

307112.

Lita Clarke

From: Appeals2
Sent: Monday 22 June 2020 15:44
To: Lisa Quinn; Lita Clarke
Subject: FW: Response to Referral Ref.307112
Attachments: Response to Referral 307112.pdf

From: Bord
Sent: Monday 22 June 2020 10:16
To: Appeals2 <appeals@pleanala.ie>
Subject: FW: Response to Referral Ref.307112

From: Admin Dept <admin@clearconsult.ie>
Sent: Monday, June 22, 2020 10:03 AM
To: Bord <bord@pleanala.ie>
Subject: Response to Referral Ref.307112

To whom it may concern,

Ref.307112

Please find attached a response to a referral relating to the Lamplighter Pub, 79 The Coombe/1 Brabazon Street, Dublin 8.

I would be grateful if you would acknowledge receipt of the attached.

Regards,
Paula

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**SIMON CLEAR & ASSOCIATES
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CONSULTANTS**

The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1.

19th June 2020

**Re: Referral Regarding The Lamplighter Pub, 79 The Coombe/1 Brabazon Street,
Dublin 8**

Your Ref: ABP-307112-20

Dear Secretary,

I refer to your letter dated 13th May 2020 addressed to Creative Real Estate Limited, College House, 71/73 Rock Road, Blackrock, issued under the provisions of Section 129 of the Planning and Development Act 2000 (as amended) enclosing a referral to An Bord Pleanála from Mr. Andreas Bruggener dated 18th April 2020.

We have been instructed by Creative Real Estate Limited to respond to the referral.

We are very concerned about the nature and content of the information passed to us in respect of this Referral and on our advice our client has taken legal advice. The Counsel advice received is stated hereunder. The relevant matters have also been taken up with the Referrer's representatives separately and will not be detailed herein.



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Legal Caution

Legal Counsel has requested that the following text (*italics*) be brought to the attention of the Board of An Bord Pleanála: -

“We wish to expressly draw your attention to the CCTV and photographic data capturing the rear of the premises supplied by Mr. Bruggener in support of his referral. Creative Real Estate Limited was unaware that Mr. Bruggener had a recording device in his dwelling capturing images of persons attending on the premises. The aforementioned data was collected without the knowledge or consent of the Creative Real Estate Limited or the persons seen therein, in breach of the Data Protection Acts. This data was unlawfully obtained and same should be excluded by the Board when considering the within referral.

We also note that the covering letter of the appeal contains defamatory statements about Creative Real Estate Limited and its officers all of which is denied. The CCTV and photographic imagery has no probative value but same is prejudicial when coupled with the defamatory language directed towards Creative Real Estate Limited contained in Mr. Bruggener’s submission.

The outcome of this referral is an equivalent of finding on planning permission. It is of utmost importance that the referral is determined in accordance with fair procedures given the potential consequences of an adverse finding by the Board against Creative Real Estate Limited. It is respectfully submitted that the only materials submitted by Mr. Bruggener that should fall for consideration by the Board are those materials which have been lawfully obtained by him and all defamatory language contained in the referral disregarded.”

Site Location and Description

The subject site is occupied by a substantial three-storey corner, Victorian era building at the junction of Brabazon Street and The Coombe. It is operated as a public house on the ground floor and there are traditional bar fittings in the interior. The upper floors are in residential accommodation use, occupying 9 bedrooms.

The existing public house has an entrance located on the corner and two windows in each façade, onto the Coombe and Brabazon Street. Three-storey houses are located along the

west side of Brabazon Street, as is the access to the overhead residential accommodation located in the Lamplighter building.



Site Location Map with the Lamplighter outlined in Red

The Lamplighter is established in a substantial Victorian era building that was designed with scale and architectural detail to mark an important junction in the inner city. It was designed as a public house occupying the ground floor and residential accommodation on two floors overhead.

The building is a fine Victorian corner site building and a positive feature in the streetscape as is clearly evident in the building form and the materials and decorative details on the façades at first and second floor levels. The Lamplighter premises has a long-established use within the area and community.

The building pre-dates modern planning legislation and the use was established as a permitted use on 1st October 1964, without a requirement for possession of a 'planning permission' certificate – a public house on the ground floor, with residential accommodation overhead on two floors.

The operation of rented accommodation on the upper floors is established by time and is consistent with the type of rented residential accommodation suited to a city centre

location. The residential accommodation is not the principal private residence of the owner. Therefore, the accommodation is not affected by the regulations that were introduced on 1st July 2019 regulating development involving a change of use relating to home sharing and limited short term letting, in a principal private residence in a rent pressure zone, specifying certain notification requirements.

The upstairs residential accommodation has been recently upgraded to meet the requirements of the Dublin City Fire Officer; the entire premises has been rewired and reroofed. The front elevations have been reinstated to the original form on foot of planning permission granted (ABP Ref. 301303 – 18; DCC Ref. 2018/18), as shown below.



The Lamplighter building marks the corner in the Coombe and has been fully refurbished for its original use.

The accommodation is set out as shared accommodation, with individual ensuite bedrooms over two upper floors (9) and provided with common kitchen and relaxation areas on the first floor, indoor and outdoor. This is consistent with the established pattern of accommodation letting within the building.

It should be noted that all of the issues raised in the Referral are internal within the established licensed premises and that no new building floor areas have been added or any element introduced that is visible from the public realm.

The Referrer indicates he bought his terraced artisan dwelling in 2014 and therefore, has no practical knowledge of the use of the premises before that date. The uses to which the building is put, which premises dates back to the 1830s, are all associated with the established use pre-1964 and they have never been abandoned.



View on Brabazon Street elevation. The Referrers house is on the left, marked by the vertical poles above the parapet erected by the Referrer to enclose a roof garden created at that level since occupation.

Garrett Simons (Judge)¹ acknowledges the established existence of primary and ancillary uses and multiple uses in buildings and is cites the *Rehabilitation Institute v Dublin Corporation* case², which found that *an ancillary use is regarded as part of the primary use so that the cesser of the ancillary use does not give rise to a material change in use.*

¹ Planning and Development Law; Garrett Simons; Thomson Round Hall, 2004; 2-28 – 2-33.

² *Rehabilitation Institute v Dublin Corporation*, unreported, High Court, Barron J., January 14 1988.

In the subject premises the public house occupies the ground floor and the residential accommodation occupies the upper floors, under the same ownership and management as it has done since pre-1964. The premises operates at all levels as an established use in accordance with the provisions of planning legislation.

Planning Authority's Decision

We note that the Referrer is disputing the decision of Dublin City Council and we have considered the Planning Officer's report dated 24th March, which included the following Assessment of the relevant items for which a Declaration was requested: -

The works which are the subject of this declaration requested under Section 5 of the Planning and Development Act 2000 (as amended), are assessed as follows:

1. The construction of a smoking/beer garden to the rear of pub.

It is noted that an opening was provided in the center of the roof of the former toilet area. However there has been no increase in floor area of the public house or intensification of use and the works are within the floorplate of the licensed premises. There has been no visual change to the premises.

It is therefore considered that the smoking area is consistent with 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. Therefore the works are deemed exempted development within the meaning of the Planning and Development Acts 2000, as amended, as set out under Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

2. Use of upstairs rooms as student/ short term letting

Short-term letting is defined in Section 3A of the Planning and Development Act 2000 (as amended), as the letting of a house or apartment, or part of a house or apartment, for any period not exceeding 14 days. Therefore the short term letting of the upper floor of the premises is only considered to be development if the duration of the short term let is 14 days or less.

3. Raising of flat roof to rear by c. 600mm and construction of a 2 metre high fence to create an outside amenity area.

In response to the application, the owner states that insulation requirements of a modern refurbishment imply more depth and the build-up raised the roof by 100mm. There has been no new roofing with the intention of creating a new outside amenity area. The owner also states that the wooden fence at the rear of the premises is for the maintenance and improvement in respect of the amenity and security of the property.

The fence is not visible from the public realm. Furthermore, it is noted that there are other structures, including a spiral staircase, visible to the rear of other properties in the vicinity. It is therefore considered that fence and raised flat roof are consistent with 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. The works are deemed exempted development within the meaning of the Planning and Development Acts 2000, as amended, as set out under Section 4(1)(h) of the Planning and Development Act 2000 (as amended).

Response to Grounds of Referral

We have reviewed the history record of referrals in the ABP data base and it does not appear that there are previous determinations directly relevant to the subject matter of this referral.

The brief grounds of Referral prepared by Peter Gillett, planning consultant, maintain that the works to the smoking area described above and to the flat roof *materially affect the external appearance of the structure and are not for the improvement of the structure.*

In response it is submitted that the Referrer's agent is wrong in the interpretation of the relevant section of the Planning Act. Section 4 (1)(h) states:- (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 or of neighbouring structures; (our emphasis – underline)

The full extent of the exemption is available to a person carrying out work for maintenance, improvement or other alteration. The works described, whereby the toilets were moved inside the original lounge area and the original toilet area was reconfigured as a smoking area are works for maintenance, improvement or other alteration affecting the interior of the structure. There is no extension and no added area, as one element was moved and replaced by another element. The premises was improved in that the comfort and amenities of the customers were improved by better toilet facilities and the premises was made compliant with the smoking legislation requirements.





Images of new toilets, male and female relocated into the former lounge area.

The reorganisation of space within a planning unit is exempted development under the provisions of Section 4(1)(h) of the Planning Act 2000, as amended and has been accepted as such by the High Court in what is referred to as the Clarence Hotel case (*Carroll and Colley v Brushfield Limited*). Toilets, which were external have been moved inside and are presented there in excellent condition for patrons of the premises. A lounge area that was inside has been moved outside to provide facilities to the patrons who smoke. The area has been arranged to comply with smoking area legislation with no increase of the area of the planning unit or material intensification of use.

The smoking area has been improperly characterised as a 'beer garden'. It is evident from photography that this is an enclosed area and no element of garden exists. The opening in the roof is simply smoking legislation compliance, with no added floor area. It should also be noted from the photo below that there is a high level wall demarcating the boundary between the pub and residential premises to the rear, an established feature in the area.



Both elements, toilets and smoking area, are ancillary to the proper operation of the primary use of the premises as a public house. There has been no material change of use and there has been no material intensification of use of the premises, contrary to what is alleged by the Referrer's agent. The owner of the premises considers the internal lounge was more frequented than the smoking area.

Accommodation

The Lamplighter premises is an established licensed public house with extensive accommodation overhead the groundfloor bar. The primary use is identifiable as a commercial premises that is an established licensed public house with overhead accommodation for letting.

Rooms are currently let on an annual basis, or subject to a lodger agreement basis for periods of less than a year and not for any periods of less than 15 days duration.

Provision of rented accommodation in rooms is an established use, as would be expected overhead a large commercial premises providing rooms in the city centre close to work and transport termini. There is evidence from previous owners in relation to the nature of rental history.

There has been no change of use from roof to an amenity area. The owner confirms that the flat roof was always available as a roof amenity ancillary to the accommodation overhead the public house and for maintenance. A similar arrangement exists in the next door property, No.78 The Coombe, which is owned by DCC and is being refurbished as accommodation. Both properties shared a boundary metal/mesh fence, which the owners replaced with a timber fence, for improved safety, security and prevention of mutual overlooking between residents exiting to the rear at first floor level and to improve amenities for tenants. All apartments require ancillary private amenity space in accordance with the Government apartment guidelines, with balconies, roof gardens etc. being the most common form of provision.³



The screen fence has a particular function in relation to No 78 and is similar to other high level screens erected in this inner city location. The upstand in the foreground is a vent to the toilets below (1 of 2) and this is clearly not the amenity area behind the accommodation, which is marked by a low parapet.

³ Sustainable Urban housing Design Standards for new apartments; DEHLG 2009.

Response to Referrer

The Referrer has included his own grounds of Referral, which are addressed where relevant hereunder.

Use on Upper Floors

Paragraph 2.1 of the Referrer's submission states the upper floors of the property were derelict and water damaged with no facilities upstairs. This claim is refuted by the owner. Given that the bar and the upstairs are the same building it would not be have been safe to ~~have a derelict property as described above a pub that was trading.~~ Declan Brady, previous owner, gave a declaration that during his tenure as owner her had let the upper floors out to people.

The sales brochure referred to in paragraph 2.3 of the Referrer's grounds is incorrect and should not be relied upon as evidence of disuse or dereliction. The reason the estate agent declared the use of 'storage' was to enhance attraction to buyers with vacant possession of the entire building.

The internal condition that the Referrer alleges to have encountered on the upper floors is irrelevant as the use there is an established use within the premises and the primary use of the premises as a trading public house was never abandoned. Therefore, section 4(1)(h) applied to works upstairs and the residential use persists.

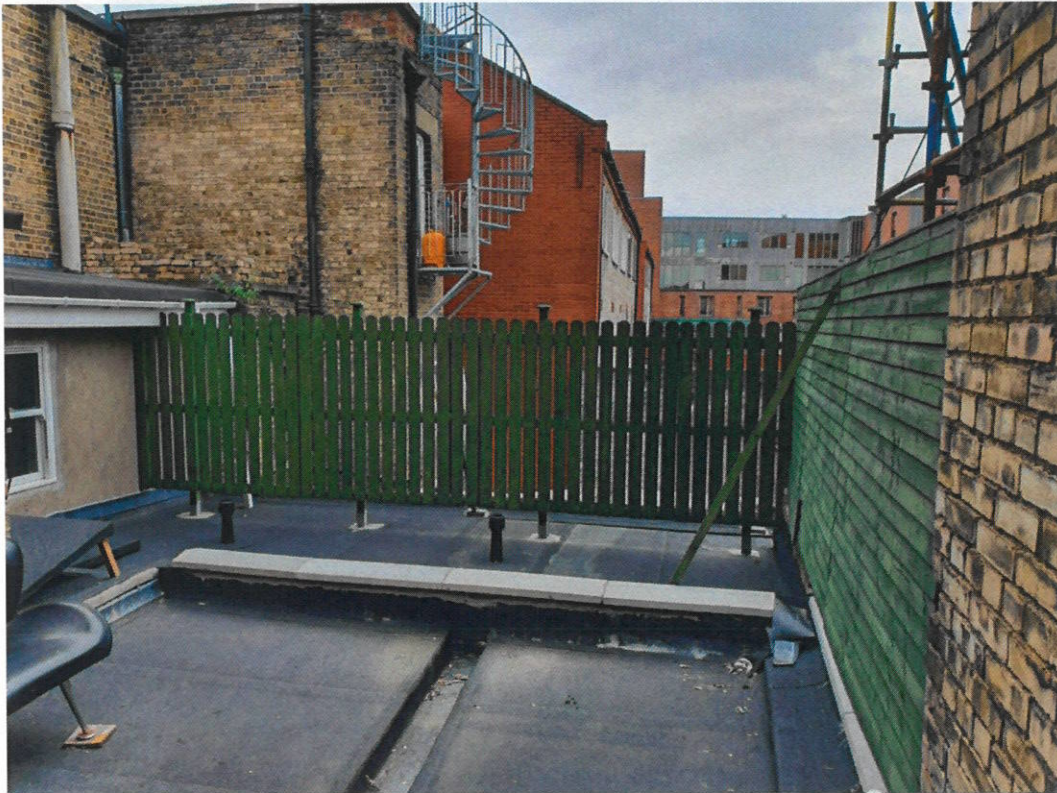
Lock-in

The allegation made in paragraph 3.9 is false. The owner confirms that the Gardai from Kevin Street had attended the premises at 10pm that evening and will confirm that there was no music and the bar was closed. There was no opening during the lock down and the allegation is totally incorrect and very damaging to his business.

Raising the Roof

As stated to DCC, the owner carried out works to a section of flat roof to allow for strengthening of a poor roof and insertion of insulation in a modern roof. The insulation was installed from inside the building from below, with ceiling panels removed, as the workmen didn't want any moisture in the insulation. Therefore, the roof had to be sealed from the outside and the insulation put in from the inside of the building. The roof was not

raised by 600mm and this is clear from the images provided by the Referrer. The timbers used in were nowhere near 600mm in section.



This photo shows 2 extractor vents in the lower roof level. The paling fence is located within and not upon the property boundary. The flat roof to the left is owned by the publican, not the Referrer.

Images of Persons

The owner confirms that the persons shown on the roof in image 6.1 are believed to be trespassers on the pub property. Fencing was erected partly to ensure that the pub premises were secure after numerous break-ins in No 78 & 77 The Coombe, the adjacent property then under refurbishment by DCC.



Previously, an unauthorised fire escape type structure, similar to the one shown in the previous photo, was constructed on the publican's roof by the Referrer, accessed via the doorway shown, to access a roof garden defined by the post and wire fence above the parapet. It was subsequently removed.

Peeping through the fence.

The alleged peeping through the fence, shown in Referrer's image 6.4, is a photo of the pub owner's electrician who was looking to run cables for the rear of the property along and within the boundary. The Referrer claims this is peeping when in fact it was a tradesman carrying out essential works on our client's property.

It should be noted that the roof beyond the fence is part of the pub premises. This is seen on the CCTV footage, which shows the carpenter putting stays on that part of the roof during works. The stays are external to where the fence was positioned on the roof, as shown in the photo below.

Fence

The Referrer reported trespassing to the pub owner and asked him to remedy this, who then erected a security fence to protect his own and the neighbour's property from trespass associated with break-ins at the neighbouring DCC property. As indicated in paragraph 6.7 of the Referrer's grounds he has no objection in principle to the fence. The fence is not located on the boundary line of the Referrer's property.



The fence is not located on the boundary of the neighbour's yard. Note there is a high level concrete block boundary above roof level located on other rear perimeters of the pub premises.

Conclusion

The development in question would come within the scope of the exemption afforded under Section 4(1)(h) of the Planning and Development Act 2000, as amended, being works for the improvement or other alteration of the existing structure, and in the particular circumstances of this case, it is considered that the development would not materially affect the external appearance of the structure so as to render that appearance inconsistent with the character of the structure or of neighbouring structures.

There has been no material change of use within the premises and there has been no material intensification of use of the premises.

The Planning Officer concluded as follows: -

The works to the public house in relation to the provision of smoking area, replacement of the rear roof and the construction of a timber fence are deemed exempted development within the meaning of the Planning and Development Acts 2000, as amended, as set out

under Section 4(1)(h) of the Planning and Development Act 2000 (as amended). The use of the upstairs accommodation for short term let for a duration of 15 days or more, is deemed exempted development, as set out under Section 3A of the Planning and Development Act 2000 (as amended).

Taking into account the legal caution expressed above and abiding by the principle of *audi alterem partem*, which has guided An Bord Pleanala deliberations in the past, it is requested that due caution be exercised in respect of information provided by the referrer ~~and that my client's responses receive due respect.~~

Therefore, the decision of the planning authority should be sustained and it is requested that this be confirmed in the decision made by An Bord Pleanala.

Yours sincerely,

Simon Clear