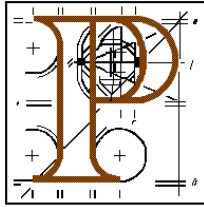


An Bord Pleanála



Inspectors Report

Board Ref.: RL08.RL3361

P.A. and Ref. No.: Kerry County Council, EX398.

Referrer: Killarney Brewing Company Limited, The Priory,
Muckross Road, County Kerry.

Question: Whether the use of part of the “Kerry Mineral Water Supply Company Limited” building at Flesk Road, Killarney, County Kerry as a craft brewery by the Killarney Brewing Company is or is not exempted development.

Building Owner: Kerry Mineral Water Supply Company Limited.

Site Inspection Date: 23 July, 2015.

Inspector: Brendan Wyse

1.0 THE SITE (see Map and Photographs)

- 1.1** The site is located on the Flesk Road a short distance to the south of Killarney Town Centre. It comprises a part of the former Kerry Mineral Water Supply Company Limited premises.
- 1.2** Occupying approximately 50% of that premises the subject unit is currently occupied by the Killarney Brewing Company Limited as a micro-brewery. It is open to the public and the internal layout includes brewing apparatus, a tasting bar/counter and a mezzanine seating area that appears to be used for giving talks to visitors.
- 1.3** There is a direct internal link to the adjacent unit to the south, a former house (indicated on drawings as ‘adjacent existing house’), currently in use as a retail outlet (brewery souvenirs, paraphernalia etc.) and associated space and ancillary to the micro-brewery. There is also an external food serving area, a seating area and a bottling plant to the rear.
- 1.4** The remaining c.50% of the original Kerry Mineral Water Supply Company Limited premises, to the north, is in office use with associated parking in an adjacent yard further to the north.
- 1.5** A yard/service/parking area extends along the rear of the subject premises with vehicular access immediately to the south of the “retail outlet”. The Flesk Road is a designated national secondary route, the N71.
- 1.6** Apart from a small premises just to the south of the access, which is used for bicycle rental, the immediately surrounding plot of land is undeveloped. The wider area is mixed residential/commercial, including substantial hotel development.

2.0 The Planning Authority Declaration

- 2.1** The Planning Authority decided that;

“the works...., namely the change of use of the Kerry Mineral Water Supply Company Building for use as a craft brewery at Flesk Road, Killarney, County Kerry does not constitute exempted development.....”.

Considerations stated as:

- (a) The premises were described in planning applications made in 2004 and 2013 as a warehouse.
- (b) The use of part of the building as a brewery constitutes an industrial use.
- (c) The development comprising change of use from warehouse to industrial use constitutes a material change of use which is not exempted development.

Conclusion stated as:

“Therefore, the proposed works would constitute development which is not exempted development”.

2.3 The decision is based on the report of the Senior Executive Engineer, Planning. This refers to the planning record of the building that indicates the previous use of the building as a warehouse. Specifically the applications referred to are:

- P.A. Ref. 04/204209 – Application to demolish existing warehouse and construct 20 no. apartments with basement car park.
- P.A. Ref. 13/205412 – Application for change of use of existing warehouse structure to office with associated car parking and ancillary works.

3.0 REFERRAL SUBMISSIONS

3.1 Referrers Case

3.1.1 The submission to the Board includes a copy of the Section 5 Declaration Report lodged to the Planning Authority.

3.1.2 The basic case advanced is that the change of use of the established industrial building represents a change of use which is exempted development as it consists of a change of use within Class 4, Part 4 of Schedule 2, Planning and Development Regulations 2001, as amended.

- 3.1.3** The submission indicates that the company has been brewing in the building for a number of months and has recently developed an ancillary visitor/tourism interpretative centre and ancillary bottling plant on site. The latter is the subject of a pending retention permission application – P.A. Ref. T.P. 15/288.
- 3.1.4** The purpose of the Referral is to determine whether or not the principle of brewing on site by virtue of the established industrial use of the building is exempted development.
- 3.1.5** It is submitted that Declarations under Section 5 of the Act should rely on the authorized use of land or buildings and not necessarily the existing use of a building. Furthermore, planning permission must be implemented to be applicable in the context of Article 10.

The main arguments upon which these contentions are based include the following:

- While it is accepted that the landowner previously made two planning applications referring to the building as a “warehouse”, it should not automatically be assumed that “warehouse” is the permitted use of the premises.
- Case law suggests that the development description of a planning application in instances of change of use does not necessarily have to refer to the authorised use of a building. In *Blessington and District Community Council Limited v. Wicklow County Council* the High Court held that it may be misleading to refer to the original (permitted) use of land in that it would not be a fair or accurate reflection of the de facto situation, i.e. unauthorised use of land for a significant period. Conversely, for the purposes of Section 5 and Article 10 one must have regard to the actual authorised use of a building rather than the existing use in instances where the existing use is unauthorised.
- The authorised established use of the building is industrial and the Section 5 must be determined on this basis.
- It appears that the Council may be relying on Article 10(1)(c) to determine the brewery use not being consistent with a planning consent. This article refers to an implemented permission. In this instance no “competing” permission has been implemented and therefore extinguishment has not occurred.

- The current office use over approximately 50% of the building was not implemented pursuant to permission P.A. Ref. 13/205412 as it is materially different to that consent. Reference to Justice Egan's judgement in McGrath Limestone Works Ltd. V. Galway County Council [1989] ILRM 602.
- The development description of P.A. Ref. 13/205412 was made in error – reference affidavit of building owner attached as Appendix B to the submission. This affidavit includes the following background information on the building:
 - The property has been in existence since the 1950's and used for the production of mineral water and soft drinks by "Kerry Mineral Water Company Limited" (Ref. Company Registration Office documents, company established 18th May, 1950).
 - The processes carried out on site consisted of mixing syrups with water in a kettle and subsequent bottling.
 - Guinness was also delivered to the site in concentrated form. It was watered down, bottled and delivered from the site in the 1970's.
 - The Kerry Mineral Water Company Limited relocated from the building to a larger premises in 2002. Up until recently all the apparatus relating to brewing and bottling remained on site and the signage remains to the front of the building.
 - The building was used for a wide range of activities in the interim, including the manufacture/repair of rally cars.
- By virtue of the pre-63 use the established permitted use of the building is "industrial". Even if unauthorised changes of use took place in intervening years the established use remains valid (Ref. Molloy v. Minister for Justice, Equality and Law Reform [2004] 2 IR 493, 2 ILRM 343).
- Though not referred to in the Declaration it should be noted that the sub-division of the building, whereby the brewery occupies just over 50%, did not require any external alterations. ABP Refs. RL.2308 and RF.713 cited as precedents establishing that sub-division of existing units does not necessarily require planning permission.

- As per drawings attached (Appendix C of the submission) the building was originally subdivided with roller shutter doors accommodating each side.
- The use of 50% of the building for brewing does not represent an intensification of development on the site. The office use in the remainder of the building is considerably less intense than the previous industrial use.

3.1.6 The Section 5 Declaration Report lodged to the Planning Authority includes the following information/argument:

- Manufacturing of soft drinks ceased on the site in the 1990's when it became evident that it was more cost effective to bring the product in rather than manufacture on site.
- The company was taken over by the C&C Group which used the premises to bottle the finished product on site in addition to distributing a range of products.
- The industrial use was never abandoned. The owner always expected the property to be returned to such use, hence the signage remaining on site.

3.2 Property Owner Response

None received.

3.3 Planning Authority Response

None received.

4.0 PLANNING HISTORY

Relevant planning history includes the following:

P.A. Ref. 04/204209

2004 Application by Kerry Mineral Water Supply Company Limited for permission to demolish warehouse and construct 20 no. apartments with basement car park. **Decision** – permission subject to conditions. Development not implemented.

P.A. Ref. 05/204475

2006 Application by Duggan Developments for permission for large mixed residential/commercial development, including demolition of existing structures. **Decision** – permission refused.

P.A. Ref. 06/204591, ABP Ref. PL63.220500 (file pouch)

2006 Application by Duggan Developments for permission for large mixed residential/commercial development, including demolition of existing structures. **Decision** – permission refused by Board on appeal (Planning Authority also refused).

P.A. Ref. 08/204921, ABP Ref. PL63.231563 (file pouch)

2008 Application by Duggan Developments for permission for large mixed residential/commercial development, including demolition of existing buildings. **Decision** – permission refused by Board on appeal (Planning Authority had decided to grant).

P.A. Ref. 13/205412

2013 Application by Con Duggan for permission for change of use of existing warehouse structure to office with associated car parking and ancillary works. **Decision** – permission subject to conditions. Partially implemented.

P.A. Ref. 14/435

2014 Application by Kerry Mineral Water Supply Company for permission to change use of existing residential unit (adjacent to south of subject unit) to office use and associated car parking. **Decision** – permission subject to conditions. Not clear if implemented – see P.A. Ref. 15/288 below.

P.A. Ref. 15/288

2015 Application by Killarney Brewery Company Limited for permission to retain extension, modifications and internal alterations to the existing building to include:

- (a) Incorporation of adjoining office unit permitted under T.P. 14/435 into the building and its change of use from office to a visitor's interpretative centre.
- (b) The addition of a food service area and a tasting counter on the ground floor.
- (c) Change of use of first floor mezzanine from storage to visitor viewing and seating area.
- (d) External canopy to rear and side of building and external seating space.
- (e) Signage to southern and western elevation.
- (f) Fire escape to rear elevation.
- (g) Bottling plant building to rear elevation.

Decision – still pending.

P.A. Ref. V106-14 (Enforcement File) (file pouch)

Warning letter issued May 2015 re unauthorised balcony at the premises.

5.0 DEVELOPMENT PLAN

Killarney Town Development Plan 2009 – 2015

Site zoning: Existing Residential.

6.0 ASSESSMENT

6.1 The Question

6.1.1 As previously indicated the question before the Board is as follows:

Whether the use of part of the “Kerry Mineral Water Supply Company Limited” building at Flesk Road, Killarney, County Kerry as a craft brewery by the Killarney Brewing Company is or is not exempted development.

6.1.2 The Board should note that the stated purpose of the referral is to determine whether or not the principle of brewing on the site is exempted development or not (see parag. 3.1.4 above). For clarity, therefore, the matter at issue is one of use only and is confined to that part of the building outlined in red on the layout drawings submitted [i.e. Appendix C to the Referral submission and Appendix A to the Declaration submission to the Planning Authority (attached as Appendix A to the Referral submission)]. The various works and changes of use carried out both within the subject unit and adjacent, in the former house to the south and in the yard area to the rear, and as described in Section 1.0 above, do not come within the scope of this Referral. They are variously the subject of previous and pending applications for permission (P.A. Refs. 14/435 and 15/288 – Section 4.0 above).

6.2 Tests/Evaluation

6.2.1 The first step in this case is to consider what was the original lawfully established use of the subject premises.

6.2.2 The information provided by the Referrer to the Board indicates that the original use of the premises, dating from the 1950's, was by the Kerry Mineral Water Company Limited for the production of mineral waters and soft drinks. Processes included mixing syrups and bottling and later, in the 1970's, diluting Guinness concentrate and bottling/delivery of same (Section 3.1.5 above).

6.2.3 The definition of “industrial building” and “industrial process” provided under Article 5(1) of the Planning and Development Regulations 2001 (as amended) are as follows:

“industrial building” means a structure (not being a shop, or a structure in or adjacent to and belonging to a quarry or mine) used for the carrying on of any industrial process;

“industrial process” means any process which is carried on in the course of trade or business, other than agriculture, and which is –

(a) for or incidental to the making of any article or part of an article, or

(b) for or incidental to the altering, repairing, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article, including the getting, dressing or treatment of minerals,

and for the purposes of this paragraph, “article” includes –

- (i) the vehicle, aircraft, ship or vessel, or*
- (ii) a sound recording, film, broadcast, cable programme, publication and computer programme or other original database.*

6.2.4 I am satisfied that the original established use of the premises is captured by these definitions and was an industrial use dating from prior to the appointed day, 1st October, 1964.

6.2.5 The second step is to consider whether or not this use was abandoned or extinguished.

6.2.6 The leading legal judgement in relation to the issue of abandonment of an established use is that in the Supreme Court case *Dublin County Council v. Tallaght Block Company Limited* [1985] ILRM 512 and which in turn references the judgement in the UK case *Hartley v. Minister of Housing and Local Government*. As cited in *O’Sullivan and Sheppard* (S.2.102), the generally accepted principles/tests arising are as follows:

*If abandonment is to occur two elements must be present – an abandonment for a considerable time **and** no evident intention of resuming it.*

6.2.7 It is evident from a review of case law generally that these matters require judgement in each case depending on the particular circumstances arising.

6.2.8 It is indicated by the Referrer that the Kerry Mineral Water Company Limited relocated from the subject building to a larger premises in 2002. It is stated that the brewing/bottling apparatus remained on site up until recently and that the signage remains on the front of the building.

6.2.9 It is also indicated by the Referrer that the building was used since 2002 for a wide range of activities in the interim, including the manufacture/repair of rally cars.

6.2.10 Information included in the Section 5 Declaration report submitted to the Local Authority (see Section 3.1.6 above) includes the following:

- Manufacturing of soft drinks ceased at the premises in the 1990’s.

- The company was taken over by the C&C Group which used the premises to bottle the finished product in addition to distributing a range of products.

6.2.11 The use record as provided is not particularly detailed or complete. It seems likely that there were significant periods of little or no use since 2002. Use akin to brewing/bottling ceased at that time. The lapse of time of the order of 12-13 years, therefore, has been considerable.

6.2.12 As indicated the issue of intent also has to be considered.

6.2.13 As previously noted the Referrer points to the “Kerry Mineral Water Supply Company Limited” signage remaining on the building and indicates that the brewing/bottling apparatus remained on site up until recently. However, while the former is evident to this day (see photographs) no evidence is submitted in support of the latter contention.

6.2.14 It is evident from the extensive planning history related to the premises, and the adjacent properties and undeveloped land (see section 4.0 above) that the property has been the subject of numerous redevelopment proposals since 2002. Several of the proposals were refused permission. P.A. Ref. 04/204209 was the subject of a grant but the permission was not implemented.

6.2.15 P.A. Ref. 13/205412 is of particular significance. This is a 2013 grant of permission for a change of use of the entire former Kerry Mineral Water Supply Company Limited building, and adjacent yard to the north, to offices. The Referrer’s contention is that this permission has not been implemented in that the current office use over approximately 50% of the building is materially different to that consent. However, comparing the layout drawings submitted with the referral to the layout drawings the subject of that permission (available on the Kerry County Council website) it appears that the only substantial difference is the exclusion of the unit the subject of the referral. It seems to me, therefore, that the weight of evidence suggests that permission P.A. Ref. 13/205412 has been implemented, albeit perhaps not fully.

6.2.16 In this connection, I would draw the Board’s attention to the view expressed in “Irish Planning Law and Practice”, Sullivan and Shepherd, Issue 43 (Feb. 2015), 2[123], that *“where there is an extinguishment of the use, the use will be extinguished for the entire planning unit and it will not be open to the user to transfer the use of the whole unit to a portion of the site only”*. In this regard it is noted that the judgement referenced by the Referrer, that of Justice Egan in *McGrath Limestone Works Ltd. V. Galway County Council* [1989] ILRM 602, concerned the implementation of a permission for mushroom growing on just c.5% of the quarry site area and on a different part of the quarry to that

delineated in the planning application and over a period during which quarrying was still being carried on. This case, therefore, does not provide a basis to substantiate the Referrer's argument that the original use of the building has not been extinguished, in my view.

6.2.17 I consider that a conclusion that abandonment occurred is difficult to draw in this case. While the established industrial use for brewing related activities at the subject premises was not carried on at the premises for a considerable period of time (12 - 13 years) since 2002 and the property was subject to numerous proposals for redevelopment for other purposes the retention of signage on site and brewing apparatus within the premises, accepting that the latter has not been substantiated, could be taken as evidence of an intention to resume. However, it is my view that the implemented office development pursuant to permission P.A. Ref. 13/205412 means that the use was extinguished.

6.2.18 It follows that the recommencement of brewing at the subject premises constitutes development by reason of being a material change in use – reference Section 3(1), Planning and Development Act 2000, as amended. It is also the case that there is no express exemption in the legislation that is of relevance in this case so that the development is not exempted development.

6.2.19 The Board will note that in reaching this conclusion I have not placed any reliance on the grounds cited by the planning authority in its Declaration, namely, the description of the premises in previous applications as a warehouse. I do not consider that the mere reference to warehousing use in the development descriptions of previous planning applications is sufficient in itself to effectively find that the previous industrial use had been abandoned. I also concur with the referrer that Article 10(1)(c), Planning and Development Regulations 2001, as amended, is not relevant in this case.

6.2.20 The Board should also note that the case *Molloy v. Minister for Justice, Equality and Law Reform* [2004] 2 IR 493, 2 ILRM 343, referenced by the Referrer, did not address the issue of pre-64 use rights and/or abandonment/extinguishment of same. It was concerned with the status of a permission, a period of unauthorised use, and a resumption of use under the earlier permission. It is not, therefore, of direct relevance to the subject referral, in my view. It is clear from this case that the courts will apply different rules to the question of abandonment of a valid permitted use as against an established use.

6.2.21 A search of the Board's database has not revealed any previous referral cases of direct relevance. In case Ref. RL2081 (2003), while the issue of

abandonment is referred to, it appears that intensification was the main issue in contention. In cases Ref. RL2146 (2004) and RL2487 (2008) the Molloy legal case was considered at some length in the Inspector's reports but was not relied upon by the Board in its decisions. The Inspector's consideration of the case aligned with my comments at paragraph 6.2.20 above.

6.2.22 In the submission to the planning authority the Referrer cites an earlier Reference case, ABP Ref. RRF087A (file attached). In this case, dating from 1999, the Board decided that the use of a structure as a dwelling house had not been abandoned despite disuse for a period of 24 years on grounds that the "intention" test was not satisfied. However, the issue of extinguishment through the implementation of a competing permission did not arise the case. I do not, therefore, consider it to be of direct relevance.

6.2.23 Following on from the conclusions drawn above I do not consider that the issues of sub-division of the premises or intensification of use, as mentioned by the Referrer, are relevant or need be pursued in this case.

6.3 Conclusion

6.3.1 It is my conclusion, therefore, that the recommencement of brewing in this instance is development and is not exempted development.

7.0 RECOMMENDATION

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 use of part of the "Kerry Mineral Water Supply Company Limited" building at Flesk Road, Killarney, County Kerry as a craft brewery by the Killarney Brewing Company is or is not exempted development;

AND WHEREAS the Killarney Brewing Company Limited, care of Cunnane Stratton Reynolds, Copley Hall, Cotters Street, Cork, requested a Declaration on the said question from Kerry County Council and the said Council issued a declaration on the 8th day of May, 2015 stating that the said development is not exempted development;

AND WHEREAS the said Killarney Brewing Company Limited referred the declaration for review to An Bord Pleanála on the 27th day of May, 2015;

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

- (a) sections 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) articles 5 and 10 of the Planning and Development Regulations, 2001, as amended,
- (c) the planning history of the site with particular reference to planning permission register reference number 13/205412, and
- (d) the submissions made by the referrers

AND WHEREAS An Bord Pleanála has concluded that –

- (a) The original established industrial use for brewing related activities was extinguished by the implementation of planning permission P.A. Ref. 13/205412, for office use, notwithstanding that it has not been fully implemented.
- (b) In the circumstances the recommencement of brewing use is development by reason of being a material change in use and for which there is no express exemption provided in the legislation.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3) of the 2000 Act, as amended, hereby decides that the said use of the structure as a craft brewery at Flesk Road, Killarney, County Kerry is development and is not exempted development.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

**Brendan Wyse,
Assistant Director of Planning.**

October, 2015.

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