



An Bord Pleanála

Inspector's Report

ABP-321791-25

Question

Whether the change of use from use as a rear yard or from unauthorised beer garden to a smoking area is or is not development and is or is not exempted development.

Location

Sheila Bun's Public House, Upper
Bridge Street, Killorglin, Co. Kerry

Declaration

Planning Authority Reg. Ref. EX1313

Applicant for Declaration Kathleen Finnegan and Patrick
Finnegan

Planning Authority Decision Is not development

Referral

Referred by

Kathleen Finnegan and Patrick
Finnegan

Owner/ Occupier

Tom Crowley

Observer(s)

None

Date of Site Inspection

10th April 2025

Inspector

Aisling MacNamara

1.0 Site Location and Description

1.1. The referral relates to Sheila Bun's public house, located on Upper Bridge Street, Killorglin in County Kerry. The premises is a historic building located on a main street, Upper Bridge Street within the town centre. The original building has been altered and extended. There is a side passage from the street to the rear yard. There is a large external yard to the rear bounded by high stone walls and which contains a large two storey unroofed derelict stone outbuilding. There is a covered structure erected in part of the yard to the rear of the building. There are a number of picnic tables / seats, barrels and bar stools dotted around the yard. The ground floor is in use as public house and two upper floors contain residential accommodation, currently not in use.

2.0 The Question

2.1. The question before the Board is whether the following is or is not development and is or is not exempted development:

2.2. *Has there been a change of use from rear yard or from unauthorised beer garden to a smoking area, and is this development which is exempt? Details provided in covering letter.*

2.3. I propose to re-word the question as follows:

2.4. *Whether the change in use of rear yard or unauthorised beer garden (area shown outlined in red on figure 2 received by An Bord Pleanala on 4th February 2025) to a smoking area at Sheila Bun's, Upper Bridge Street, Killorglin, Co.Kerry is or is not development or is or is not exempted development.*

3.0 Planning Authority Declaration

3.1. Declaration

The planning authority issued a declaration as follows:

As no material change of use is taking place there is no development that comes within the scope of Section 3(1) of the Planning and Development Act 2000 (as amended).

A copy of the declaration is included in the referrer's submission.

3.2. **Planning Authority Reports**

3.2.1. Planning Reports

- The planners report concludes with the recommendation as per the declaration issued by the planning authority. The report makes reference to the following:
 - The bar is closed and is for sale. As the bar is now closed, it is considered that no material change of use is taking place. Therefore, it is considered that development is not taking place.

4.0 **Planning History**

PA22/77 (PL08.313775) – Tom Crowley – granted – permission to redevelop the premises including (1) partial demolition of existing structure to create wider laneway access on ground floor with front elevation changes, (2) internal alterations, (3) construction of toilets and keg store at rear, (4) roofing and refurbishing existing outbuilding for use as bar and performing arts centre, (5) development of rear yard as beer garden with parasols and awnings, (6) redevelopment of first floor as apartment and staff facilities, (7) redevelopment of second floor as apartment.

Note this permission was not commenced.

PA93/871 – grant – permission for toilet extension, stairs and extension

ENF 9635 – there is an open enforcement file in place.

South Western Circuit Court Order dated 26th June 2024 between Patrick Finnegan and Kathleen Finnegan (applicants) and Tom Crowley (respondent). Order states as follows:

The Court Doth Order

1. A Declaration that the use of the premises in particular the beer garden and live music venue to the rear by the Respondent since May 2023 is an intensification of use and therefore a material change of use requiring planning permission.
2. A Declaration that the works carried out at Sheila Buns licensed premises belonging to the Respondent at Upper Bridge Street, Killorglin, County Kerry since May 2023 is and was an unauthorised development by virtue of the provisions of Article 9 of the Planning and Development Regulations 2001.
3. An injunction pursuant to section 160(3) of the Act aforesaid restraining the Respondent from making use of the unauthorised development at the rear of his premises namely the beer garden and live music venue (to include also the projection of music or sound from external speakers) otherwise than in accordance with a planning permission regulating the use of the beer garden and live music venue.

And the Court Doth Further Order

5. That the premises can trade using only the external passageway and smoking area to the rear.

5.0 Policy Context

5.1. Development Plan

Kerry County Development Plan 2022-2028

Site is located within Killorglin Architectural Conservation Area

Kenmare Municipal District Local Area Plan 2024-2030

The site is zoned 'Town Centre'

5.2. Natural Heritage Designations

Castlemaine Harbour SAC and pNHA is located 0.265km to the east of the site.

6.0 The Referral

6.1. Referrer's Case

The referrer's case is summarised as follows:

- Previous planning history of the site outlined – 22/77 (ABP313775-22) has not been implemented.
- Note Enforcement file 9635 – a section 160 injunction resulting in court order dated June 26th 2024 making declarations in relation to the site.
- The planning authority's declaration is ambiguous. The planning authority has concluded that no material change of use has occurred but provides no further explanation nor provides any justification for this conclusion.
- The only authorised use of the rear of the premises is rear yard. By Circuit Court order of 26th June 2024, the structure of the beer garden created in 2023 or the individual structures which comprise the beer garden constructed in 2023 are unauthorised development and a material change of use of the rear yard occurred in Aug 2023 requiring planning permission.
- The developer stated he closed the unauthorised beer garden on 13th Aug 2024.
- Signage was subsequently erected in the area referring to 'smoking area' and this suggests the developer now considers the use of the area as beer garden has ceased and the use of the rear yard is now a smoking area.
- The unauthorised bar serving areas and unauthorised outdoor speaker system have not been in use since Aug 13th 2024 but remain in place. All other works deemed unauthorised development remain in use as part of the new smoking area. These include a new extension to hard concrete surfaced area, new gravel area, wiring for electricity, new lighting, hard concrete area for stage, demolition of outbuildings to extend footprint of yard and open up access to main building and construction of a new steel framed covered structure. Lighting has been upgraded in Aug 2024. The enforcement file 9635 is still active.

- Advertisement photos display beer garden development and show photos of the yard.
- The premises is open sporadically at the moment.
- Take the developer in good faith that beer garden has closed. However there is little change in the operation of the reopened area and it currently does appear to be in use as a beer garden rather than a smoking area. The provision of benches, tables, chairs, decorative lighting areas to place drinks and evidence of groups of patrons remaining in this area consuming alcohol for extended periods suggest that this is extension of the public house rather than outdoor area for smoking.
- Reference made to ABP304059-19 and 307112-20 and Inspectors report (distinction between smoking and beer garden).
- If the yard has reopened as smoking area, this is a material change of use (substantial extension of footprint of public house and has material consequences on neighbouring residential amenity). It cannot be exempted development having regard to the number of unauthorised structures it makes use of and the unauthorised use it facilitates in the main building.
- Works carried out in 2023 to integrate the former side corridor with the building created another smoking area more appropriately sized in comparison with the size of the previous bar.
- If it is considered that the unauthorised beer garden has not ceased use and this is continuing, then the material change of use that occurred in Aug 2023 without planning permission is continuing and remains unauthorised.
- Documentation attached in support of the submission.

6.2. Planning Authority Response

None

6.3. Owner/ occupier's response

The owner's response is summarised as follows:

- The bar is now closed and has been since 13th Aug 2024 and no development has taken place since nor has the back yard been used for any purpose.
- Circuit Court Order dated 26th June, paragraph 5 states “That the premises can trade using only the external passage and the smoking area to the rear.” It is implicit that the smoking area pre existed and notwithstanding the use of the yard as a beer garden and music venue was deemed to be ‘intensification of use’, the Court allowed the premises to trade using only the external passageway and smoking area. The smoking area was not defined by the Court but is included part in the yard which is lined in red on the appellants figure 2.
- The appellants are undermining the pub business, objected to development on the site with result that premises cannot operate a viable beer garden without reasonable music levels and this has predicated the closure of the business and a social outlet in the town.
- The appeal is vexatious. The appellants have overlooked the implicit acceptance of the legality of retaining a smoking area as evidenced by the declaration contained in paragraph 5 of the Court order.
- Notwithstanding that the premises is now closed and on the market (for sale), the owner is entitled to retain the smoking area usage as part of the intrinsic value and for future use of the premises The smoking area is an established and permitted usage. Mr. Crowley now asks the Board to give the appellants clarity they seek and confirm that there is a legal acceptance of the smoking area and that it is an established use and as such, a compliant element of the premises.

6.4. Further Responses

None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 as amended

Section 2(1)

“works ..includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...’

Section 3(1) In this Act, except where the context otherwise requires, "development" means— (a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land

Section 4

(1) sets out development that is exempt from requiring planning permission.

(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

(c) Regulations under this subsection may, in particular and without prejudice to the generality of *paragraph (a)*, provide, in the case of structures or other land used for a purpose of any specified class, for the use thereof for any other purpose being exempted development for the purposes of this Act.

(4) 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.

7.2. Planning and Development Regulations, 2001

Article 5(1)

“business premises” means—

(a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons,

- (b) a hotel, hostel (other than a hostel where care is provided) or public house, or
- (c) any structure or other land used for the purposes of, or in connection with, the functions of a State authority;

Article 10 of the Regulations provides for a number of categories of development that are exempted from requiring permission.

Article 10(1) states:

Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted

development for the purposes of the Act, provided that the development, if carried out would not—

- (a) involve the carrying out of any works other than works which are exempted development,
- (b) contravene a condition attached to a permission under the Act,
- (c) be inconsistent with any use specified or included in such a permission, or
- (d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

Schedule 2, Part 4 Exempted development – Change of use

Class 12

Use as a Public House, meaning a premises which has been licensed for the sale and consumption of intoxicating liquor on the premises under the Licensing Acts 1833 to 2018.

Assessment

7.3. Is or is not development

7.3.1. Firstly I would note that the referrer's question relates to the area of land outlined in red as shown on 'Figure 2 – Area of site the subject of Declaration' which is attached to the referrer's submission on this application to An Bord Pleanala (received 4th Feb

2025). The referrer is asking whether or not there has been a change of use in this area from 'rear yard' or from 'unauthorised beer garden' to 'smoking area'. The question referred to for consideration relates to the change of use of the rear yard. The question does not relate to works.

- 7.3.2. Having reviewed the planning history file PA93/871, I am satisfied that the land outlined in red has historically been a rear yard. There is no evidence that the rear yard area outlined in red has permission for a 'smoking area'. There is evidence that the small area in the northwestern section of the yard has historically been used as smoking area. This is shown on the drawings submitted under PA22/77 (refer Ground Floor Demolition Plan ,FC/ON/0520/04, Jan 2022) which shows an 'open yard' and a small 'covered smoking area' in the north western corner near the passageway and abutting the 'boiler/store' (now demolished).
- 7.3.3. I also note that PA22/77 is a permission granted in August 2023. Whilst certain works have been carried out, I am satisfied that this permission has not been implemented and the permitted development is not in place.
- 7.3.4. I note Court order dated 26th June 2024 which states that the use of the premises as beer garden and live music venue to the rear since May 2023 is an intensification of use and therefore a material change of use requiring planning permission and that the works carried out at the premises since May 2023 are unauthorised development by virtue of the provisions of Article 9 of the Planning and Development Regulations 2001.
- 7.3.5. I note from site visit, the works that have taken place to the premises including demolition of boiler store, erection of canopy and concrete surfacing in rear yard, the new bar in the derelict building in the rear yard and the new access from the building to the rear. I note that the rear yard contains lighting, signage, seating, tables, barrels etc and that effectively, the 'beer garden' is still in place. Whilst the premises may not be currently operating, the premises can open. Whilst the court has ordered that the owner must restrain from the use of the unauthorised development at the rear of premises, this unauthorised use is still in place.
- 7.3.6. Paragraph 5 of the Court order states the following: "That the premises can trade using only the external passageway and smoking area to the rear." I acknowledge that the Court has not explicitly defined the area to the rear for use as smoking area.

However I am satisfied that the northwestern part of the yard has been previously used as a smoking area. This area is much smaller than the site outlined in red in the referrers submission.

- 7.3.7. I am not satisfied that the larger area outlined in red in the referrers submission has a permitted use as a 'smoking area'. I consider that the use of this larger area outlined in red for smoking area is a change of use and that it is a material change of use. This conclusion is based on the following:
- 7.3.8. This is a large rear yard that is part of a public house premises and which can be accessed directly from the public house building. The yard has capacity for a large number of people to gather to 'smoke' within the space. The gathering of people would undoubtedly result in intensified activity and noise within the yard. Smoking itself would likely result in additional outdoor facilities such as seating / tables / lighting etc for smokers (ashtrays, drinks etc). The use of the space would result in the extension of commercial floor space, to be serviced by staff etc. The site is an open yard located in a built up town centre location in proximity to adjoining properties including residential properties. Additional noise, lighting etc would have implications for the amenity of adjoining properties. The character and use of the land would be substantially altered with material impacts to the area.
- 7.3.9. The change of use of the area (outlined in red) from rear yard to smoking area is a material change of use and is therefore 'development'.

7.4. Is or is not exempted development

- 7.4.1. Having reviewed the Planning and Development Regulations 2001 (as amended), I consider that Article 10 (change of use) is relevant to the referral question.
- 7.4.2. Under Article 10, 'development' which consists of a change of use within any one of the classes of use specified in part 4 of schedule 2 is exempted development. Class 12 relates to use as a public house. The area outlined in red, for the uses 'rear yard', 'unauthorised beer garden' or 'smoking area', are all within the same site of a public house. As the change of use falls within class 12 it is exempted development. However this is only provided that the development if carried out would not:
 - (a) *involve the carrying out of works other than works which are exempted development*

In this regard, I note the court order whereby the courts have already determined that works carried out at the premises, which would include the works at the rear of the premises, are unauthorised development.

(b) contravene a condition attached to a permission,

Not applicable

(c) be inconsistent with any use specified or included in such a permission, or

Not applicable

(d) be development where the existing use is an unauthorised use, save where such a use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

In this regard, I note the court order which states that the use of the premises in particular the beer garden and live music venue to the rear is a material change of use requiring planning permission. This unauthorised use relates to the lands outlined in red that is the subject of this referral. The development is therefore within the same site as the existing unauthorised use.

7.4.3. The development does not fall within the provisions of Article 10 and therefore the development is not exempted development.

7.4.4. **AA/EIA**

7.4.5. I am satisfied that environmental impact assessment or an appropriate assessment of the development is required. I have considered the development in light of the requirements of Section 177U of the Planning and Development Act 2000 (as amended). The subject site is located c 0.265km from Castlemaine Harbour SAC. I am satisfied that it can be eliminated from further assessment because there is no risk to any European site. The reason for this conclusion is:

- The nature, scale and location of the development including the lack of any significant alterations to the lands or environment,
- The distance to the European site network,
- The absence of hydrological or ecological pathways between the development and any European site.

7.4.6. I consider that the proposed development would not be likely to have a significant effect individually or in-combination with other plans or projects, on a European site and appropriate assessment is therefore not required.

7.4.7. The proposed development (change of use) is not a project for the purposes of EIA.

8.0 Recommendation

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

WHEREAS a question has arisen as to whether the change in use of rear yard or unauthorised beer garden (area shown outlined in red on figure 2 received by An Bord Pleanala on 4th February 2025) to a smoking area at Sheila Bun's, Upper Bridge Street, Killorglin, Co.Kerry is or is not development or is or is not exempted development.

AND WHEREAS Kathleen Finnegan and Patrick Finnegan requested a declaration on this question from Kerry County Council and the Council issued a declaration on the 22nd day of January 2025 stating that the matter was not development.

AND WHEREAS Kathleen Finnegan and Patrick Finnegan referred this declaration for review to An Bord Pleanála on the 4th day of February 2025.

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

- (a) Sections 3(1) of the Planning and Development Act 2000 (as amended)

- (b) The Planning and Development Regulation 2001 (as amended), Article 10(1) and schedule 2, part 4, class 12
- (c) The planning history files PA93/871 and PA PA22/77 (ABP313775-22)
- (d) Circuit Court order dated 26th Juen 2024 between Patrick Finnegan and Kathleen Finnegan and Tom Crowley – served under Section 160 of Planning and Development Act 2000 to 2021 as amended.
- (e) Documentation of file
- (f) The location of the site and adjoining development in the surrounding area

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The change of use of this area outlined in red to smoking area would be a material change of use and is development.
- (b) The change of use of the area outlined in red to smoking area is not an exempted form of development because this change of use does not fall within the provisions of the Planning and Development Regulations 2001, Article 10(1) and Part 4, class 12 because it would be a form of development (change of use) where the existing use (beer garden) is an unauthorised use, and the change of use being proposed does not consist of the resumption of a permitted use that has not been abandoned. The change of use also relates to lands where works have been carried out that are unauthorised and are therefore not a form of exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (X) (x) of the 2000 Act, hereby decides that the change in use of rear yard or unauthorised beer garden (area shown outlined in red on figure 2 received by An Bord Pleanala on 4th February 2025) to a

smoking area at Sheila Bun's, Upper Bridge Street, Killorglin, Co.Kerry is development and is not exempted development.

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.

Aisling Mac Namara
Planning Inspector

29th May 2025

Form 1

EIA Pre-Screening

An Bord Pleanála		321791	
Case Reference			
Proposed Development Summary		Change of use from rear yard or unauthorised beer garden to smoking area	
Development Address		Sheila Bun's Public House, Upper Bridge Street, Killorglin, Co Kerry	
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	Proceed to Q2.
		No x	No further action required
2. Is the proposed development of a CLASS specified in Part 1 or Part 2, Schedule 5, Planning and Development Regulations 2001 (as amended)?			
Yes		State the Class here.	Proceed to Q3.
No			No further action required
3. Does the proposed development equal or exceed any relevant THRESHOLD set out in the relevant Class?			
Yes		State the relevant threshold here for the Class of development.	EIA Mandatory EIAR required
No			Proceed to Q4
4. Is the proposed development below the relevant threshold for the Class of development [sub-threshold development]?			

Yes		State the relevant threshold here for the Class of development and indicate the size of the development relative to the threshold.	Preliminary examination required (Form 2)
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5. Has Schedule 7A information been submitted?		
No	x	Pre-screening determination conclusion remains as above (Q1 to Q4)
Yes		Screening Determination required

Inspector: _____ **Date:** _____