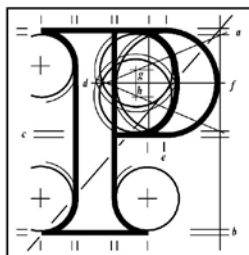


An Bord Pleanála



Inspector's Report

Question: Whether the proposed sub-division of the existing restaurant and bar, including associated works comprising removal of part of the basement mezzanine level, removal of staircase, and insertion of new staircases, at Nos. 130 – 133 St. Stephen's Green West, Dublin 2 (The Dandelion), into two units to be used as (i) a restaurant at proposed Unit A, and (ii) a bar and restaurant at proposed Unit B, is development or is not development and is or is not exempted development.

Referrer: Restrana

Landowner: Irish Life Assurance PLC & Ventasker Ltd

Planning authority: Dublin City Council

Referral ref. no. EXPP 0276/15

Site visit: 22nd January 2016

Inspector: Hugh D. Morrison

Site

The site is located on the west side of St. Stephen's Green within a five storey over basement building, which accommodates The Fitzwilliam Hotel, an eatery known as TGI Fridays, and the unit that is the subject of this referral. The adjoining building to the north is the St. Stephen's Green Shopping Centre and at a short remove to the south is the Royal College of Surgeons. The subject unit comprises a ground floor, a mezzanine, and a basement, and it presents to the street under a row of three shop fronts, the more northerly and southerly of which have doorways. Each of the shop fronts has a sign above with the single word "Dandelion" on it.

Proposal

The proposed sub-division would entail the following works:

- The removal of part of the basement mezzanine associated with proposed unit A,
- The removal of the existing centrally placed staircase between the ground floor, the mezzanine, and the basement and the construction of two new staircases between the ground floor and the basement within proposed unit A.
- The construction of an internal wall on the ground floor and in the basement between the proposed units A and B.

The question

The question posed by the referrer is as follows: Whether the proposed sub-division of the existing restaurant and bar, including associated works comprising removal of part of the basement mezzanine level, removal of staircase, and insertion of new staircases, at Nos. 130 – 133 St. Stephen's Green West, Dublin 2 (The Dandelion), into two units to be used as (i) a restaurant at proposed Unit A, and (ii) a bar and restaurant at proposed Unit B, is development or is not development and is or is not exempted development.

Planning history

Relevant planning history pertaining to the subject units is set out below.

- 0252/95 and PL29S.096371: Parent permission for the overall building at Nos. 128 – 134 St. Stephen's Green: Retail use permitted on the ground and first floors and restaurant/bar use in the basement at Nos. 130 – 133.
- 0528/97: Change of use of 735 sq m from retail to licensed restaurant use on the ground floor and change of use of 50 sq m from loading bay to licensed restaurant use in the basement: Permitted.

- 0685/97: Additional 20 sq m mezzanine within the basement space: Permitted.
- 3592/04 and PL29S.209835: Change of use of basement and mezzanine from restaurant/bar use to restaurant/bar use incorporating dance/entertainment area and ancillary areas and restaurant/bar use and ancillary areas, respectfully, + retention of internal alterations to existing restaurant: Permitted, subject to conditions, including one which prohibited the dance area from being used as such.
- 2687/06 and PL29S.218598: Retention at ground floor level of 21.5 sq m in restaurant use, which was previously a void beside the central stairs, retention of extended mezzanine (60 sq m for restaurant/bar use and 11 sq m for ancillary use), and retention of reorganised basement, including reduction of 78 sq m for restaurant/bar use from 317 sq m to 239 sq m, and additional 44 sq m for ancillary use and 5 sq m for dance floor use, in conjunction with relocated dance floor and modified performance area: Permitted.

The planning authority's declaration

The planning authority declares that the proposed sub-division is development and that it is not exempted development. The case planner's report elucidates this declaration by stating that the said sub-division would comprise "intensification of development as two restaurants would require additional/separate deliveries and staff, etc."

The referrer's case

- In the light of the planning history of the unit, the sub-division to provide a restaurant at ground floor and basement levels in proposed unit A and a restaurant at ground floor level and a restaurant/bar at mezzanine and basement levels would all be permitted uses and so no material change of use would arise.
- The case of Galway County Council -v- Lackagh Rock Ltd is cited. In this case, it was judged that if, in assessing a proposed use, the matters considered are materially different from the original use, then a material change of use would occur. In the present case, if the matters that would be considered in assessing the proposed sub-division would be different from those considered in assessing the permitted uses of the existing unit, then a material change of use would occur.
- In the light of the foregoing paragraph, the referrer makes the following points:

- The proposed sub-division would not entail any increase in floorspace and so, given the continuity in permitted usage, no significant increase in traffic movements would be generated. In any event the vast majority of patrons would either walk or travel by public transport to the city centre location in question.
- The proposed sub-division would occur entirely within the existing fabric of the subject building and so, given the continuity in permitted usage, no additional impacts in terms of noise and general disturbance would arise.
- The proposed sub-division would entail no change in existing servicing from within the existing dedicated area in the basement and the level of service activity would not increase materially.
- The scale of activity in the two proposed units would not be comparable to the potential scale of activity that could arise in the existing unit, as acknowledged by Section 17.34 of the Dublin City Development Plan 2011 – 2017, wherein problems associated with “super pubs” are discussed. Thus, the proposed sub-division would lead to a de-intensification of the potential use of the unit.
- In the light of the above considerations, under the test established by the Lackagh Rock case, the proposed sub-division would not entail a material change of use and so planning permission with respect to the same is not required.
- Attention is drawn to four referral cases in which the Board declared that the sub-divisions in question would not lead to a material change of use and so planning permission was not required. These cases are RL2308, PL39/8/397, RL2464, and PL62.RF713.

Response

The planning authority has not responded to the above beyond that which is set out in the case planner’s report.

Legislation

Planning and Development Act 2000 – 2015

Section 2(1) of the Planning and Development Act, 2000 – 2015, states the following:

In this Act, except where the context otherwise requires –

“planning authority” means a local authority,

Section 5(1) of the aforementioned Act, states the following:

If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

Section 5(3)(a) of the aforementioned Act, states the following:

Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

Section 127(1) of the aforementioned Act states the following:

An appeal or referral shall –

(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,

Section 3(1) of the aforementioned Act states the following:

In this 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 2(1) of the aforementioned Act states the following:

“land” includes any structure and any land covered with water (whether inland or coastal);

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

“alteration” includes –

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof,

That materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;

Section 4(1) of the aforementioned Act states the following:

The following shall be exempted developments for the purposes of this Act

–

(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 of neighbouring structures;

Planning and Development Regulations 2001 – 2015

Article 5(1) of the aforementioned Regulations states the following:

“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 or public house,

(c) any structure or other land used for the purposes of, or in connection with, the functions of a State authority;

“shop” means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public –

...

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies;

Part 4 of Schedule 2 to Article 10 of the aforementioned Regulations states the following:

...

Class 10

Use as –

...

but not as a dance hall or concert hall.

Class 11

Use as –

(a) a theatre,

(b) a cinema,

(c) a concert hall,

(d) a bingo hall,

(e) a skating rink or gymnasium or for other indoor sports or recreation not involving the use of motor vehicles or firearms.

Assessment

1. The planning history of Nos. 130 – 133 St. Stephen's Green, hereafter referred to as the referral building, indicates that, whereas this building was originally permitted for retail use at ground floor level and restaurant/bar use in the basement, it was subsequently permitted for licenced restaurant use at ground floor level, restaurant/bar use and ancillary areas on the mezzanine floor, and restaurant/bar use, incorporating entertainment/dance area, and ancillary areas in the basement. With respect to the said entertainment/dance area, the latter, as distinct from the former, was effectively omitted by condition 2(b) attached to the permission granted at appeal (PL29S.209835). Nevertheless, under a subsequent retention permission granted at appeal (PL29S.218598), a relocated and extended dance area was permitted. In the light of this planning history, I conclude that the authorised pattern of usage for the now vacant referral building is as follows:

- Ground floor: licenced restaurant,
- Mezzanine: restaurant/bar and ancillary area, and
- Basement: restaurant/bar, incorporating entertainment/dance area, and ancillary area.

2. This pattern authorises specific uses to each floor. Within this pattern, the said planning history does not restrict any of the said uses by condition to any specific portion of the referral building, except for the dance area. The first of the aforementioned appeal decisions is effectively parent to the second and so, based on such a reading of the ensuing permissions, while the space originally identified

for the dance area is sterilised for such use, the relocated and extended dance area is authorised for such use.

3. The definition of development set out in Section 3(1) of the Planning and Development Act, 2000 – 2015, comprises two arms, i.e. that of “the carrying out of works” and “the making of any material change of use”.
4. The proposal, which is the subject of this referral, would entail works of demolition and construction, i.e. with respect to the former, the partial removal of the mezzanine floor and the complete removal of the centrally placed staircase, and, with respect to the latter, the construction of two new staircases and an internal wall to separate the two proposed units from one another.
5. Under Section 2(1) of the aforementioned Act, “works” are defined as including any act or operation of demolition or construction, amongst other things. Accordingly, the works comprised in the current proposal would constitute development. These works would be undertaken wholly within the referral building, which is not a protected structure. If these works are taken in isolation from the question of material change of use, then, as they would constitute an alteration which would affect only the interior of this building, they would be exempted development under Section 4(1)(h) of the aforementioned Act and they would not be de-exempted under Article 9(1)(a) of the Planning and Development Regulations, 2001 – 2015.
6. The impetus for the aforementioned works would be the proposed sub-division of this building into two units, denoted as A and B, and they would enable the same to happen. Accordingly, whether such sub-division would entail a material change of use must now be examined.
7. The referral question states “Whether the proposed sub-division of the existing restaurant and bar...into two units to be used as (i) a restaurant at proposed Unit A, and (ii) a bar and restaurant at proposed Unit B, is development or is not development and is or is not exempted development.” The planning authority took the view that such sub-division would lead to an intensification of use that would constitute a material change of use. It based this view on the likely increase in staff and service deliveries that would result from the operation of two businesses, as distinct from one, in the referral building.
8. The referrer has contested the planning authority’s view by making the following points:
 - Attention is drawn to the scale of the referral building, which would be commensurate with that of a “super pub” and to the potentially greater intensity of use that such usage would entail by comparison with that which would arise under the proposed sub-division.

- Attention is drawn to the absence of any increase in floorspace and the continuity in permitted usage that would arise. Thus, no additional environmental/amenity impacts would arise and no additional traffic generation would occur.
 - Attention is drawn to the continuity in service arrangements for the referral building. Thus, the existing dedicated service area would serve both proposed units and no significant increase in service vehicle movements within this area is anticipated.
9. The first of the referrer's points turns on whether the potential use thus identified would be one that could arise under the permissions applicable to the referral building. While they have not established that this would be so, the underlying point that, all other things being equal, the referral building could be used more intensively as it is rather than as it would be under the proposed sub-division is credible.
10. The second of the referrer's points refers to floorspace and usage. With respect to the former, there would be a slight contraction in floorspace with the partial demolition of the mezzanine floor in the space that would be comprised in proposed Unit A. With respect to continuity of usage, I will discuss this matter in greater detail below.
11. The third of the referrer's points contends that the proposed sub-division would not lead to a significant increase in service vehicle movements. Without knowing in advance the businesses that would operate from the proposed units, it is not possible to predict whether or not some of these movements would entail linked trips, although this would at least be possible. Again, the type of vehicles cannot be predicted with confidence either, although an increased incidence of smaller vehicles may arise. Suffice to say that all such movements would be capable of being handled in the existing dedicated service area for not only the referral building and adjoining uses comprised in the overall building of which it is part, but for the St. Stephen's Green Shopping Centre, too. During my site visit, I observed the functioning of this area and I consider that, given its scale and existing intensity of use, the proposed sub-division would not lead to a significant increase in its usage.
12. The third of the referrer's points also contends that the proposed sub-division would not lead to a significant increase in staff. If it is assumed that commercial considerations would lead to the efficient rostering of staff, then the referrer's position on this matter is plausible.
13. In the light of the foregoing discussion, I conclude that a material change of use by means of intensification would not arise under the current proposal.

14. Returning to the question of continuity of use, the planning history of the referral building indicates that there would be a change of use in moving from the existing authorised pattern of uses to that which would arise under the proposed sub-division. Thus,

- In proposed Unit A, there would be continuity of usage at ground floor, while in the basement there would be a change of use from restaurant/bar, incorporating entertainment/dance area to restaurant, and
- In proposed Unit B, there would be a change of use at ground floor from licenced restaurant to restaurant/bar, at mezzanine level there would be continuity of use, and in the basement there would be a further change of use from restaurant/bar, incorporating entertainment/dance area, to restaurant/bar.

15. The question as to whether the aforementioned changes of use would constitute material changes of use now arises. Guidance in seeking to answer this question comes from planning legislation and case law. With respect to the former, the following points arise:

- Under Article 5(1) of the aforementioned Regulations, the definition of shop specifically excludes restaurants and public houses and so under Part 4 of Schedule 2 to Article 10 of these Regulations, these uses are not categorised under Class 1, which refers to shops. An interrogation of the other Classes in this Part indicates that they are not categorised therein either and so they are *sui generis* uses.
- Under Article 5(1) of the aforementioned Regulations, the definition of business premises includes public houses.
- Under Class 10 of Part 4 of Schedule 2 to Article 10 of the aforementioned Regulations, dance halls and concert halls are specifically excluded. Under the following Class 11, concert halls are included but not dance halls. Dance halls are thus a *sui generis* use, too.
- Under Article 10 of the aforementioned Regulations, the changes of use that are cited, which are stated to be exempted development, do not pertain to the uses in question under this referral.

16. In the light of the above points, restaurants and public houses are distinct and separate uses in their own right. However, they appeared together in the authorised use of the referral building as restaurant/bar. This use also incorporated an entertainment and dance use, which would have been analogous to a concert hall and dance hall use. Under the current proposal, within Unit A, the former bar and entertainment and dance use would be

omitted, and, within Unit B, the former entertainment and dance use would be omitted.

17. The referrer draws attention to the case of Galway County Council -v- Lackagh Rock Ltd, which was referred to in the case of Monaghan County Council -v- Brogan, in which the question of materiality arose and was addressed as follows:

The matters which the planning authority would take into account in the event of a planning application being made for the use. If these matters are materially different (from the original use), then the nature of the use must equally be materially different.

18. The referrer proceeds to invite a comparison between the current proposal and the last, as distinct from the original uses, of the referral building. I accept that this suggested baseline is appropriate insofar as the last uses are the currently authorised uses of this building for planning purposes. As indicated above, this proposal would entail the omission of authorised uses, rather than the introduction of any new ones.
19. If the existing authorised uses are compared with the proposed ones, then the matters that would have been taken into account and the matters that would be taken into account would be likely to overlap. Thus, the restaurant/bar and entertainment and dance uses would have raised matters to do with serving food and drink, the management of people and the traffic generated by their attendance, the impact of noise and disturbance, and the selection of days and hours of operation. Likewise, the proposed restaurant and restaurant/bar would raise these same matters, even if, given the omission of the entertainment and dance use, there would be instances wherein their magnitude of impact would be likely to be less. Accordingly, no different matters would arise and so a material change of use would not arise.
20. In view of the foregoing discussion, the referral question should be amended to acknowledge the change of use that would occur, even if this change of use would not, in my view, be material. The question should thus read as follows:

Whether the proposed sub-division of the existing restaurant and bar, which incorporates an entertainment and dance use, and which would include associated works comprising removal of part of the basement mezzanine level, removal of staircase, and insertion of new staircases, at Nos. 130 – 133 St. Stephen’s Green West, Dublin 2 (The Dandelion), into two units to be used as (i) a restaurant at proposed Unit A, and (ii) a bar and restaurant at proposed Unit B, is development or is not development and is or is not exempted development.

Conclusion

In the light of my assessment, I conclude that whereas the current proposal would entail the carrying out of works that would be development, such development would be exempted development by virtue of Section 4(1)(h) of the Planning and Development Act, 2000 – 2015. This proposal would also entail a change of use. However, as this would not be a material change of use, it would not constitute development.

Recommendation

Having regard to the above, I recommend that the Board should decide as follows:

The question, as amended, that was referred to the Board, under Section 5(3)(a) of the Planning and Development Act, 2000 – 2014, is whether the proposed sub-division of the existing restaurant and bar, which incorporates an entertainment and dance use, and which would include associated works comprising removal of part of the basement mezzanine level, removal of staircase, and insertion of new staircases, at Nos. 130 – 133 St. Stephen's Green West, Dublin 2 (The Dandelion), into two units to be used as (i) a restaurant at proposed Unit A, and (ii) a bar and restaurant at proposed Unit B, is development or is not development and is or is not exempted development.

In considering this referral, the Board has had regard particularly to:

- (a) Sections 2, 3, 4 and 5 of the Planning and Development Act, 2000 – 2015,
- (b) Articles 5, and 10 of the Planning and Development Regulations, 2001 – 2015,
- (c) The following submissions:
 - (i) The referrer's submission,
 - (ii) The case planner's report, and
- (d) The report of the inspector.

AND WHEREAS An Bord Pleanála has concluded the following:

That the proposed sub-division of the existing restaurant and bar, which incorporates an entertainment and dance use, and which would include associated works comprising removal of part of the basement mezzanine level, removal of staircase, and insertion of new staircases, at Nos. 130 – 133 St. Stephen’s Green West, Dublin 2 (The Dandelion), into two units to be used as (i) a restaurant at proposed Unit A, and (ii) a bar and restaurant at proposed Unit B would by virtue of the said works constitute development, which would, under Section 4(1)(h) of the Planning and Development Act, 2000 – 2015, be exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5(4) of the Planning and Development Act, 2000 – 2015, hereby declares that the proposed sub-division of the existing restaurant and bar, which incorporates an entertainment and dance use, and which would include associated works comprising removal of part of the basement mezzanine level, removal of staircase, and insertion of new staircases, at Nos. 130 – 133 St. Stephen’s Green West, Dublin 2 (The Dandelion), into two units to be used as (i) a restaurant at proposed Unit A, and (ii) a bar and restaurant at proposed Unit B is development and that it is exempted development.

Hugh D. Morrison

Inspector

26th January 2016