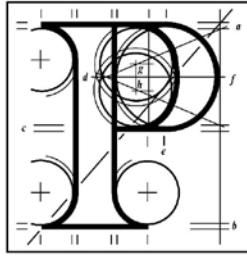


An Bord Pleanála



Inspector's Report

Question: Whether the use of a residential apartment for short term holiday lettings at Apartment 1A, 5 – 5A Crown Alley, Dublin 2 is or is not development or is or is not exempted development.

Original referrer: Temple Bar Residents

Planning authority: Dublin City Council

Subsequent referrer/owner: Michael Melinn

Referral ref. no. 0151/16

Inspector: Hugh D. Morrison

Site

The subject apartment is located within a four storey building on the eastern side of Crown Alley, a street in the centre of Temple Bar that runs on a north/south axis between the street known as Temple Bar and Cope Street. Crown Alley effectively links Merchant's Arch and the Ha'penny Bridge to the Central Bank on Dame Street and so it forms part of one of the City's major pedestrian routes. The said building is in use as a coffee shop and restaurant on the ground floor and it is authorised for use as five apartments on the upper floors.

The question

The original referrer posed the following question for the planning authority's declaration: "Change of use from residential to commercial". The location cited is 5 – 5A Crown Alley. The planning authority's subsequent declaration enlarges on this question as follows: "Change of use from residential to commercial. We request a determination under Section 5 "that the use of this residential apartment for short-term holiday lettings is development and is not exempted development."" Likewise, the stated address is enlarged to include reference to Apartment 1A.

In the light of the foregoing paragraph, I consider that the question can reasonably be formulated as follows:

Whether the use of a residential apartment for short-term holiday lettings at Apartment 1A, 5 – 5A Crown Alley, Dublin 2 is or is not development or is or is not exempted development.

Planning history

- 2773/98: Partial demolition of existing two storey structure, including retail outlets and upper floor habitable home, and erection of four storey structure, including ground floor commercial unit and 6 residential units on floors above in place of demolished structure: Permission was granted at appeal PL29S.110301, albeit for 5 rather than 6 residential units.
- Two subsequent applications 2608/04 and 3319/04 relate to ground floor signage only.

The planning authority's declaration

No provision is made in the Planning and Development Act 2000 (as amended) or the Planning and Development Regulations 2001 (as amended) by which the said change of use would constitute exempted development. It is concluded that the proposed change of use of the subject apartment for short term letting constitutes development, being a material change of use having regard to its character and its material impacts on the proper planning and sustainable development of the area.

The subsequent referrer/owner's case

- The permission authorising the subject apartment is not the subject of any restrictive occupancy conditions.
- The subject apartment is within a building that lies in an area zoned Z5 (city centre). This zoning has persisted throughout the period that this apartment has been insitu.
- Section 5(1) of the Planning and Development Act, 2000 – 2015, 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.

The original referrer questioned the subject apartment following an advertisement in which it was advertised for sale as an “investment property”. However, this description is not a matter for planning and so the referrer’s question does not come within the meaning of the Act.

Likewise, the evidence submitted pertains to anti-social/criminal behaviour at other properties, behaviour that is not susceptible to control under planning legislation.

- The advice of the Development Management Guidelines with respect to referrals and declarations is cited and the planning authority’s assessment of the case is critiqued on the basis that extraneous matters were introduced only to be overlooked in the subsequent recommendation.
- The planning authority’s assessment is further critiqued as follows:
 - In revising the question, the word “conversion” is used thereby implying that the underlying change of use had already been considered.
 - Case law is cited when the assessment should be confined to whether or not development and exempted development have taken place, within the meaning of the Act.
 - The use of case law is critiqued insofar as a change of use is “taken as read” and the question of materiality is addressed but not “for planning purposes” and the question of exempted development is not addressed.

- The subject apartment is and always has been in residential use. Thus, whether its tenancy was that of owner-occupier or short term renter, there has been no change of use.
- The subject apartment is located in Temple Bar, where under the CDP's Z5 (city centre) zoning, the strategy is "to provide a dynamic mix of uses, which interact with each other, creates a sense of community and which sustains the vitality of the inner city both by day and night." Neither the original referrer or the planning authority have cited any material planning considerations that would lead the short term letting of the apartment to effect either the character or the residential amenities of Temple Bar.
- The McMahon case differs from the subject apartment in several respects and the judgement in this case was based on specific findings of fact that included an intention that the dwellings in the estate in question would have been purchased by owner-occupiers and evidence from existing residents that their amenity was affected by short-term letting. Accordingly, it does not provide a binding precedent for the subject apartment.
- Under landlord and tenant legislation, provisions for dealing with anti-social behaviour exist. Planning legislation does not address this issue and, if such legislation were to address changes in residential tenure, then this would need to be enacted by the Oireachtas.
- Referral ref. no. 06D.RL2317 is cited by the planning authority. However, this, too, does not provide a precedent as in this case 6 apartments were converted to facilitate a change in their use to that of student accommodation. Thus, physical alterations were undertaken to these apartments to facilitate their re-use. By contrast, the subject apartment has not been the subject of any physical alterations in moving from owner-occupation to short-term rental tenure.
- The planning authority's declaration is critiqued insofar as it fails to make clear that the use in question is extant and, more substantially, in the light of the foregoing discussion it is considered to be erroneous.

Response of planning authority

The planning authority reiterates its declaration but widens the ambit of the same by referring to the potential of the change of use to have material impacts on the wider environment.

Response of original referrer

- The original referrer estimates that approaching 3000 entire dwellings in Dublin are being used for short-term holiday lettings. By contrast, the number of dwellings available for rental in the private rented sector may be less than 1300. Given the current housing crisis in the city, the loss of so many dwellings from the private rented sector requires urgent attention. Berlin is cited as an example of a European city that has brought short-term holiday lettings under control.
- The subject apartment is on the market with an asking price twice as high as might have been expected because of the lucrative rental income and the high occupancy rate that it can command as, in effect, unconventional hotel accommodation. The Revenue Commissioners have distinguished between such lettings and the “Rent a Room” scheme, with the former, as distinct from the latter, no longer qualifying for tax relief.
- The subsequent referrer states that the asking price for the subject apartment and its description as an “investment property” are not matters that are relevant to planning. He also states that the short-term holiday letting of this apartment is a temporary measure. However, this claim is irreconcilable with the said asking price.
- The original referrer insists that there is a qualitative and quantitative difference between an apartment that is occupied on a permanent basis and one that is the subject of a short-term holiday letting. Thus,
 - The former type of occupation qualifies as a dwelling or a home and is a residential use, while the latter type is a commercial use.
 - In moving from the former to the latter type of occupation, there is an increase in the intensity of use with a high turnover of occupants and the coming and going of service staff, such as cleaners, between lettings. Such intensity of use poses security issues for other occupiers of apartment blocks.
 - The said change in the type of occupation has an impact upon residential amenity, as acknowledged by the planning authority and illustrated by the original referrer’s initial submission.
- Contrary to the subsequent referrer’s contention, the McMahon case has a wider application that is relevant to the subject apartment.
- Contrary to the reported position of the planning authority, the current referral is an opportunity for the question of short-term holiday lettings to be

addressed and settled with respect to their planning status that would inform subsequent practise.

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

*“habitable house” means a house which –
(a) is used as a dwelling,
(b) is not in use but when last used was used, disregarded any unauthorised use, as a dwelling and is not derelict, or
(c) was provided for use as a dwelling but has not been occupied;*

“house” means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;

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

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

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

“use”, in relation to land, does not include the use of land by the carrying out of any works thereon;

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

For the avoidance of doubt, it is hereby declared that, for the purposes of this section, the use as two or more dwellings of any house previously used as a single dwelling involves a material change in the use of the structure and of each part thereof which is so used.

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

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

(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;

Section 4(2)(a) of the aforementioned Act states the following:

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 –

(i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against the principles of proper planning and sustainable development...

Section 4(2)(c) of the aforementioned Act states the following:

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.

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, hostel (other than a hostel where care is provided) or public house,

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

“care” means personal care, including help with physical, intellectual or social needs;

“excluded premises” means –

(a) any premises used for purposes of a religious, educational, cultural, recreational or medical character,

(b) any guest house or other premises (not being a hotel or a hostel) providing overnight guest accommodation, block of flats or apartments, club, or boarding house, or,

(c) any structure which was designed for use as one or more dwellings, except such structure which was used as business premises immediately before 1st October, 1964 or is so used with permission under the Act;

“house” does not, as regards development of classes 1, 2, 3, 4, 6(b)(ii), 7 or 8 specified in column 1 of Part 1 of Schedule 2, or development to which articles 10(4) or 10(5) refer, include a building designed for use or used as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;

“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 6

Use as a residential club, a guest house or a hostel (other than a hostel where care is provided).

Previous Board decisions

While there are no Board decisions relating to the precise use in question, there have been several that have a bearing on the current case. Details of these are summarised below.

- PL29/8/279: Whether the change of use of town houses at Lansdowne Village, Sandymount Village, Dublin, to holiday homes is a material change of use: The Board declared that this is development that is not exempted development.
- PL61.212518: The construction of a one-storey extension to the rear of an existing two storey dwelling together with the refurbishment of the existing dwelling, all to be used as a Section 50 student dwelling at 23 St. Enda’s Road, Shantalla, Galway: Permission was refused for the following reason:

Having regard to the location of the site in an established residential area and to the pattern of development in the vicinity, it is considered that the proposed change of use of a mid-terrace, single family dwelling to use as a multiple dwelling unit, in itself and by the precedent it would set, would seriously injure the amenities of the area and would depreciate the value of properties in the

vicinity by reason of intensification of use, general disturbance, noise and additional parking demands. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

- 06D.RL2317: Whether the change of use of six of the eight apartments within an apartment block situated at the Merrion Grove apartment complex, Stillorgan Road, Stillorgan, Co. Dublin to student accommodation is a material change of use: The Board declared that this is development that is not exempted development.
- 01.RL2192: Whether the change of use of permitted holiday apartments to permanent residential accommodation at The Dolmen Hotel, Kilkenny Road, Carlow is a material change of use: The Board declared that this is development that is not exempted development.

Case law

The first of the above cited referrals was the subject of a High Court challenge, i.e. McMahon -v- Dublin Corporation 1997 1 ILRM 227, in which the Board's declaration was upheld. Barron J. held that

...in the absence of explicit reference in the planning permission to a permitted use, regard must be had to the use for which the structure was designed, i.e. the use which was objectively intended for the structure having regard to the relevant planning documentation. The purpose for which the plaintiffs' homes had been designed was private residential, whereas the use to which they were currently being put was commercial.

The question as to whether a change of use is a material one was addressed by Keane J. in the case of Monaghan County Council -v- Brogan. He stated that the issues of relevance to this question are

...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.

Assessment

The question to be addressed under this referral is as follows:

Whether the use of a residential apartment for short-term holiday lettings at Apartment 1A, 5 – 5A Crown Alley, Dublin 2 is or is not development or is or is not exempted development.

Essentially, this question invites an assessment under the following three headings:

(i) Has a change of use occurred?

(ii) If so, has a material change of use occurred?

(iii) If development has occurred, is this development exempted development?

(i) Has a change of use occurred?

1.1 The baseline for this assessment is the authorised use of the subject apartment.

The planning history of this apartment indicates that it was one of five residential units that were authorised at appeal ref. no. PL29S.110301, under permitted application reg. no. 2773/98. None of the eleven conditions attached to this permission restricts either the nature of residents or the duration of their occupation and there have been no further applications for either this apartment or the other apartments.

1.2 Under Section 2(1) of the Planning and Development Act, 2000 – 2015, (hereafter referred to as the Act), the definition of “house” includes an apartment and the definition of a “habitable house” is a house which is used as a dwelling. While the Act or the accompanying Regulations do not proceed to define “dwelling”, a common dictionary definition is “a building or place of shelter to live in; place of residence; abode; home.”

1.3 The aforementioned permission does not explicitly state what the use of the residential units was intended to be. However, in the light of the McMahon case, it is in order to establish from the design of these units set out in the relevant planning documentation what this use was intended to be. Scrutiny of this documentation reveals that these units were designed to be private residential apartments.

1.4 The subsequent referrer reports that no physical alterations have been made to facilitate the use of the subject apartment for short-term holiday lettings.

1.5 The original and subsequent referrers agree that only the nature of the short-term holiday lettings use is at issue. The subsequent referrer contends that this use has been the sole use of the subject apartment for the last year. He also states that it is a temporary use. The original referrer contends that, to the contrary, as the asking price for the apartment, which is presently on the market, is twice what would otherwise be expected, there is every prospect that this use will persist, as it represents the more lucrative use available for the subject apartment.

1.6 The original referrer states that the nature of the short-term holiday lettings use is commercial in character rather than residential. Thus, the motivation for providing this use is solely a commercial one, as the subsequent referrer/owner of the subject apartment does not reside in the same. (While the adjective

“commercial” is not defined in the Act or the accompanying Regulations, a common dictionary definition is “concerned with or engaged in commerce” or “making or intended to make a profit”). That said, the motivation for providing private rented residential properties by landlords is typically a commercial one, too, and yet the use of such properties as “houses” is not changed thereby. The subsequent referrer/owner hints that, prior to this last year, the subject apartment may have been rented out as a private residence.

1.7 Critically, in the light of the definitions of “house”, “habitable house”, and “dwelling” cited above, no one in the subject apartment is now a resident, all are visitors, and so the presence of a residential use has ceased to apply, i.e. no one staying in the apartment lives there, resides there, considers it their home or their abode. Thus, the subject apartment is no longer in use as a private residential apartment but as short-term holiday lettings accommodation. I, therefore, conclude that a change of use has occurred.

(ii) If so, has a material change of use occurred?

2.1 Under Section 3(1) of the Act, for a change of use to be considered development, it must be a material change of use.

2.2 Sections 3(3) and 4(1)(j) of the Act address two scenarios. The first establishes that where a house used as a single dwelling is sub-divided into two or more dwellings a material change of use arises. The second establishes that where a structure within the curtilage of a house is used for any purpose incidental to the enjoyment of the house as such, such use is exempted development. Thus, the Act explicitly recognises one instance of intensification of use that constitutes development that is not exempted development and one instance of incidental use that is exempted development. However, these scenarios are not relevant to the subject apartment, as no sub-division has occurred and the apartment does not have a curtilage.

2.3 In the light of the Brogan case, materiality can be identified where, under a planning application scenario, the planning authority would take into account matters that would differ from those taken into account when the original use was assessed.

2.4 When the subject apartment was assessed under the application for the same, the question of residential amenity arose, both in terms of the amenities afforded by the apartment itself and whether the location of the apartment as one of five apartments on the site above retail outlets in the centre of Temple Bar would provide a satisfactory standard of amenity to future residents.

2.5 In relation to the amenity afforded by the apartment itself, the apartment was held to comply with the relevant development standards for apartments that

were then operative. The short-term holiday lettings use in question is analogous to the short-term holiday lettings uses undertaken in aparthotels, which are addressed under Appendix 24 of the Dublin City Development Plan 2011 – 2017. This Appendix makes clear that “It is not intended that any type of visitor accommodation, including aparthotels, is used or occupied by permanent households, including students.” It further adds that “If it is intended to convert the aparthotel units into residential units in the future, the standards for residential developments as set out in the development plan must be adhered to, including car parking standards and all private and public open space requirements.”

- 2.6 The implication of the aforementioned advice in Appendix 24 is that the development standards that are relevant to the assessment of any type of visitor accommodation differ from those that are relevant to the assessment of a residential unit. Differing development standards equate to differing matters to be taken into account in assessing these respective uses.
- 2.7 The aforementioned difference gives expression to the reality that the needs and amenity expectations of visitors using short-term holiday lettings accommodation differ from the needs and amenity expectations of residents of apartments. Thus, differences in the physical specifications and fit outs relevant to development for these two uses arise.
- 2.8 In relation to the amenity available in the building at 5 – 5A Crown Alley, the new factor for residents of the apartments in this building is the presence of the short-term holiday lettings use in the subject apartment. The original referrer discusses several characteristics of this use that both distinguish it from the residential use of apartments and impact upon amenity. They draw attention to the high turnover of visitors staying in the subject apartment and the activity that is generated thereby and the attendant security risk to the residents of other apartments in the same complex, in which there are shared circulation and communal storage areas, that this poses. They also draw attention to the support activities that service this high turnover, for example, cleaning staff are in attendance between visitor stays. Thus, this high turnover and the support activities that it generates distinguishes the use of the subject apartment from the other apartments in the building and this use has implications for the amenities of residents in these apartments and the wider environment of the area.
- 2.9 The original referrer’s description of the current use of the subject apartment indicates that it is being used more intensively than heretofore and that this use has changed the character of the previous residential use. Furthermore, as already noted above, this use does not entail the subsequent referrer/owner or anyone else residing in this apartment. Thus, there is no resident hosting visitors

in their own home, but rather the use of the subject apartment exclusively by visitors. Accordingly, the oversight of guests that would be typical of, for example, bed and breakfast accommodation in someone's home, does not arise. The use is thus one that would be likely to affect the amenities of residents in the adjoining residential apartments as the differing needs and amenity expectations of visitors, as distinct from residents, come into contact.

- 2.10 In the light of the foregoing, the intensification of the use of the subject apartment and, again, the differing needs and amenity expectations of visitors, as distinct from residents, lead to matters that differ from those that would arise under an assessment of the subject apartment for residential use.
- 2.11 I conclude that the use of the subject apartment as short-term holiday lettings accommodation raises matters that differ from those that would arise under any assessment of this apartment for residential use. Thus, in accordance with the Brogan case, the test for a material change of use of this apartment has been met and so its use as short-term holiday lettings accommodation constitutes development.

(iii) If development has occurred, is this development exempted development?

- 3.1 The Act in defining "house" and "habitable house" effectively defines residential use. However, neither the Act nor the accompanying Regulations define short-term holiday lettings accommodation or refer to this use.
- 3.2 Under Article 5(1) of the Planning and Development Regulations, 2001 – 2015, the definition of "business premises" leads on to the definition of "excluded premises", which refers to the provision of "overnight guest accommodation". A common dictionary definition of "guest" is "a person who is invited to visit someone's home" or "a person staying at a hotel or guest house". It thus does not include within its ambit the self-catering visitor that characterises the short-term holiday lettings use in question.
- 3.3 Neither the Act nor the Regulations state that the use of an apartment as short-term holiday lettings accommodation is exempted development. If the view is taken that this use is analogous to that of a hostel, then it could be said to be encompassed by Class 6 of Part 4 of Schedule 2 to Article 10 of the Regulations. However, as the residential use of an apartment is not included within this Class or any other Class of the said Part 4, the possibility that the material change of use of the subject apartment from residential use to short-term holiday lettings is exempted development does not arise.
- 3.4 Accordingly, I conclude that the material change of use of the subject apartment from residential use to short-term holiday lettings use is development, which is not exempted development.

Conclusion

In the light of my assessment, I conclude that the change of use of Apartment 1A, 5 – 5A Crown Alley, Dublin 2, from residential use to short-term holiday lettings use is a material change of use. Accordingly, this change of use constitutes development under Section 3(1) of the Planning and Development Act, 2000 – 2015, which is not exempted development either under this Act or the accompanying Planning and Development Regulations, 2001 – 2015.

Recommendation

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

Whether the use of a residential apartment for short-term holiday lettings at Apartment 1A, 5 – 5A Crown Alley, Dublin 2 is or is not development or is or is not exempted development.

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

- (a) Sections 2, 3, 4, 5, and 127 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 subsequent referrer’s submission,
 - (ii) The original referrer’s submission and response to the subsequent referrer’s submission, and
 - (ii) The planning authority’s assessment, declaration, and response to the subsequent referrer’s submission, and
- (d) The report of the inspector.

AND WHEREAS An Bord Pleanála has concluded the following:

- That the use of a residential apartment for short-term holiday lettings at Apartment 1A, 5 – 5A Crown Alley, Dublin 2 is a change of use, which, in the light of the different matters that it raises for assessment compared to those that would have arisen for the original use of this apartment, is a material change of use and thus development, and
- That neither the Planning and Development Act, 2000 – 2015, nor the Planning and Development Regulations, 2001 – 2015, recognise the said material change of use to 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 use of a residential apartment for short-term holiday lettings at Apartment 1A, 5 – 5A Crown Alley, Dublin 2 is development that is not exempted development.

Hugh D. Morrison

Inspector

19th September 2016