastewater Treatment Plant.

Likely impacts of the project (alone or in combination)

Due to the long established nature of the existing building that takes up the entire footprint of the site in a built up urban area, to the absence of any open drains or watercourses in close proximity to the site, and the absence of ex situ habitats on the site that would be suitable for foraging birds and to the minimal nature of the works to the building that includes a new door, closing up of windows on the eastern elevation and the changing of windows, which have already been carried out under the provisions of an exemption provided by S.I.75 of 2022, I consider that the development would not have generated impacts that could affect anything but the immediate area of the development site, thus having a very limited potential zone of influence on any ecological receptors. I am also satisfied that a number of other windows to be installed, would similarly have not generate any impacts. As the works are already substantially completed, I am satisfied that these works would not have resulted in any direct or indirect impacts on any European site either via the surface water system or the Ringsend WWTP, either alone or in combination with any other projects.

Likely significant effects on the European sites in view of the conservation objectives

The development includes physical works to the building including a new door, closing up of window opes on the eastern elevation and the changing of windows on the Abbey Street Upper elevation, all of which have already been carried out under the provisions of an exemption provided by S.I.75 of 2022. A number of other windows have been proposed to be installed at the rear of the building, subject to permission being granted. I am satisfied that the proposed works, works already carried out and the proposed change of use would not result in impacts that could affect the conservation objectives of either South Dublin Bay and River Tolka Estuary SPA or South Dublin Bay SAC which are 'to maintain the favourable conservation condition' of all of the Qualifying Interests (Species and Habitats) listed in the table above in respect of the SPA and SAC or any other Natura 2000 site, due to distance and lack of meaningful ecological connections. Due to distance and the absence of meaningful ecological connections there would be no changes in ecological functions due to any construction or operational related emissions or disturbance.

There would have been no direct or ex-situ effects from disturbance on mobile species during the works already carried out to the building.

In combination effects

The works already carried out and proposed change of use and works to be carried out would not result in any effects that could contribute to an additive effect with other developments in the area.

No mitigation measures were considered in coming to these conclusions.

Overall Conclusion

Screening Determination

Having carried out Screening for Appropriate Assessment of the project in accordance with Section 177U of the Planning and Development Act 2000 (as amended), I conclude that that the project individually or in combination with other plans or projects would not be likely to give rise to significant effects on either

South Dublin Bay and River Tolka Estuary SPA or South Dublin Bay SAC or any other European Sites within Dublin Bay in view of the sites Conservation Objectives, and Appropriate Assessment (and submission of a NIS) is not therefore required.

This determination is based on:

- The nature and scale of the proposed works, some of which have already been carried out by way of an exemption provided for in S.I.75 of 2022.
- The distance from the nearest the European site and the absence of meaningful pathway to any European site.
- Objective information presented in the AA Screening Report.

No measures intended to avoid or reduce harmful effects on European sites were taken into account in reaching this conclusion.