



An  
Bord  
Pleanála

## Inspector's Report RP91.RL3519.

### Question

Whether the installation of three vents and air handling units to the rear of the property is or is not development or is or is not exempted development.

### Location

49/50 Thomas Street, Limerick.

### Declaration

Planning Authority

Limerick City and County Council.

Planning Authority Reg. Ref.

EC16/50.

Applicant for Declaration

Aubars Bar and Restaurant.

Planning Authority Decision

Is development and is not exempted development.

### Referral

#### Referred by

John Crean of Cunnane Stratton Reynolds Land Planning and Design on behalf of Aubars Bar and Restaurant.

#### Owner/ Occupier

Aubars Bar and Restaurant.

**Observer(s)**

None.

**Date of Site Inspection**

23 January 2017.

**Inspector**

Stephen Rhys Thomas.

## **1.0 Site Location and Description**

1.1. The referral site is located at 49/50, Thomas Street in the heart of Limerick City Centre. The site comprises a four storey mid terrace period building currently in use as a bar/restaurant on the ground floor with commercial and residential uses on upper floors. The rear service yard is narrow in width and opens via a gateway onto a public back laneway. There are a number of air handling units, vents, ducting and other plant attached to the rear walls of the premises, at both ground and first floor level, within the service yard and onto the public back laneway.

## **2.0 The Question**

2.1. The referrer seeks a determination as to whether or not the installation of three vents and an air handling unit to the rear of the property at 49/50 Thomas Street, Limerick, is or is not development or is or is not exempted development within the meaning of the Planning and Development Acts, 2000 (as amended) and Planning and Development Regulations, 2001 (as amended).

## **3.0 Planning Authority Declaration**

3.1. On the 27 October 2016 Limerick City and County Council, having regard to the planning history of the site and to Section 32 of the Planning and Development Act 2000 (as amended) declared that the installation of three vents and an air handling unit to the rear of the property, would not be exempt from the requirement to obtain planning permission and that therefore a Declaration under Section 5 of the Planning and Development Act 2000 (as amended) should be issued to state that the works described above is development is not exempt development.

- They provided that this was in breach of Condition number 3 of An Bord Pleanála reference PL91.244912 which regulates emissions from the property and requires extract duct details to be agreed in writing with the planning authority.

- They provided that it was also in breach of Section 32 (2) of the Planning and Development Act 2001 (as amended).

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Report

3.2.2. The planning report considered sections 2, 3, 4(1)(h) and 32(2) of the Planning and Development Act 2000 (as amended), plans and particulars submitted as part of register reference 14/1243 and plans and particulars submitted with the Section 5 application. The report concluded that the three vents and air handling unit would not materially affect the external appearance of the structure and therefore comply with Section 4(1)(h) of the Act. However, the structures are not in compliance with register reference 14/1243 and therefore conflict with Section 32(2) of the Act, being in breach of a planning permission.

## 4.0 Planning History

**Planning register reference number 14/1243 and An Bord Pleanála reference PL91.244912.** Permission granted for change of shopfront to the front elevation and amalgamation of two rear windows. September 2015.

Condition 3

*(a) The development shall be operated such that there will be no emissions of malodours, fumes, gases, dust or other deleterious materials such as would give reasonable cause for annoyance to any person in any residence in the vicinity of the development.*

*(b) The developer shall control odour emissions from the premises in accordance with measures including extract duct details and details of associated noise emissions at neighbouring residential property which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.*

*Reason: In the interest of the residential amenity of neighbouring property.*

Further information was submitted to clarify that internal changes to cooking fume extraction was proposed but fumes would be expelled via existing external plant and vents.

**An Bord Pleanála reference PL91.LC.2065.** Grant a licence for the placement of advertisement structure and tables and chairs along the public road/street at 49/50 Thomas Street. September 2015.

#### 4.1. **Planning Enforcement History**

**Planning register reference number DC-408-15.** Warning Letter issued under Section 152 (1) of the Planning and Development Act 2000 (as amended). January 2016.

#### 4.2. **Relevant Referrals**

I have also reviewed the Board's Referral System database to establish whether the issue of vents and air handling equipment has been previously considered by the Board. In this respect a single referral, ABP reference **PL06D.RL2986**, has some relevance. The referrer sought an answer as to whether the provision of a smoking area with fans and condensers/air handling equipment on the roof of a public house is or is not development or is or is not exempted development. With respect to the condensers/air handling equipment, a point of detail arose as to their location rather than their installation as new equipment. The Inspector in this case concluded that the alternate location of the plant was an addition to the roof and could not be considered 'maintenance' or 'improvement' as defined by Section 4(1)(h) of the Act. In this instance the Board considered that the provision of condensers and air handling equipment was development and was exempted development within the scope of section 4(1)(h) of the Planning and Development Act 2000, (as amended).

## 5.0 **Planning Policy**

### 5.1. **Development Plan**

- 5.1.1. Limerick City Development Plan 2010-2016 is the statutory development plan for the area.

## 5.2. Natural Heritage Designations

- 5.2.1. The site is located 300 metres to the south east of the Lower River Shannon SAC (site code 002165).

## 6.0 The Referral

### 6.1. Referrer's Case

- 6.1.1. Subsequent to the Council's Declaration John Crean of Cunnane Stratton Reynolds Land Planning and Design have made this Referral on behalf of Aubars Bar and Restaurant to An Bord Pleanála as per the provisions of Section 5(3) of the Planning and Development Act, 2000 (as amended). They present the issue for determination by the Board as follows: whether the installation of three vents and an air handling unit to the rear of the property is or is not development or is or is not exempted development. The submission by the owner/occupier is accompanied by supporting material and documentation including photographs and a copy of the Council's decision. The grounds of referral are summarised as follows:

- Once works are considered to comply with requirements of Section 4(1)(h) of the Planning and Development Act 2001 (as amended), the Act, it is not relevant as to whether or not there is a contended breach of a planning consent.
- Condition 3 and related Section 32 (2) of the Act, refer to a separate act of development.
- Given the city centre location and the positioning of the structures which are not readily visible from the public domain, the alleged works do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.
- Because Section 4(1)(h) of the Act refers to 'appearance' and not emissions, then this aspect of vents which are found all over the city centre must be outside the planning process.

- The Council on one hand consider the works to be within the requirements of Section 4(1)(h) of the Act, but appear to have cross referenced two separate development issues – exempted development under Section 4(1)(h) of the Act and non-compliance/alleged enforcement.
- Permission granted under reference number PL91.244912, attached a condition which required compliance with a need to submit extract duct details for agreement with the planning authority. The works subject of the referral occurred post implementation of this permission. The permission does not restrict additional works nor does it de-exempt additional works from being done.
- The Council have acted ultra vires, by using Section 32 of the Act to refuse an exemption declaration because of a contended non-compliance issue on another separate planning consent.
- The Council's declaration should be altered to confirm their statement that the works are exempted development under Section 4(1)(h) of the Act.
- The matter of contended breach of condition 3 (PL91.244912), should be dismissed as it is not a Section 5 issue.

## 6.2. Planning Authority Response

No further observations to make on the referral.

## 7.0 Statutory Provisions

7.1. Planning and Development Act 2000 (as amended), the Act.

7.1.1. Under Section 2(1), the following is the interpretation of 'works':

"...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."

7.1.2. Section 3(1) states as follows:

"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."

7.1.3. Section 4(1) of the Act states that the following shall be exempted developments for the purposes of this Act:

“(h) development consisting of the use 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 or of neighbouring structures;”

7.1.4. 32.— (1) Subject to the other provisions of this Act, permission shall be required under this Part —

(a) in respect of any development of land, not being exempted development, and  
(b) in the case of development which is unauthorised, for the retention of that unauthorised development.

(2) A person shall not carry out any development in respect of which permission is required by subsection (1), except under and in accordance with a permission granted under this Part.

## 8.0 **Assessment**

### 8.1. **Is it or is it not development?**

8.1.1. The referrer has asked the question as to whether the installation of three vents and an air handling unit is or is not development and is or is not exempted development.

The equipment can be described as follows:

- a self-contained air handling unit attached via a bracket to the external wall of the building,
- a protruding box flap vent structure adjacent to the rear exit doorway of the building,
- a flush flap vent beneath the eaves of the rear return of the building onto the back laneway,
- and a protruding balance flu associated with a heating system, located in a small alcove to the rear of the building.



8.1.2. Having Regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended), I consider that the installation of three vents and an air handling unit to the rear of the property constitutes an alteration and is therefore considered to be development.

## 8.2. Is the Development Exempted Development?

8.2.1. *Section 4(1)(h) of the Planning and Development Act 2000 (as amended) – The Act.*

Works, by default, require permission unless an exemption otherwise applies. In my opinion, the relevant exemption to consider is Section 4(1)(h) of the Act, which extends an exemption to certain acts of ‘maintenance, improvement, or alteration’, which I consider reflects the subject proposal exactly. In the interests of clarity, the relevant ‘caveats’ are as follows.

- 4(1)(h) – the works would not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

The planning authority conceded in their report dated 27 October 2016, that the installation of the aforementioned equipment would not materially affect the external appearance of the premises or of the neighbouring premises. On the day of my site visit I viewed a number of restaurant/bar premises in the vicinity in similar back laneways. I observed that the rear of these properties frequently exhibited a profusion of similar air handling equipment and service boxes, and that such equipment is a common occurrence. The air handling equipment at other locations may or may not be exempted development. However, purely from an external appearance perspective, air handling equipment and service boxes have, in my opinion, materially changed the character of the rear elevations of this type of premises across the city centre.

I would note that the number of vents, ducting, plant and other paraphernalia associated with the operation of the subject premises is excessive. The point at which section 4(1)(h) no longer applies is when the appearance is materially altered. I think that in this situation, the number and nature of the equipment attached to the external wall of this premises verges on materiality. The external wall now serves as a support structure for air handling equipment for a large proportion of its surface area, to such an extent that the appearance of the wall is at odds with other

neighbouring structures. The character of such neighbouring structures (business premises and residential) is defined by the absence of commercial air handling equipment because it is not needed in conjunction with the use being carried out.

The referrer makes the point that alterations can only be seen once on the property, within the rear yard. This may be the case and I would agree that plant and equipment attached to the rear walls of the subject premises within the yard are not visible from the back laneway. I do, however, note other ducting features which are visible from the laneway and which add cumulatively to the question of the material nature and visual impact of such structures. In addition, the rear yard would be partially visible from the upper floors of other premises in the vicinity. In any case the visibility or otherwise of structures from the public realm is not a necessary condition for accordance with section 4(1)(h).

The referrer also makes the point that similar air handling equipment is typical of other parts of the city centre and therefore such structures must be outside the scope of the planning process. I do not think it appropriate to compare the subject site to development at other sites, authorised or otherwise.

In this instance I think that the spirit and meaning of section 4(1)(h) is being stretched to beyond its limitations by the referrer in suggesting that the addition of four more units would be exempted development. I note also that there are no exemptions which apply to air handling plant equipment and Public Houses under the Planning and Development Regulations, 2001 (as amended). Consequently, it is unnecessary to consult Article 9 of the Regulations to determine any restrictions on exemption.

As such, in my opinion, the installation of three vents and an air handling unit to the rear of the property when taken together with existing equipment of a similar nature would result in the material alteration of the appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structures and cannot avail of the exemptions under Section 4(1)(h) of the Act.

### *8.2.2. Planning History*

Permission was granted for elevational changes and other minor internal development which included the fitting of new extraction hoods, PA reference

14/1243 and ABP PL91.244912 refers. The planning authority sought to de-exempt the referral development based upon conditions attached to this permission. The planning authority maintain that the installation of new air handling and vent equipment would breach condition 3 of the permission.

Firstly, condition 3 seeks to control and manage emissions from the permitted development. Having consulted planning application drawings, I can see that the air handling unit, the subject of this referral, is not shown, nor are the other subject vents. Therefore, the matter concerning permitted external air handling equipment, compliance with conditions and the control of nuisance is either closed or open to enforcement proceedings. I consider, therefore, that the three vents and air handling unit are outside the scope of the previous planning permission (PA reference 14/1243 and ABP PL91.244912).

Secondly, and on a point of clarity, the planning authority have used condition 3 as a means to control exempted development. I would broadly agree with the case presented by the referrer with respect to Section 32(2) of the Act. The installation of three vents and air handling equipment is separate to the planning permission and could be considered for assessment as exempted development under section 4(1)(h), therefore outside the remit of section 32 of the Act.

## 9.0 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 installation of three vents and an air handling unit to the rear of the property at 49/50 Thomas Street, Limerick, is or is not development or is or is not exempted development:

**AND WHEREAS** John Crean of Cunnane Stratton Reynolds Land Planning and Design on behalf of Aubars Bar and Restaurant, 49/50 Thomas Street, Limerick requested a declaration on this question from Limerick City and County County

Council and the Council issued a declaration on the 28th day of October, 2016 under Declaration number EC16/50 stating that the matter was development and was not exempted development:

**AND WHEREAS** John Crean of Cunnane Stratton Reynolds Land Planning and Design on behalf of Aubars Bar and Restaurant, 49/50 Thomas Street, Limerick referred this declaration for review to An Bord Pleanála on the 23rd day of November, 2016:

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

- (a) Sections 2(1), 3(1), 4(1)(h), 32(1) and 32(2) of the Planning and Development Act, 2000 (as amended);
- (b) The planning permission granted under appeal reference PL91.244912,
- (c) The planning report under register reference EC16/50,
- (d) The referrer's submission,
- (e) The report of the inspector.

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) That the installation of three vents and an air handling unit to the rear of the property at 49/50 Thomas Street, Limerick, comprised works as defined in the Act, and therefore constitutes development, and
- (b) when taken together with existing plant and equipment attached to the rear of the structure, would materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structures and would be development that is not exempted development considered to be within the scope of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended):

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by Section 5(3)(a) of the Planning and Development Act, 2000 (as amended) hereby declares that the installation of three vents and an air handling unit to the rear of the property at 49/50 Thomas Street, Limerick, is development and is not exempted development.

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Stephen Rhys Thomas  
Planning Inspector

28 February 2017