



An
Bord
Pleanála

Inspector's Report ABP-318772-23

Questions

1. Whether the alterations to the façade of the Southern Star public house involving the upgrade of the fenestration and signage fall within the scope of Section 4(1)(h) of the Planning and Development Act 2000 as amended and are therefore exempted development.
2. Whether the alterations and improvements to the garden bar of the public house comprising the upgrade of furniture and fittings and the replacement of roof structures with canvas awnings with a similar footprint (but excluding the arch and the canopy over the raised section at the northern end of the garden bar) are exempted.

Location

The Southern Star Public House, 9
Southern Road, Cork T12WN83

Declaration

Planning Authority Cork City Council

Planning Authority Reg. Ref. R809/23

Planning Authority Decision Split decision

Referral

Referred by Conor Murphy

Occupier Conor Murphy

Landowner Niall Murphy

Date of Site Inspection 15th March 2024

Inspector John Duffy

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1.0 Site Location and Description

- 1.1. The referral site which is triangular in configuration accommodates the Southern Star public house and an associated external area used as a beer garden. The premises is located at the junction of Southern Road and High Street in Cork City centre. The South Link Road adjoins the eastern site boundary. The Southern Star public house, a two storey building with flags hanging from 4 no. flagpoles on the front façade is the end property in a long terrace of mainly residential units. A post office and single storey commercial units are located across the road from the premises.
- 1.2. The beer garden is located at the eastern side of the public house and it is denoted as a smoking area and garden bar on the submitted plans. There is gated vehicular access from the public road to this part of the premises. Across and above the vehicular entrance is an archway.
- 1.3. The floor of the garden bar area is covered with artificial grass. Two to three expansive stretch tents cover this area which contains the garden bar and smoking area and accommodates, inter alia, the following items / fixtures and fittings: significant numbers of seated areas including custom built booths, tables, ledges, speakers, heaters, lighting, beer kegs, a catering trailer from which food would be dispensed and timber panelling along the boundary with the South Link Road. An elevated area / platform is located at the northern part of the garden bar area.

2.0 The Questions

- 2.1. Two questions have arisen pursuant to Section 5 of the Planning and Development Act 2000, as amended, as follows:
 - (i) Whether the alterations to the façade of the Southern Star public house involving the upgrade of the fenestration and signage fall within the scope of Section 4(1)(h) of the Planning and Development Act 2000 as amended and are therefore exempted development, and
 - (ii) Whether the alterations and improvements to the garden bar of the public house comprising the upgrade of furniture and fittings and the replacement of roof structures with canvas awnings with a similar footprint (but excluding the

arch and the canopy over the raised section at the northern end of the garden bar) are exempted because (a) the works fall within the scope of Section 4(1)(h), and (b) the works were not carried out to facilitate any material change or intensification of the premises.

- 2.2. Reference is made in the Declaration and the Planner's Report to a protruding illuminated sign on the front façade of the Southern Star and it is visible in the photographs included in the planning report and the referrers' submission to the Planning Authority. The sign was not in place when I visited the site and as such, I do not intend to consider whether it would constitute development and exempted development.
- 2.3. I note that the Planning Authority's Section 5 Declaration Application Form seeks additional details regarding the question / works / development. Having regard to the information provided in that application form, and following a review of the submitted information on the file, and having regard to the matter referred to in paragraph 2.2 above, my opinion is that the questions before the Board can be formulated as follows:
- (i) Whether the alterations to the façade of the Southern Star public house involving repainting, the replacement of windows and doors, and the replacement of pre-existing flags and flagpoles at The Southern Star Public House, 9 Southern Road, Cork, is or is not development and is or is not exempted development, and
 - (ii) Whether the alterations and improvements to the garden bar of the public house comprising the upgrade of furniture and fittings and the replacement of roof structures with canvas awnings with a similar footprint (but excluding the arch and the canopy over the raised section at the northern end of the garden bar), is or is not development and is or is not exempted development.

3.0 Planning Authority Declaration

3.1 Planner's Report

- 3.2. It is considered that all alterations / improvements in this case constitute works and are therefore development.
- 3.3. The replacement of the windows, doors and repainting is consistent with neighbouring properties and these elements can be considered to come under Section 4(1) (h).
- 3.4. The new flagpoles and signage (which replace other flagpoles and signage) render the façade inconsistent with neighbouring structures and they are unique to the property. As such they do not fall within the scope of Section 4(1)(h). Furthermore, they do not have the benefit of planning permission. The height of the protruding illuminated sign is above 4 metres.
- 3.5. In the context of this development, it is considered that Article 9 (1) (a) (viii) applies. Reference is also made to Classes 4 and 6 (relating to advertisements) under Article 6 of Part 2 of the Planning and Development Regulations 2001, as amended. The Condition and Limitation under Class 4 notes that not more than one advertisement in the form of a flag shall be exhibited on a business premises. Condition and Limitation 2 under Class 6 notes that no part of any such advertisement shall be more than 2.5 m in height above ground level.
- 3.6. It is considered that the development carried out in the garden bar does not come within the scope of Section 4 (1) (h). Reference is made to Article 9 (1) (a) (viii). It is noted that any previous roofing and fittings at this area would also have been unauthorised and the extension, alteration, repair and renewal of furniture, fittings, roof structures and new catering facilities are not exempt.
- 3.7. The development undertaken in the garden bar caters for patrons on a year-round basis. No planning permission has ever been sought or issued. This development provides a significant additional footprint to allow the pub to cater for a significant

increase in the number of patrons, which has material consequences in terms of amenity issues for the surrounding area. A material change of use has occurred which has intensified the overall use of the licensed premises.

3.8. Declaration

Cork City Council, in accordance with Section 5 of the Planning and Development Act 2000 as amended, considered that the replacement of the windows, doors and the repainting of the premises would be exempted development having regard to section 4(1)(h) of the Planning and Development Act 2000, as amended. It also considered that the replacement of signs and flags do not fall under section 4(1)(h) and that the alterations and improvements to the garden bar are not exempted development.

The Planning Authority's decision letter to the referrer states the following:

'The Planning Authority considers that –

1. *The replacement of the windows, doors, and the repainting* is consistent with the neighbouring properties and these elements can be considered to come under Section 4(1)(h) of the Planning and Development Act 2000 (as amended) and are therefore considered **EXEMPT DEVELOPMENT**;
2. *The replacement of the signs and flags* do not fall under the scope of 4(1)(h) of the Planning and Development Act 2000 (as amended) and are **NOT EXEMPTED DEVELOPMENT**;
3. *The alterations and improvements to the garden bar of the Southern Star comprising the upgrade of the furniture and fittings and the replacement of the roof structures with canvas awnings with a similar footprint (but excluding the arch and the canopy over the raised section at the northern end of the garden bar)* do not fall under the scope of 4(1)(h) of the Planning and Development Act 2000 (as amended) and are **NOT EXEMPTED DEVELOPMENT**;

Further to this, it is considered that a material change of use has occurred and this also has intensified the overall use of the licensed premises. This is **NOT EXEMPTED DEVELOPMENT.**

4.0 Planning History

4.1. Site History

Enforcement: A Warning letter and Section 8 Notice issued in January 2023 in relation to the alterations.

Planning Authority Ref. 23/42290 – Permission refused in November 2023 for erection of advertising board on gable end of public house.

An Bord Pleanála Ref. PL.28.220800 / Planning Authority Ref. 06/31240 – Retention permission refused in 2007 for 6.5 metre by 3.3 metre illuminated tri-vision rotating advertising sign on south-eastern gable wall of public house.

An Bord Pleanála Ref. PL.28.126784 / Planning Authority Ref. 01/25304 - Retention permission granted in 2002 for the erection of DCS telecommunications antennae, microwave dish, equipment cabinets, cabling, and associated equipment.

Relevant condition:

- 1. This permission is for a period of five years from the date of this order. The telecommunications structure and related ancillary structures shall then be removed unless, prior to the end of the period, planning permission shall have been granted for their retention for a further period. Reason: To enable the impact of the development to be re-assessed, having regard to changes in technology and design during the period of five years.*

4.2. Previous Board References / Referrals

- ABP-307112-20: Referral relating, inter alia, to construction of a smoking area / beer garden to rear of Lamplighters Pub, 79 The Coombe / 1 Brabazon Street, Dublin 8. Decision: Is development and is not exempted development
- RL 3524: Referral relating to provision of a partial roof to replace canopy and metal clad roof in an external beer garden at 47 Temple Bar, Dublin 2. Decision: Is development and is not exempted development. It was decided that the development does not come within the scope of section 4 (1) (h) not being works for the maintenance or improvement or other alteration of a

structure but consists of the provision of a new structure onto existing structures.

- RL 2188: The Board determined that the provision of a beer garden on purpose-built decking and the provision of three number gazebos thereon at Turners Cross Tavern, 1 Evergreen Road, Cork City is development and is not exempted development. The Board concluded, inter alia, the beer garden use constitutes a material change of use, being an extension to the net floorspace of the commercial activity and, consequently, an intensification of use of the land.

5.0 Policy Context

5.1. Development Plan

Under the Cork City Development Plan 2022 – 2028, the subject site is situated in an area zoned ZO 01 Sustainable Residential Neighbourhoods with the objective ‘To protect and provide for residential uses and amenities, local services and community, institutional, educational and civic uses.’

5.2. Natural Heritage Designations

The referral site is not located within or in the vicinity of any European site. The Cork Harbour SPA is the closest Natura 2000 site located approximately 2 kms south-east of the site. Cork Lough proposed NHA is located c 1.5 km to the south-west.

6.0 The Referral

6.1. Referrer’s Case

The grounds of appeal are set out by the referrer’s agent as follows:

- Failure of the Planning Authority to comply with Section 5(2) (a) of the Planning and Development Act 2000, as amended, as no adequate reasons or considerations were given in the Declaration.
- No adequate justification given for conclusions in the Declaration that the works involved in the replacement of the signs and flags and the alterations /

improvements to the garden bar do not fall within the scope of Section 4 (1) (h) of the Act.

- No adequate justification given for the conclusions in the Declaration that the alleged change and / or intensification of use is not exempted development.
- There is no legal basis for the conclusions reached in the Declaration that a material change of use has occurred which has intensified the overall use of the licensed premises, and which is not exempted development.
- Reference made to the Planning Officer's report. There is no basis for distinction between the windows and doors and the flags and signage, given that in both cases works involved the replacement of very similar and long established features.
- It is assumed in the planning report that the licensed premises should be considered to be part of a residential development and that any changes should be assessed on the basis as to whether they would be appropriate for a structure within a primarily residential area. However, the premises forms part of a cluster of non-residential uses at the junction of Southern Road, High Street and Capwell Road. Any assessment of the impact on the character of the adjoining residential terrace to the north should have regard to the fact that the area is located in a heavily trafficked, mixed use, inner-suburban area.
- The existing licensed premises with associated flags, signs and garden bar was established before the Local Government (Planning and Development) Act 1963 came into operation. As such there is no legal basis to treat pre-existing features as unauthorised on the sole ground that they were not the subject of a subsequent planning permission.
- There is no legal basis for the reference in the planning report to Article 9 (1) (a) of the Planning and Development Regulations as amended as Article 9 only applies to 'development to which article 6 relates.' Article 6 applies to 'development of a class specified in column 1 of Part 1 of Schedule 2.' It does not apply to the provisions of Sections 3 or 4 of the 2000 Act.
- In terms of the improvements to the garden bar the assessment ignores that (i) the site forms part of a cluster of non-residential uses, (ii) the works were carried

out to replace typical features within a licensed premises which was established since before the 1963 Act came into operation, (iii) the features which were replaced had been shown as existing on previous planning applications and were not considered to be unauthorised at that time and (iv) the fact that these features are not present in neighbouring structures is entirely irrelevant if they are only appropriate for a licensed premises.

- The assessment of the materiality of the change is undermined by the following assumptions: (a) that the improvement works to the garden bar were not exempt and (b) that there was no established use of the garden bar before the recent improvements were carried out. Evidence of previous use was provided in the application by the former licensee and this was not considered by the Planning Authority.
- It would appear that because no planning permission was sought or issued in respect of the garden bar, it was concluded that a material change or intensification had occurred. This position is unreasonable and would discriminate against any business which was established before the 1963 Act came into operation.
- There have been significant changes in the hospitality sector since the Covid pandemic and it is normal for customers of bars, cafes and restaurants to avail of outdoor seating. This is 'extensification' rather than 'intensification' and does not necessarily involve any increase in patronage.
- The planning report does not provide evidence that there is a material change in terms of intensification of use of the premises. The assessment of potential impact on amenity of surrounding properties does not consider that the site adjoins the Douglas Road and the N27 South Link Road, two of the busiest traffic arteries in the city, or that the adjoining section of the N27 has a speed of 100 km/h.

6.2. Landowner response

None received.

6.3. Planning Authority response

None received.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 as amended

Section 2(1) – Interpretation

The following are relevant to the subject questions:

advertisement means –

‘any word, letter, model, balloon, inflatable structure, kite, poster, notice, device or representation employed for the purpose of advertisement, announcement or direction’

advertisement structure means –

‘any structure which is a hoarding, scaffold, framework, pole, standard, device or sign (whether illuminated or not) and which is used or intended for use for exhibiting advertisements or any attachment to a building or structure used for advertising purposes’

structure means –

‘any building, structure, excavation or other thing constructed or made on, in or under any land, a part of any structure so defined and

(a) where the context so admits, includes the land on, in or under which the structure is situate and

(b) in relation to a protected structure or proposed protected structure includes

(i) the interior of the structure,

(ii) the land lying within the curtilage of the structure,

(iii) any other structures lying within that curtilage and their interiors and

(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraphs (i) or (iii)'

works

'includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure'.

Section 3(1) - Development

In the Act '...'development' means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.'

Section 4 (1) sets out various forms and circumstances in which development is exempted development for the purposes of the Act and this includes:

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

Section 4(4) 'Exempted development'

'Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.'

Section 5 (2) (a) 'Declaration and referral on development and exempted development'

'Subject to paragraphs (b) and (ba), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under *subsection (1)*, and,

where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

7.2. Planning and Development Regulations, 2001 as amended

Article 9

(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,

(iii) endanger public safety by reason of traffic hazard or obstruction of road users,

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use

Schedule 2

Part 2 – Exempted Development – Advertisements

Description of Development

Class 4

An advertisement in the form of a flag which is attached to a single flagstaff fixed in an upright position on the roof of a business premises and which bears no inscription or emblem other than the name, device or logo of a person or business occupying the business premises.

Condition and Limitation

Not more than one such advertisement shall be exhibited on a business premises.

8.0 **Assessment**

- 8.1. I have inspected the site, examined the referral details and all other documentation on file, including all of the submissions received in relation to the referral, and the report of the local authority.

It should be stated at the outset of this assessment, that the purpose of the referral is not to determine the acceptability or otherwise of the repainting, the replacement fenestration and doors, the replacement flags/flagpoles, and alterations / improvements to the garden bar including replacement of roof structures, but rather whether or not the matters in question constitute development, and if so, fall within the scope of exempted development. Likewise, planning enforcement is a matter for the Planning Authority and does not fall within the jurisdiction of the Board.

8.2. **Is or is not development**

- 8.2.1. Having regard to Section 2(1) and Section 3(1) of the Planning and Development Act 2000 as amended, it is considered that the following elements constitute 'works' and 'development' within the meaning of the Act;

- Alterations to the façade of the public house involving the replacement of the windows and doors, repainting of facade and replacement of pre-existing signage and flags
- Alterations to the garden bar to the side of public house comprising the upgrade of furniture and fittings and the replacement of roof structures with canvas awnings with a similar footprint (but excluding the arch and the canopy over the raised section at the northern end of the garden bar).

8.3. The façade of the public house

8.3.1. Having established that the 'works' undertaken amount to 'development,' the next issue to be considered is whether the development is exempted development or not. Development can be exempt from the requirement for planning permission by either Section 4 of the Planning and Development Act 2000 as amended, or by Article 6 of the Planning and Development Regulations 2001, as amended.

8.3.2. Section 4 (1) of the Act defines certain types of development as being 'exempted development.' In this regard, section 4 (1) (h) is relevant and states the following:

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

The replacement of fenestration and doors and the repainting of the premises do not materially affect the external appearance of the building so as to render its appearance inconsistent with its character or that of neighbouring structures. As such I am satisfied that these aforementioned developments come within the parameters of section 4 (1) (h) of the Act and constitute exempted development.

8.3.3. I note the referral submission contends that the existing licensed premises together with associated flags, flagpoles, signs and garden bar was established before the Local Government (Planning and Development) Act 1963 came into operation. While this may be the case, no evidence which verifies this contention has been provided by the referrer's agent.

8.3.4. The referrer as part of their submission to the Planning Authority provided photographs of the premises from 2009, 2011, 2022 and 2023. I note there are no flagpoles evident on the premises in the June 2009 photograph. Front flagpoles are evident from a review of available online photography from September 2011 onwards. It is apparent that the new re-positioned flagpoles with flags advertising the premises appear larger and more prominent.

8.3.5. I consider the flagpoles / flags do not come within the parameters of section 4 (1) (h) on the basis that they render the appearance of the building inconsistent with the

character of neighbouring structures which comprise adjoining residential units and commercial units located opposite the subject property.

- 8.3.6. While there is provision under Class 4 of Part 2 of Schedule 2 of the Planning and Development Regulations 2001, as amended, for a flag attached to a single flagstaff fixed in an upright position on the roof of a business premises, the existing flags and flagpoles do not comply with this criteria and as such they cannot avail of the exemption provided for under Class 4.

8.4. Alterations to the garden bar

- 8.4.1. The referrer's agent claims that the garden bar is an established part of the public house premises prior to the introduction of the Local Government (Planning and Development) Act 1963. While this may be the case no evidence in this regard has been provided in this referral.
- 8.4.2. The nature of the beer garden has however changed in recent times, likely driven, as noted in the referral, by the Covid pandemic, and there is strong demand for bars and restaurants to provide outdoor dining facilities. The referral describes this expansion as 'extensification' rather than 'intensification.' The garden bar area, located at the eastern side of the site, is large in size and runs along the full length of the site. It is clear from the assortment of fixtures and fittings in the garden bar including the expansive stretch tents, seated areas, booths, tables, heaters, speakers and the food trailer that patrons of the public house may consume their food and drinks in this space. The stretch tents are visible from the public realm. In the absence of evidence to the contrary, I consider the alterations made to this outdoor area extends the internal seating of the existing public house. The Board's order under RL3524 that that development would constitute an extension to the internal seating area of the existing public house is relevant, and, having regard to the Supreme Court judgement in Michael Cronin (Readymix) Ltd - v - An Bord Pleanála (Supreme Court Appeal No. 304/2010, 30th May 2017) an extension is a development that does not come within the exemption afforded by Section 4 (1)(h) of the Planning and Development Act 2000, as amended.
- 8.4.3. The referral site is located in a busy mixed-use area at the junction of Southern Road and High Street in the city centre. The premises is proximate to residential properties

and the public house accommodates 2 no. apartments overhead. In my view the alterations made to the garden bar as described above creates material planning consequences. A Planning Authority would likely consider impacts such as noise, fumes and late night activity on the amenities of nearby properties. Having regard to the material consequences with respect to the proper planning and sustainable development of the area, it is considered that a material change of use has occurred, which amounts to development which is not exempted.

- 8.4.4. It is the referrer's position that the alterations to the garden bar are exempt under Section 4 (1) (h) of the Act on the basis the works do not materially affect the external appearance of the structure so as to render it inconsistent with the character of the structure of neighbouring properties. The replacement of roof structures with two or three large stretch tents, akin to those one might observe at outdoor festivals, renders the subject roof entirely inconsistent with surrounding roof types which predominantly comprise pitched tiled roofs and flat roofs. It is considered that these works would materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the property itself and/or with the character of neighbouring structures. I therefore conclude that the works are not exempted development by virtue of Section 4 (1) (h) of the Planning and Development Act 2000, as amended. Furthermore, I consider there are no provisions in the Act or Regulations by which the development would be exempted.

9.0 Recommendation

I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS questions have arisen as to:

- (a) Whether the alterations to the front façade of the Southern Star Public House involving (i) the repainting of the façade and the replacement of windows and doors, and (ii) the replacement of pre-existing flags and flagpoles is or is not development and is or is not exempted development, and
- (b) Whether the alterations and improvements to the garden bar of the public house comprising the upgrade of furniture and fittings and the replacement of roof structures with canvas awnings with a similar footprint (but excluding the arch and the canopy over the raised section at the northern end of the garden bar) is or is not development or is or is not exempted development;

AND WHEREAS the said questions were referred to An Bord Pleanála by Conor Murphy on the 28th of December 2023;

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Sections 2(1) and 3(1) of the Planning and Development Act 2000, as amended,
- (b) Section 4 (1) (h) of the Planning and Development Act 2000, as amended,
- (c) Part 2 of Schedule 2 of the Planning and Development Regulations 2001 as amended, and
- (d) the pattern of development in the area;

AND WHEREAS An Bord Pleanála has concluded that:

(a) the alterations to the front façade of the Southern Star public house comprising (i) the repainting of the façade and the replacement of windows and doors, is development and is exempted development, and (ii) the replacement of the flagpoles and flags is development and is not exempted development, and

(b) the alterations and improvements to the garden bar of the public house comprising the upgrade of furniture and fittings and the replacement of roof structures with canvas awnings with a similar footprint (but excluding the arch and the canopy over the raised section at the northern end of the garden bar) is development and is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Planning and Development Act as amended, hereby decides that the said development as set out at (a) (i) is development and is exempted development, and that the said development as set out at (a) (ii) and (b), above, is development and is not exempted development.

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

John Duffy
Planning Inspector
30th May 2024