

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

AN BORD PLEANÁLA	
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ABP-	
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Friday, 19th June 2020

[By Hand]

Dear Sir/Madam,

Re: SECTION 5 REFERRAL – HILTON DUBLIN KILMAINHAM HOTEL, SOUTH CIRCULAR ROAD, DUBLIN 8, D08 XAK3

DUBLIN CITY COUNCIL REG. REF. 0122/20

Introduction

Tom Phillips + Associates, Town Planning Consultants, have been requested by Thornmont Limited, Hilton Dublin Kilmainham Hotel, South Circular Road, Dublin 8, D08 XAK3 to refer a Declaration received from Dublin City Council (DCC) to An Bord Pleanála (ABP) under Section 5(3)(a) of the *Planning and Development Act 2000*, as amended. The DCC Declaration is dated 26th May 2020 and relates to the following question:

‘Whether amendments to an existing hotel at basement and ground floor levels resulting in 10 no. additional hotel bedrooms with ancillary uses is or is not development or is or is not exempted development within the meaning of the Act?’

DCC issued a ‘split decision’ in relation to the above question and concluded that the proposed minor amendments to the eastern and western elevations including two new windows proposed to the western elevations and the re-arrangement of the spandrel panels on the eastern elevation, and the minor amendments at basement level -1 to convert a meeting room into two new offices, constituted exempted development.

However, the Planning Authority considered that the provision of 10 no. additional bedrooms, ancillary offices, a general meeting room, comms room and luggage space in place of 4 no. existing meeting rooms, offices and a portion of the reception/lobby area at ground floor level did not comprise exempted development.

We disagree with this aspect of the Council’s assessment and now seek the Board’s determination of the matter. The statutory fee of €220 is enclosed.

The existing hotel development and site is described in detail in the Applicant’s submission (dated 13 March 2020) and is, therefore, not considered necessary to repeat again in full here. We understand that the Board will be copied the Applicant’s submission in full as part of the Referral process.

TOWN PLANNING CONSULTANTS



DCC Declaration

As noted above, DCC concluded that the following works did not comprise exempted development:

'..10 no. additional bedrooms, ancillary offices, a general meeting room, comms room and luggage space in place of 4 no. existing meeting rooms, offices and a portion of the reception/lobby area at ground floor level'

The primary rationale for this decision is included in the associated Planning Officer's Report, which is assessed as part of this submission.

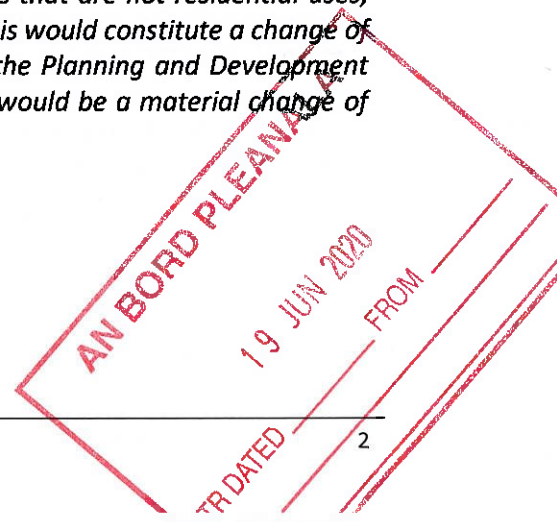
Our response to the above Declaration is set out below.

Dublin City Council Assessment

The submitted Section 5 application sought to assess the proposed works on the basis of (i) whether these accord with the provisions of Section 4(1)(h) of the *Planning and Development Act 2000*, as amended in respect of whether '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' and (ii) and whether the addition of 10 no. bedrooms in lieu of existing meeting rooms, offices and an area of reception/lobby space would constitute an intensification of use such that a material change of use would arise. This was supported by way of 'existing and proposed' architectural drawings to address the Section 4(1)(h) assessment, together with an analysis of relevant case law and the opinions of consulting engineers in relation to whether any material planning impacts would arise specifically in relation to traffic generation, car parking provision and drainage requirements arising from the proposed bedrooms.

In response to the Applicant's contentions regarding intensification of use/material change of use, the Planning Officer stated:

'Likewise it could be argued that this does in fact constitute an intensification of use for a number of reasons; 1) firstly it is an increase of 8% in the number of bedrooms, 2) it is a reduction in the ancillary uses of the hotel, ie.in the number of offices and meeting rooms, especially at ground level and also a reduction in the communal area such as the reception area, 3) there will be a need for increased capacity in the restaurants and bars with the additional guests, 4) This will have implications on car parking for the additional guests 5) could argue that it provides for a very unmaintained street frontage along the SCR, although this frontage is already lacking in animation as there are blinds to the meeting rooms at ground floor level. 6) Also you could argue that there are existing offices and meeting rooms that are not residential uses, albeit it under the same roof and use class of the Hotel, that this would constitute a change of use under Part 4 Article 10 of the use Classes as defined in the Planning and Development Regulations 2001(as amended). The question is whether this would be a material change of use'.





We do not accept that any of the 6 no. examples cited above constitute evidence that an intensification of use will arise in planning terms, or that any of the issues raised will give rise to any material planning impacts necessitating planning permission. The above assessment also appears to suggest that there may be the potential for a change of use in planning terms arising from 'office' to 'residential' use, having regard to the use classes noted in the *Planning and Development Regulations 2001*, as amended. This latter issue is also addressed below but we wholly reject the premise that any form of material land use change is occurring here outside of the permitted existing 'hotel' use. For the avoidance of doubt, the issue at hand relates to the conversion of internal ancillary hotel uses (meeting room, offices and part of the reception area) to hotel bedrooms. All uses, however, comprise hotel use and do not constitute any form of stand-alone or independent land uses within the meaning of the 2001 Regulations. Hotel meeting rooms and ancillary offices do not constitute Class 2 or 3 'office' uses and hotel bedrooms do not constitute 'residential' use as per the Regulations.

We address the 6 no. issues noted above as follows (*our response in italics*):

- An 8% increase in bedrooms:

(The provision of an additional 10 no. bedrooms within the existing built envelope and footprint of a hotel that currently accommodates 120 no. existing hotel bedrooms, or a c.8% increase in overall bedroom numbers, does not of itself indicate any form of intensification of use in planning terms. If anything, this illustrates the minor nature of the proposed change within the overall context of the existing hotel);

- A reduction in ancillary uses i.e., in the number of offices and meeting rooms, especially at ground level and also a reduction in the communal area such as the reception area:

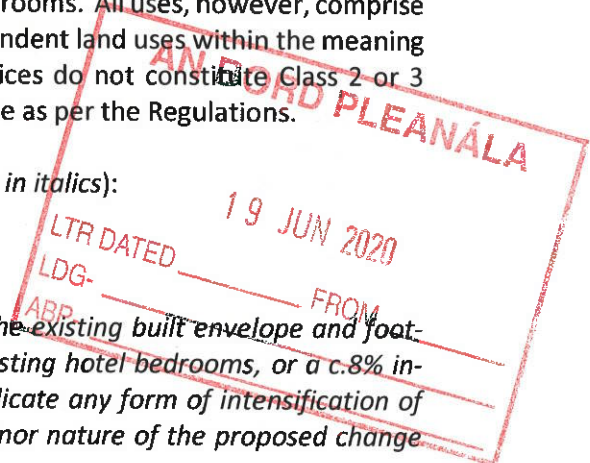
(We fail to see what bearing a reduction in the extent of internal ancillary uses within an existing hotel has in planning assessment terms. Any reduction in this regard will not give rise to any new planning impacts);

- There will be a need for increased capacity in the restaurants and bars with the additional guests:

(We would suggest that the need, or otherwise, for increased capacity within the existing hotel restaurants and bars is an internal operational matter for hotel management to consider. It is not, however, a planning consideration and no extension or other alteration to the existing bar and restaurant arrangement is being proposed. In addition, the provision of 10 no. additional bedrooms will result in a maximum of 20 no. additional guests. The removal of the hotel meeting room, which will occur to facilitate the proposed hotel bedrooms will naturally result in significantly less customers using the hotel for business meetings, conferences and other events and will consequently reduce the demand within the hotel bars and restaurants well below that created by a maximum of 20 no. additional guests);

- Implications for parking for the additional guests:

(The Transport Statement enclosed with the initial submission to DCC as prepared by Arup Consulting Engineers concludes that "The vehicle trips generated by the 10 no. additional accommodation rooms will be mainly taxi trips that are distributed throughout the day. A small increase in demand for parking overnight is expected (approximately 5 spaces), however, there is sufficient capacity within the existing hotel car park to accommodate this and no additional parking is required. No other changes in terms of pedestrian and cycle access or servicing





arrangements are proposed while no change in staffing requirements are anticipated." Given the above, it is clear that there are no parking implications arising in respect of the proposed bedrooms and no additional car parking is required or proposed. It is also noted that the proposal will not give rise to any traffic hazard and will result in reduced traffic generation when compared to the existing situation;

- Could argue that it provides for a very unmaintained street frontage along the SCR, although this frontage is already lacking in animation as there are blinds to the meeting rooms at ground floor level:

(The 'unmaintained street frontage' is not a consideration unless the proposed works are not deemed consistent with Section 4(1)(h) of the Planning and Development Act, 2000 (as amended). The DCC Decision subsequently confirmed that the proposed minor amendments to the eastern and western elevations, including two new windows proposed to the western elevations and the re-arrangement of the spandrel panels on the eastern elevation, constituted exempted development, thereby rendering this point moot);

- Could argue that the existing offices and meeting rooms that are not residential uses, albeit under the same roof and use class as the hotel, that this would constitute a change of use under Part 4 Article 10 of the use classes as defined in the Planning and Development Regulations 2001 (as amended):

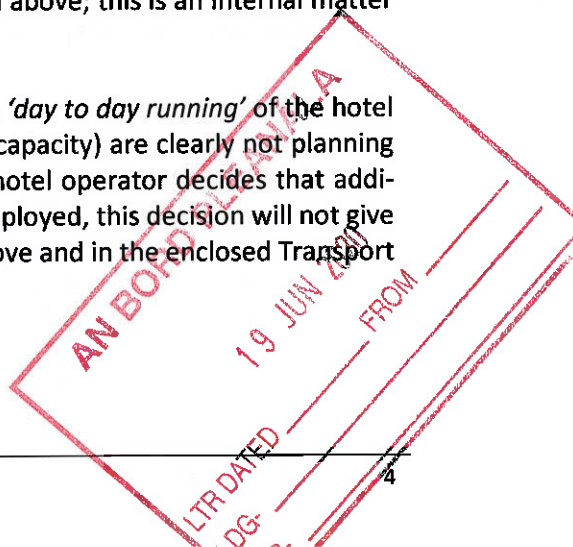
(As noted above, there are no stand-alone office or residential uses proposed here. All uses remain part of the existing overall hotel use and no change of use between use classes arises in this case.)

The Planning Officer's Report further notes:

'The applicants note that the 10 bedrooms which will result in an overall 8 percent increase in the overall bedrooms that the primary use of the building as a hotel will remain and any operational impacts will be negligible. This is not accurate as an increase in any amount of bedrooms in a hotel will have impacts on the day to day running of a hotel, in terms of staffing required for checking in, parking for the guests, extra staffing implications of maintaining the rooms, extra capacity needed in the hotel restaurants/bars to accommodate these guests, etc. The hotel is also losing its main meeting rooms and some offices which would assist in the day to day running of this hotel.'

The negligible operational impacts as cited by the Applicant relate to planning impacts i.e., whether the proposed works will give rise to any new material planning or environmental impacts. The planning system is not concerned with, or has any role in, whether the proposed internal layout changes impact upon the commercial management of the hotel as described above; this is an internal matter for the hotel to consider.

Thus, it is submitted that the changes noted above in respect of the 'day to day running' of the hotel as a commercial enterprise (viz., staffing levels and restaurant/bar capacity) are clearly not planning issues, but rather are internal hotel management matters. If the hotel operator decides that additional staff are required, or if less staff are necessary or can be re-deployed, this decision will not give rise to a requirement to seek planning permission. (As described above and in the enclosed Transport Statement, car parking is not an issue in this case.)





Similarly, the loss of the hotel's meeting room and other ancillary offices and the implications for the operation of the hotel are not matters of relevance or concern for the Planning Authority, but comprise commercial business considerations for the hotel operators. We submit that the above issues are simply not relevant to the Section 5 process and are unrelated to planning assessment.

The Planning Officer's Report concludes by stating:

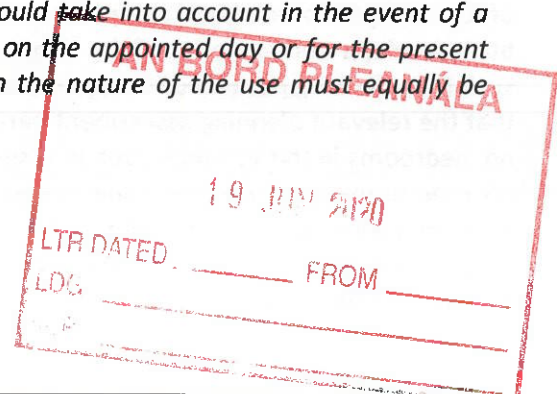
'After reviewing the submitted application and the documents submitted it is considered that a) the works to change the use of the existing meetings rooms & offices at ground floor level and also the reduction of the reception/lobby area to residential use are considered 'development' under Part 3 (1) of the Planning and Development Act 2000(as amended) which defines "development" " as " the carrying out of any works on, in, over or under land or the making of any material change in the use of any structure or other land". Furthermore it is considered that albeit under the same envelope of the 'Hotel' use, that the Planning Authority considers that the increase in bedrooms by 10 numbers constitutes an intensification of the use of the hotel and furthermore that this would constitute a material change of use from 'office' to 'residential' use under Part 4 Article 10 of the use Classes as defined in the Planning and Development Regulations 2001(as amended). The proposed works are therefore not exempt under the meaning of the act.'

We disagree with the above assessment on several fronts. The conclusion that a 'material change of use' has occurred from 'office' to 'residential' use, within the context of what is an existing permitted hotel is wholly incorrect in planning terms in our opinion. All uses will remain 'hotel' and we submit that the basis underlying the Planning Authority's decision as described above is fundamentally flawed.

In addition, we contend that the above assessment does not identify how the conversion of the existing hotel meeting room/ancillary offices to additional bedroom accommodation within the existing hotel footprint and building envelope comprises development requiring planning permission. No material planning impacts arising from the proposed works have been identified. The purported impacts noted above relate to the internal management and operation of the hotel (staffing and restaurant capacity), which are commercial management matters for the hotel with no planning implications. The Planning Authority assessment concludes that an intensification of use will occur but has not demonstrated what gives rise to the requirement to seek planning permission.

Case law is clear in this regard. In *Galway County Council v. Lackagh Rock*, Barron J held that it was not sufficient for the Planning Authority to simply establish that an intensification of use had taken place. It had to prove that the intensification of activity amounted to a change of use which was material i.e., had given rise to fresh planning considerations (see *Irish Planning Law and Procedure* by Eamon Galligan, page 74). Barron J described the test as follows:

'To test whether or not the use is materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If these matters are materially different, then the nature of the use must equally be materially different'.





In the case of the Hilton Dublin Kilmainham, the matters which the Planning Authority would take into account in the assessment of an increase in the number bedrooms (10 no.) as proposed here would be unchanged in respect of the existing hotel use. In addition, the Applicant has submitted documentary evidence, which confirms that there will be no material planning impacts arising as a result of the proposal when compared to what has previously been assessed and permitted. This categorically confirms that there will be no material impacts arising on foot of the additional bedrooms. In this regard, we refer to the enclosed Transport Statement prepared by ARUP Consulting Engineers, and the Wastewater Statement, prepared by Caldwell Consulting as enclosed with the original submission to DCC. On that basis, we contend that there is no material change of use arising in this case and no development taking place such that planning permission is required.

Galligan further states that:

'It is unlikely that the courts will allow the doctrine of intensification of use to act as an inhibiting factor on the growth of economic activity unless the character of the use has changed' (see *Irish Planning Law and Procedure* by Eamon Galligan, page 77).

He cites Walsh J who stated:

'Many businesses expand and grow with the passage of time but, of course, it could not be seriously contended that a material change of use had taken place when some additional machines are installed in a premises to cope with increasing demands. In such a case the use remains the same but it becomes intensified' (see *Irish Planning Law and Procedure* by Eamon Galligan, page 77).

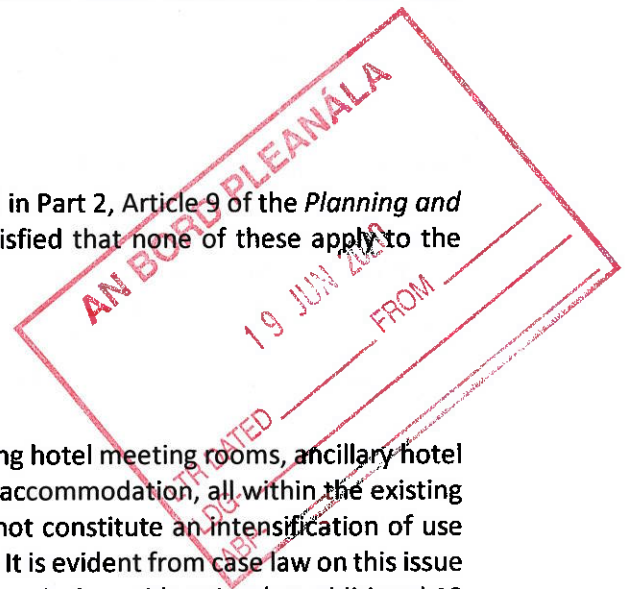
In this case, no change to the character of the existing primary use of the premises will occur as a result of the increase in bedrooms, which will remain as a hotel. As noted by Walsh J above, it is entirely possible for an existing business to intensify and increase its operations without necessarily resulting in a material change of use. We submit that the Hilton Dublin Kilmainham is one such example.

De-Exemptions

We have reviewed the restrictions on exemptions as identified in Part 2, Article 9 of the *Planning and Development Regulations 2001*, as amended, and we are satisfied that none of these apply to the proposed development in this case.

Conclusion

In summary, we submit that the proposed conversion of existing hotel meeting rooms, ancillary hotel offices and part of the hotel reception area to hotel bedroom accommodation, all within the existing built envelope and footprint of the Hilton Kilmainham, does not constitute an intensification of use such that planning permission is required to effect this change. It is evident from case law on this issue that the relevant planning assessment here is not simply a numerical consideration (an additional 10 no. bedrooms in this instance), but an assessment of whether or not the proposed works result in the creation of material planning impacts that would require planning permission. We contend that no such impacts arise here as confirmed in the reports submitted with the initial application viz., no requirement for additional car parking provision; reduced traffic generation; no additional impact on drainage infrastructure or Appropriate Assessment issues.





As confirmed in the DCC decision, the external changes to the building are minor and considered exempt under Section 4(1)(h) of the *Planning and Development Act 2000*, as amended.

We strongly disagree with the purported impacts as identified in the DCC assessment that suggest material issues will arise as a result of the proposed internal changes to the hotel; on examination, the issues raised primarily relate to the internal management and operation of the hotel, but have no planning implications and are beyond the scope of this Section 5 assessment. In addition, we submit that no material change of use between use classes, as stated in the DCC assessment, will arise in this case and all uses under discussion are hotel-related. We ask An Bord Pleanála to carefully consider the matter and overturn the Declaration of DCC in respect of the purported intensification of use.

We look forward to acknowledgement of receipt of this submission in due course and please contact the undersigned should any additional clarification or information be required.

Yours sincerely

John Gannon
Director
Tom Phillips + Associates

