



An
Bord
Pleanála

Inspector's Report 29N. RL 3502

Proposal	Use residential apartments as serviced apartments
Location	Metro Apartments, Santry Cross, Ballymun Road, Dublin 9
Planning Authority	Dublin City Council
Planning Authority Reg. Ref.	0260/16
Requester and Referrer	Metro Hospitality Ltd.
Type of Application	Referral of declaration under section 5
Planning Authority Decision	Is development and is not exempted development
Date of Site Inspection	6 th January 2017
Inspector	Stephen J. O'Sullivan

1.0 Site Location and Description

1.1. The site is in a suburban area in north Dublin city. It lies at the corner of two main roads : the Ballymun Road and Santry Avenue - in the designated district centre for Ballymun. It is occupied by a 16 storey building. There is a hotel on the first six floors of the building. This referral is concerned with 30 apartments located on the floors above. There are separate but adjoining doors to the apartment and hotel on the eastern side of the building.

2.0 The Request

2.1. The requester operates the hotel on the site. According to the details submitted with the request, the 30 apartments above are owned by a single person and are let under standard residential tenancy agreements, typically for a fixed period of 12 months. The request sought a declaration as whether the use of the apartments as serviced apartments constitutes development under section 3(1) of the Planning and Development Act 2000, as amended. The request states that serviced apartments are commonly defined as completely furnished apartments available for both short term and long term stays. They are normally inclusive of utility bills and may include additional amenities such as maid service, reception or use of hotel leisure facilities. In this case the apartments would be managed by the requester and would be available for short and long term stays. The units would also serve a longer term market as regular principal places of residence for occupants which require a more flexible lease. Occupation would not be limited to short stays as is the case with aparthotels as defined in the 2011 development plan. Nor would the occupation of the units as a principal residence be precluded. The permitted use of the units under Reg. Ref. 1052/03 was as apartments without condition as to their occupancy or the terms on which they could be leased. No actual change of use would occur in this case. The units would remain in residential use and within the definition of 'house' in section 2 of the planning act. Even if a change were considered to occur, it could not be considered material as it would not give rise to any perceptible impact on the proper planning and sustainable development of the area or any planning impacts on the wider environment. There would be no impact on residential amenity or traffic. Therefore the proposal would not constitute development

3.0 Planning Authority Declaration

3.1. Declaration

The planning authority's declaration stated that the proposed use of 30no. residential apartments as serviced apartments constitutes a material change of use and would not be exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The courts decided in *McMahon vs. Dublin Corporation* 1997 1 ILRM 227 that the use of houses for short term letting was a material change of use from use as private residences. This case was quoted in the board's declaration 06D. RL2317 where a change from apartments to student accommodation was held to be a material change of use. The parent permission for the development on the site refers to 30 apartments on the 6th to the 15th floors. The apartments were designed and intended for private residential use. The character of the first residential use with standard residential tenancy agreements typically for a fixed period of 12 months is substantially different from the character of the proposed use as serviced apartments with flexible lease options on short term and long term stays. The change from one to the other is a material change of use. A handwritten note on the report also refers to the different legal status of a residential tenant under the Residential Tenancies Act 2004 compared with that of a visitor or guest in serviced accommodation.

4.0 Planning History

There is an extensive planning history on the site, as described in the council planner's report. The parent permission for the development of the hotel and apartments on the site was granted under Reg. Ref. 1052/03. A subsequent permission granted under Reg. Ref. 04/3434 referred to 30 apartments from the sixth to the fifteenth floors of block C of the overall development. The use of the apartments does not appear to have been the subject of any of the later applications on the site.

5.0 Policy Context

5.1. Development Plan

The site is zoned under objective Z4 for 'mixed use services' of the Dublin City Development Plan 2016-2022

6.0 The Referral

6.1. The Referral

The requester referred the planning authority's declaration to the board. The covering letter submitted with the referral states the requester's position that the proposed use would not involve a material change of use that constituted development. It includes the arguments that were stated in the request to the planning authority. It also responds to the consideration of the request by the planning authority. The cited judgement of *McMahon vs. Dublin Corporation* relied on the fact that the properties concerned were subject to a planning condition that prohibited non-residential uses, were designed and authorised as houses but then had been used for commercial short term lettings as holiday homes. The present case can be distinguished from that case. The requester's proposal would not result in any commercial use. The residential use would be retained. The only difference would be its temporal nature. The essential question in determining whether a material change of use has occurred is whether the existing use would be substantially altered or whether one might consider the effect of the change in use on the proper planning and sustainable development of the area. The council planner's report also referred to the Residential Tenancy Act, 2004. The tenancy of a property is not generally a planning consideration so it is not clear how that act would be a material to this case where the only change would be the leasing arrangements. The use of the apartments would remain consistent with the permitted and established use and so would not be substantially different. The proposal would not result in any impacts on the proper planning and sustainable development of the area either in terms of traffic or residential amenity or otherwise. No such impacts are identified in the report of the planning authority. The proposed

use of the apartments as serviced apartments would not constitute an actual change of use, would not result in any substantial change in the character of the use, and would not result in any additional or altered impacts on the proper planning and sustainable development of the area. Therefore it would not constitute a material change of use or development under section 3(1) of the planning act.

6.2. **Planning Authority Response**

The planning authority's response referred to its planner's report.

7.0 **Legislation**

Section 3(1) of the Planning and Development Act 2000-2016 states –

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 states –

“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

Section 94 (1)(a) of the act states –

Each planning authority shall include in any development plan it makes in accordance with section 12 a strategy for the purpose of ensuring that the proper planning and sustainable development of the area of the development plan provides for the housing of the existing and future population of the area in the manner set out in the strategy.

8.0 **Precedent Cases**

8.1. McMahan and others vs. Dublin Corporation, ILRM 1 227

The High Court upheld a declaration by the board that the use of homes as holiday homes constituted development. The case involved a newly built housing of 91

homes scheme authorised by the planning authority within which 10 homes were let as holiday homes from their first occupation. Much of the judgement therefore sets out why the use as holiday homes was not permitted by the permission, which is somewhat different from the current case where the apartments are already in residential use.

8.2. 01. RL 2192

The board declared on 4th February 2005 that the change of use of holiday apartments to permanent residential accommodation was a material change of use that constituted development, having regard to its character and impact on the proper planning and sustainable development of the area.

8.3. 06D. RL2317

The board declared on 6th November 2006 that the change of use of apartments to single purpose student accommodation was a material change of use that constituted development having regard to the potential impacts on the residential amenities of properties in the vicinity and to the amenities of the area.

8.4. 06D. RL 3304

The board declared 4th February 2015 that the change of use of 19 dwellings to a supported housing scheme was not material in planning terms as the proposed change involved occupation by particular demographic profile but not in the residential nature of the use. It does not provide a precedent for the current case which does not relate to the housing needs of any particular section of society.

8.5. 29S. RL 3490

The board declared on 17th October 2017 that the use of a residential apartment for short term holiday lettings constituted a material change of use and hence development. The board's declaration referred to the McMahon judgement, amongst other considerations, and various external impacts of the change of use.

9.0 Assessment

- 9.1. The proposal from the referrer is described in rather general terms. However it involves the letting of some or all of the existing apartments on a short term basis while also retaining the option of using them for long term residential accommodation. The judgement of the High Court in the McMahon makes it clear that the permanent occupation of a house or apartment as a home is different from the short term occupation of the same structure, that the difference is material in planning terms and that the change from one to the other constitutes development. The short term occupation to which the judgement referred was not only that by tourists on holiday, it explicitly included other types of user such as those on business or those moving home who required transient accommodation. The judgment is applicable to the proposed use as serviced apartments in this case. The materiality of the distinction set out in the McMahon judgment has been upheld in subsequent declarations from the board including those under RL 2192, RL 2317 and RL 3490. The referrer in this case has not submitted any persuasive arguments as to why the settled position of the board and the law on this question should now be overturned, or to distinguish the circumstances of this case from the others cases in which the question was settled.
- 9.2. The referrer is correct that ownership or leasing arrangements are not a planning issue. The planning system should not normally be used to enforce the requirements of other legislative codes, including that set out in the Residential Tenancies Acts 2004-2015. However those acts provide just one example of how the law treats someone's home very differently from property that they may occupy are a temporary basis which is not their home. This also arises under criminal law, tax law, contract law and at article 40.5 of the constitution, for example. These legal distinctions simply recognise the profound difference between a person's home and any other place. This difference would also be apparent from a modicum of introspection. It would be rather absurd if it were not appreciated under the planning system.
- 9.3. There are of course many instances where people might stay in a place that was not their home. There is nothing inherently objectionable in providing accommodation for that use. However it is a fundamentally different use from the residential

occupation of property as a home. The proposal by the referrer would involve the change from one use to the other, and possibly back again. The proposal is therefore for a material change of use that is development under section 3 of the planning act. No exemption has been established for such development under the planning act or the planning regulations. The judgement in *McMahon vs. Dublin Corporation* described various impacts on neighbours that might be more likely to arise from use for short term accommodation as opposed to residential use that would be material planning considerations, including noise, disturbance and traffic. The provision of an adequate supply of homes for the people of a locality is also a material planning consideration, as is made explicit under part V and section 94(1)(a) of the planning act. This may not have been a pressing social concern at the time of the *McMahon* judgement, but it certainly is now. It may well be that the particular circumstances of the site and the surrounding area mean that a change of use of the apartments there to short term accommodation, or a mix of short term and residential accommodation, would not injure the amenities of the area or unduly restrict the supply of housing so that the proposal was actually in keeping with the proper planning and sustainable development of the area. Or it might not be. These are planning matters which would need to be considered by the planning authority in the course of an application for permission upon which the public would have the opportunity to comment. Once it has been determined that such questions could reasonably be held to arise, it would be inappropriate to try and determine them in the course of a section 5 application which does not provide for any public consultation or the imposition by condition of any detailed or technical requirements that might be necessitated by the change of use.

10.0 Recommendation

- 10.1. I recommend that the board declare, as out below, that the use of the residential apartments on the site as serviced apartments would constitute a material change of use and so would be development and not exempted development.

WHEREAS the question has arisen as to whether the use of residential apartments as serviced apartments at Metro Apartments, Santry Cross/Ballymun Road, Dublin 9 is or is not development or is or is not exempted development

AND WHEREAS Metro Santry Hospitality Ltd. requested a declaration on the said question from Dublin City Council and the council issued a declaration on the 4th day of August, 2016 stating the use of the residential apartments as serviced apartments would constitute a material change of use and as such would be development and not exempted development

AND WHEREAS Metro Santry Hospitality referred the declaration for review to An Bord Pleanála on the 30th day of August, 2016.

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

- section 3 of the Planning and Development Act, 2000, as amended,
- The High Court decision of Barron, J in Thomas McMahon and Others vs. the Right Honourable The Lord Mayor, Aldermen and Burgesses of Dublin (High Court 1989 No. 9870P)
- the submissions on file, and
- The difference between the use of a property as a person's home and its use as accommodation on any other basis, both in terms of the fundamental character of those uses and the planning considerations that arise from them in relation to the amenities of the area and the supply of an adequate level of housing for the community,

AND WHEREAS An Bord Pleanála has concluded that the proposed use of the residential apartments as serviced apartments would allow them to be occupied on a short term basis and not as a person's home, and so would involve a material change in of use of the residential apartments

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3)(a) of the 2000 Act, hereby decides that the proposed use of the residential apartments as serviced apartments would be development and would not be exempted development.

Stephen J. O'Sullivan
Planning Inspector

6th January 2017