

MURISA
SECTION 131 FORM

File With _____

Appeal NO: ABP 314088-22

Defer Re O/H

TO: SEO

Having considered the contents of the submission dated/ (received) 31/8/2022
fromPaul Casgrave I recommend that section 131 of the Planning and Development Act, 2000
be not be invoked at this stage for the following reason(s): no new issuesE.O.: MaflinDate: 6/9/2022

To EO: _____

Section 131 not to be invoked at this stage. ☐Section 131 to be invoked – allow 2/4 weeks for reply. ☐

S.E.O.: _____

Date: _____

S.A.O.: _____

Date: _____

M _____

Please prepare BP _____ - Section 131 notice enclosing a copy of the attached
submission

to: _____ Task No: _____

Allow 2/3/4 weeks – BP _____

EO: _____

Date: _____

AA: _____

Date: _____



FEARGALL KENNY
REGISTERED ARCHITECT

B.Arch. Dip. T.P. RIBA FRIAI MIPI
PLANNING CONSULTANT

45 Hainault Drive, Foxrock, Dublin D18 E091 T: 01 2892119 M: 087-2360717 E: feargarch@hotmail.com

The Secretary
An Bord Pleanála
61 - 64 Marlborough Street
Dublin D01 V902

AN BORD PLEANÁLA

LDG- _____
ABP- _____

31 AUG 2022

Fee: € _____ Type: _____
Time: _____ By: *psot*

29th August 2022

Re: Whether the change of use of C 75m2 of the car-park to a beer/outdoor drinking area at the front of the Druids Chair Pub is/or is not development and is or is not exempted development.

Location: The Druids Chair, Killiney Village, Killiney Hill Road, Killiney, Co Dublin

Planning Authority Order Ref: 76/22; ABP Case no. ABP-314088-22

Dear Sir / Madam

I refer to your letter of 25th August 2022 with attached copy of the submission of Kieran O'Malley and Co. Ltd. in relation to the above case. On behalf of my client, Paul Cosgrave, I wish to thank the Bord for the opportunity to comment on the O'Malley submission and respond as follows:

1. Documents: The referrer, Mr Cosgrave, who is a lay person, unschooled in these matters, was guided by the Planning Authority in the appropriate means of response to the original Section 5 referral lodged by O'Malley and Co. on behalf of their client. He was astonished that as the representative of the owners of the subject premises he was precluded from referring the decision on the matter to An Bord Pleanála. As can be seen from the record of email correspondence in Appendix 1, my client was advised that there is no mechanism to facilitate observations from 3rd parties on Section 5 applications under the Planning & Development Act 2000. Only the applicant can appeal to An Bord Pleanála within 4 weeks of the decision being made. Obviously, the applicant got the decision they sought so they did not feel the need to refer the matter to Bord Pleanála, thereby denying my client the opportunity to make a submission to the Bord, unlike in the current case, where O'Malley & Co are facilitated by the law to make an observation on my clients Reference to Bord Pleanála.

As can also be gleaned from the record of email correspondence in Appendix 1 my client was advised that the only way to bring the matter to the attention of Bord Pleanála for a definitive decision was to make his own Section 5 application, which he duly did. He used the maps and photographs which had been submitted with the original Section 5 reference by O'Malley and

Co because it seemed to be the most convenient way to steer the issue through the Section 5 process for the second time, particularly as these documents were already in the public domain. It should be noted also that these documents were given to my client by O'Malley & Co with no instructions as to restrictions on their use. Furthermore, since the maps and photograph referred to his company's property and had been included in a Section 5 reference relating to the property my client did not appreciate that the sensitivity placed on them by O'Malley & Co. My client can only apologize for the use of the maps and refer the Bord to the map included with the Referral of 13th July. As for the photograph included with the referral it did not have any attribution and was included merely as an illustration of a scene which was likely to be visited by a representative of the Bord in any case. If it helps to resolve the matter my client has asked me to substitute the more recently taken photograph below.



2. Misrepresentation: As pointed out above the referrer, Mr. Cosgrave, is not familiar with the planning legislation and processes. He made a Section 5 application in haste as it seemed the only course open to him in the light of O'Malley & Cos pressing the Planning Authority to reopen Enforcement case ENF 14221 and take enforcement action against the Druids Chair. There appears to be text missing from item 10 in the covering letter of 20th May. The item as it stands actually makes no sense and should be ignored.

3. Referral to ABP: As already noted above my client was informed by the Planning Authority, the competent body in this matter, that he was precluded from referring the original Section 5 declaration in favour of O'Malley & Co's client to Bord Pleanala. Hence the reason for this current referral.
4. Date of change of use: O'Malley & Co selectively extract from the current referral to suggest that a change of use only took place only with the onset of the Covid pandemic. In fact, a more careful perusal of the referral would reveal that the subject area has functioned as an informal smoking and drinking area since at least the introduction of the smoking ban in 2004, and that it was only with the advent of the pandemic that the area was upgraded and cars excluded to make it a more attractive area for outdoor socializing.
5. Exempt development: The applicants do not agree with the Declaration issued by the Planning Authority and wish to have the matter adjudicated by Bord Pleanala. The applicants maintain as set out in the referral of 12.07.22 that the use of the space at the front of their premises for activities associated with the primary use of the premises is exempted development.

The observer notes that An Bord Pleanala has dealt in the past with Section 5 referral cases, which it is suggested have relevance to the subject case. In particular it refers to the RL 2185 and RL 2188 cases. In these cases, it appears that the change of use was a pronounced change of a previously unused yard which had been recently carried out. The ABP-307112-20 case referred to a number of developments including "the construction of a smoking / beer garden to the rear of the pub". In this case "construction" indicated that works had taken place as well as a change of use. The beer garden was located to the rear of the pub in a narrow courtyard surrounded by residential buildings. The Bord's Inspectors Report noted that in terms of its proximity to adjoining residential development the beer garden/smoking area would have significant impact on adjoining residential amenity in terms of noise nuisance. The Bord concluded that the construction of a smoking /beer garden to the rear of the pub is development and not exempted development. With all due respect none of the above cases, which involve pronounced changes of use to the rear of the premises, is relevant to the subject case. The subject case is to the front of the premises facing a busy road and does not involve construction. It therefore deserves to be assessed on its own merits.

6. The Narconnon Trust case: Again, with due respect to the Observer, we are not dealing with like cases. In terms of the Narconnon Trust Judicial Review the initial Section 5 reference by the Trust was decided by the Planning Authority in September 2016. It was not challenged by third parties and on foot of the Planning Authority's Section 5 decision, that the proposed change of use from a nursing home to residential drug rehabilitation facility was exempted development, the Trust purchased the property and spent substantial amounts of money developing and fitting it out. Subsequently in 2018 two Section 5 references were made by third parties and these were referred to the Bord by the planning authority. The Bord decided in November 2018 that a change of use from a permitted nursing home to a residential drug rehabilitation facility was not exempt development, effectively a declaration which was the reverse of the 2016 decision. The Trust sought a judicial review of the Bord's decision. The court found in favour of the Trust, deciding that the Bord's decision was ultra vires. Apart from the legalities of the case, the Court must have given consideration to the injustice that would be suffered by the Trust because of the belated challenge resulting in the reversal of the original decision.

This current case also represents an injustice to the owners of the subject property. The original Section 5 reference was submitted to the planning authority by a third party. The owners of the property were made aware of the application but were precluded by deficiencies in the legislation from making a submission to the planning authority in the course of their deliberations. Furthermore, they were precluded from referring the decision to An Bord Pleanála. The transcript of email no.3 in Appendix 1, from an official of the planning authority to my client makes this quite clear.

As a result of deficiencies in the legislation, my client has been forced to take this Section 5 referral himself. The Planning Authority has naturally made the same decision as previously, but now, my client as the applicant, has been able to refer the matter to the Bord as is his entitlement under Section 5(3)(a) and Part VI, Chapter III of the Planning and Development Act 2000. An Bord Pleanála is therefore requested in the interests of natural justice to continue consideration of the case put to them in my client's Reference for a review of the Declaration of the Planning Authority dated 17.06.22.

Yours Faithfully



Feargall Kenny

Response to MBP letter of 25.08.22 re The Druids Chair

APPENDIX 1

TRANSCRIPT OF EMAIL CORRESPONDENCE BETWEEN THE PLANNING AUTHORITY AND THE REFERRER

EMAIL No.1: From Planning Dept. DLR Co Co to Paul Cosgrave 20.04.22, 12.10pm

From: Planning Dlr <planning@dlrcoco.ie>
Date: 20 April 2022 at 14:38:06 IST
To: Paul Cosgrave <paulcosgrave@icloud.com>
Subject: RE: SwiftScan 20 Apr 2022 12.10

Dear Mr. Cosgrave,

Thank you for your email, which I have forwarded onto the Decisions Section of the Planning Department for their attention and direct reply.

Kind regards,
Megan

Megan Moran
Assistant Staff Officer | Planning Secretariat | Planning Department
Dún Laoghaire-Rathdown County Council, County Hall, Dún Laoghaire, Co. Dublin, A96 K6C9
Telephone: 01-2054871 | Email: planning@DLRCOCO.IE

EMAIL No.2 : From Paul Cosgrave to Planning Dept. DLR Co Co 20.04.22, 14.03pm

From: Paul Cosgrave <paulcosgrave@icloud.com>
Sent: Wednesday 20 April 2022 14:03
To: Planning Dlr <planning@DLRCOCO.IE>
Subject: SwiftScan 20 Apr 2022 12.10

Dear Sir/Madam,

Further to my call to your office, I would appreciate if you would forward this letter to Section 5 Department.

Thank you
Yours sincerely
Paul Cosgrave.

EMAIL No.3: From Planning Dept. DLR Co Co to Paul Cosgrave 21.04.22, 13.15pm

From: Heavey Cormac <cheavey@dlrcoco.ie>

Date: 21 April 2022 at 13:15:30 IST

To: Paulcosgrave@icloud.com

Cc: Peppard Sharon <speppard@dlrcoco.ie>

Subject: Section 5 application 'Ref3522'

Dear Mr Cosgrave,

The application in question 'Ref3522' 'The Druids Chair Pub' is still a live application and a decision is due to be made by Tuesday the 3rd of May.

Unfortunately there is no mechanism to facilitate observations from 3rd parties on Section 5 applications under the Planning & Development Act 2000. Only the applicant can appeal to An Bord Pleanala within 4 weeks of the decision being made.

Kind Regards,
Cormac

Cormac Heavey | Assistant Staff Officer

Decisions | Planning

Dún Laoghaire-Rathdown County Council, County Hall, Dún Laoghaire, Co. Dublin

Telephone: 01-2054854 | Email: cheavey@dlrcoco.ie



EMAIL No.4: From Planning Dept. DLR Co Co to Paul Cosgrave 18.05.22, 16.54pm

On 18 May 2022, at 16:54, Heavey Cormac <cheavey@dlrcoco.ie> wrote:
Hi Paul,

Further to our conversation I attach a Section 5 application form as well as a link to the previous application referenced.

All material on the application can be found
here: <https://planning.agileapplications.ie/dunlaoghaire/application-details/92627>

Regards

Cormac

Cormac Heavey | Assistant Staff Officer

Decisions | Planning

Dún Laoghaire-Rathdown County Council, County Hall, Dún Laoghaire, Co. Dublin

Telephone: 01-2054854 | Email: cheavey@dlrcoco.ie



EMAIL No.5: From Paul Cosgrave to Planning Dept. DLR Co Co 25.05.22, 11.08am

From: Paul Cosgrave <paulcosgrave@icloud.com>
Sent: Wednesday 25 May 2022 11:08
To: Heavey Cormac <cheavey@DLRCOCO.IE>
Subject: Re: Section 5 application

Hi Cormac,
I have submitted by post our Section 5 application. It should have arrived by yesterday.
I hope it is filled in correctly.
The residents association gave a letter of support, so hopefully it will help in decision progress.
What happens next. Do I get a notification of acceptance of application.
Thank you for your advice on the process last week, as I was at a loss on how to proceed.

Paul Cosgrave

EMAIL No.6: From Planning Dept. DLR Co Co to Paul Cosgrave 25.05.22, 11.27am

From: Heavey Cormac <cheavey@dlrcoco.ie>
Date: 25 May 2022 at 11:27:50 IST
To: Paul Cosgrave <paulcosgrave@icloud.com>
Subject: RE: Section 5 application

Hi Paul,

I can confirm that I have received your application and have sent you out a letter of acknowledgement which should arrive in the post today.

I have processed the application and the file has been sent to the planner. The planner has until the deadline date of the 17/06/22 to make a decision on the case.

When a decision has been made I will send you out a letter of correspondence informing you of the result. If there is anything else that I can help you with feel free to contact me.

Regards
Cormac

Cormac Heavey | Assistant Staff Officer
Decisions | Planning
Dún Laoghaire-Rathdown County Council, County Hall, Dún Laoghaire, Co. Dublin
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