



**Question**

Whether in the case of the premises known as the Button Factory (formerly The Temple Bar Music Centre), the use of the premises (in whole or in part) with a publican's 'seven day licence' in lieu of the use of the premises with a Publican's Licence (ordinary) Theatre is or is not development or is or is not exempted development.

**Location**

The Button Factory (former Temple bar Music Centre) Curved Street North/Temple Lane South, Temple Bar, Dublin 2, a Protected Structure

**Declaration**

Planning Authority	Dublin City Council South
Planning Authority Reg. Ref.	E0055/18
Applicant for Declaration	NOTTUB DAC
Planning Authority Decision	Material change of use, not exempted

**Referral**

**Referred by** NOTTUB Ltd

**Observers** Temple Bar Cultural Trust

**Date of Site Inspection**

**Inspector** Dolores McCague

## 1.0 Site Location and Description

- 1.1. Button Factory (former Temple bar Music Centre) Curved Street North/Temple Lane South, Temple Bar, Dublin 2, a protected structure.

## 2.0 The Question

- 2.1. In the case of the premises known as the Button Factory (formerly The Temple Bar Music Centre), the use of the premises (in whole or in part) with a publican's 'seven day licence' in lieu of the use of the premises with a Publican's 'Licence (ordinary) Theatre' is or is not development or is or is not exempted development.

## 3.0 Background

- 3.1.1. The referral has been made by Simon Clear & Associates, Planning and Development Consultants on behalf of NOTTUB Ltd. The application to Dublin City Council was made by Doyle Kent Planning Partnership Ltd on behalf of Temple Bar Cultural Trust Designated Activity Company (TBCT DAC).  
TBCT application for Declaration
- 3.1.2. In the application to Dublin City Council TBCT state that the leasehold was sold by TBCT to NOTTUB Ltd in September 2017. TBCT retains ownership of the head lease and must consent to any new licence for sale of alcohol. The premises provides various facilities, with the key component being culture through the medium of music and ancillary activities.
- 3.1.3. TBCT stated that they were requested by NOTTUB Ltd for their consent to the change of license but were not supplied with any detail in relation to the proposed change, including in respect of the extent of the area to be affected.
- 3.1.4. They referred to Carrickhall Holdings v Dublin Corporation (1983) ILRM 268 and to Tivoli Cinema Ltd HC 1992 (I 412), in relation to the relationship between licensing and the use of a premises in planning terms.
- 3.1.5. They stated that a Publican's Licence (Ordinary) Theatre provides for restricted sale of alcohol, as permitted per Section 21 of the Intoxicating Liquor Act 1972, as amended and the website of the Revenue Commissioners summarises this as:

The holder of a Publican's Licence (Ordinary) Theatre is entitled to sell alcohol during the specified time to:

persons who have paid for seats for the performance taking place  
theatre employees.

The specified time begins 30 minutes before the commencement of the performance and ends 30 minutes after the performance ends.

The holder of this licence can apply to the District Court for special exemption orders and operate a late-night premises

- 3.1.6. A seven day ordinary on-licence is the standard public house or bar licence and it permits the normal activity of bars and pubs within the hours:

Monday to Thursday – 10.30 am to 11.30 pm.

Friday and Saturday – 10.30 am to 12.30 am.

Sunday– 12.30 pm to 11.00 pm.

- 3.1.7. A special exemption may be obtained from the Courts to extend the opening hours. If there are music events in the bar or public house, there is a requirement for a further music and singing licence.

- 3.1.8. They stated that incidental to the principle use as a music venue, the serving of alcohol is permitted, but is restricted to persons attending performances and commencing shortly before (30 mins) and ending shortly after (30 mins) the performance. The main activity open to the public is attendance at performances and the serving of alcohol outside the restrictions imposed by the theatre licence is not permitted. This restriction on the sale of alcohol is a significant factor in relation to the existing and permitted land use character in planning terms.

- 3.1.9. NOTTUB have indicated that they continue to be a theatre but with the facility to serve alcohol without such service being connected to a performance.

- 3.1.10. TBCT stated their concerns in relation to the change which include that the primary reason for visiting the premises would change from a cultural one to drinking and the hours would change, with issues regarding the protection of the amenity of the area including residents, due to a different pattern of noise and disturbance and increased anti-social behaviour; they noted the number of licensed premises in Temple Bar and the issue of alcohol-related crime with which Temple Bar has become particularly

associated. They stated that there would be nothing to prevent the premises being operated as a super pub. If the change contributed to anti-social problems it would be a cause of serious concern to TBCT given its overall role in Temple Bar.

3.1.11. Case cited: Carrickhall Holdings v Dublin Corporation (1983) ILRM 268 –

An hotel bar changed to a public house – the Courts had regard to the increased numbers, traffic and noise and the impact on the amenity of residents of the area. It was decided that the change amounted to a material change of use requiring planning permission.

Section 5 case 29S.RL2879 –

This concerned the question of the use of the premises as a guest house and restaurant with a publican's on-licence, in lieu of the use of the premises as a guest house and restaurant with a special restaurant licence. The Board considered that:

- a) an additional use, namely a public house, is introduced for part of the premises arising from a publican's on-licence;
- b) the public house use is a change of use and is materially different from the established uses by reason of changes to trading patterns, likely impacts on neighbouring residential amenity, and social behaviour, thus constituting development within the meaning of the Planning and Development Act 2000, as amended, and
- c) there is no provision for exemption for change of use from guest house or restaurant to public house under the exempted development provisions of the Planning and Development Regulations, 2001, as amended.

They stated that the first two considerations apply in the Button Factory.

There is no definition of a public house or bar and no definition of a theatre or concert hall in the Planning and Development Act and Planning and Development Regulations but they are given explicit and distinct recognition in the regulations. Extracts from Article 5(1), Article 201 and schedule 2 were cited.

Tivoli Cinema Ltd HC 1992 (L 412), was referred to, in which the judge pointed out that the then owner might not be the owner in the future and that any undertakings in relation to the use of the premises could be liable to change.

They submitted that:

- a) an additional use, namely a public house, is introduced into the premises arising from a publican's seven day licence;
- b) the public house use would be both an intensification of use and a change of use which would be materially different from the permitted use by reason of changes to trading patterns, likely impacts on neighbouring residential amenity, and increased potential for anti-social behaviour, thus constituting development within the meaning of the Planning and Development Act 2000, as amended, and
- c) there is no provision for exemption for change of use from theatre or concert hall to public house under the exempted development provisions of the Planning and Development Regulations, 2001, as amended.

and that the change is development and not exempted development.

NOTTUB response to application.

- 3.1.12. NOTTUB Ltd responded to the application which response includes: they are not changing the premises just the license in the Auditorium Bar to avail of the flexibility of a 7 day licence. They agree that if it was for the whole building it is not exempted development, the proposal represents 3% of the total floor area and is simply a theatre with the full publicans licence in its ancillary Auditorium Bar like the Olympia Theatre or the Stella Cinema. A precedent has been set with a number of venues in the city having been granted 7 day licenses without the need for planning permission including the Olympia Theatre, Vicar Street and the Stella Cinema. These venues are not public houses but have the flexibility of a 7 day licence.

They refer to an enforcement notice and a Section 5 declaration made by the Board regarding the use of the Rock n'Roll museum. It became apparent that if they lost the continuous Rock n'Roll museum tours it would de-legitimise their established opening hours of the ground floor bar as the 30 minute restriction would kick-in and their existing trading times would technically become illegal. They decided to change and operate the Auditorium Bar with the flexibility of a 7 day licence.

They point out:

- The Auditorium Bar already opens 7 days of the week and for the same hours of the 7 day Publican's Licence.
- There would be no change to the physical bar.
- The licensed use would be just maintaining and regularising its existing use, not intensifying it.
- They have operated this bar on the premises responsibly since it opened in 1995.

The possibility of change of ownership is irrelevant.

The question should be re-worded to

Whether in the use of the Auditorium Bar within the Button Factory having a 7 day Publican's Licence instead of the existing Publican's Licence (ordinary) Theatre type of Licence is or is not development and if it is development whether it is exempted development.

Whether the change of licence happens or not is a matter for the Licensing Court under the 1927 Licensing Legislation. The limited declaration they are seeking will provide certainty in the Courts and would be beneficial.

The proposition put forward by TBCT is hypothetical and the extrapolation of effects that there might be a greater material change of use and might be unauthorised development is contested. The High Court judgement in the matter of Michael McDowell & Niamh Brennan v Roscommon County Council (2004 IEHC 396) is referred to. Mr Justice Finnegan determined that the planning authority is not entitled to adjudicate on an issue in respect of a particular section of the Act (in that case Part III), when there are wide powers conferred under Part VIII of the Act, in the event of an unauthorised material change of use having taken place.

The determination and resolution of unauthorised development by way of material change of use (by intensification or other means) is a matter reserved to the Courts alone. It would be inappropriate for DCC to make any determination on the request as submitted and any decision could be subject to potential Judicial Review in the Courts.

## **4.0 Planning Authority Declaration**

### **4.1. Declaration**

4.2. The planning authority decided that the use of the premise's (in whole or in part) with a publican's 'seven day licence' in lieu of the use of the premises with a Publican's 'Licence (Ordinary) Theatre' is a material change of use which constitutes development and is not exempted development.

### **4.3. Planning Authority Reports**

#### **4.3.1. Planning Reports**

- There are no structural changes associated with the proposal. It does not constitute development by reason of works.
- The serving of alcohol is restricted to persons who have paid for seats for the performance taking place during a specified time, which is 30 minutes before the commencement of the performance and ceases 30 minutes after the performance ends.
- The serving of alcohol as thereby restricted is subsidiary to the main theatre use.
- The proposed licence change makes the public house use separate or independent of theatre use. It forms a public bar in the premises. The addition of this new use constitutes a change of use. This change is material as it alters the functioning of the premises in a substantive way. There are a range of potential substantive planning impacts arising such as differing trading patterns and possible impacts on neighbouring residential amenity. The proposal constitutes a material change of use.

- The owners state that the Crowbar is currently operating similar hours to a normal public house because there are regular Rock n'Roll tours on-going throughout the day and therefore there will be no difference in trading patterns. They also note that if the Rock n'Roll museum tours ceased it would de-legitimise the established opening hours of the ground floor bar.
- Article 10(2) of the Regulations (2001) is noted. However it is considered that a 7 day Publican's Licence is not an incidental use to a theatre, an additional use would result.
- Part 4 of Schedule 2 allows for changes of use within any one of the classes of use to be exempted development. There is no provision for exemption for change of use from a theatre to a public house under the exempted development provisions.

## 5.0 Planning History

2050/18 Planning permission refused for retention of 2 no. digital illuminated signs (1.55 sq m each) located at first floor balcony level above the entrance to the Temple bar Music Centre on the south elevation fronting Curved Street, for reason including: contrary to section 16.24.3 of the development plan, adverse impact on visual amenity of the building itself and undesirable precedent for similar type advertisements and signage, and injury to the amenities of adjoining properties.

EXPP0180/17 exemption certificate refused for proposed signs.

E0048/16 enforcement file in relation to digital signs and use of basement as museum.

1661/82 planning permission granted for a 4 storey over basement music centre including auditorium, backstage facilities, foyer, offices, music rehearsal / experimental facilities, 3 shop units and ancillary accommodation with frontage onto new curved street, change of use and conversion of no 11 Temple Lane South including minor changes to listed Temple Lane South elevation and new roof, and retention of listed façade of no 10.10A, including minor changes to elevation.



## 6.0 Policy Context

### 6.1. Development Plan

6.2. The Dublin City Development Plan 2016-2022 is the operative plan. Relevant provisions include:

Zoned Z5 to consolidate and facilitate the development of the central area and to identify, reinforce and strengthen and protect its civic design character and dignity.’

Part of the site is located within a Conservation Area.

### 6.3. Natural Heritage Designations

The nearest Natura sit is South Dublin Bay and River Tolka Estuary SPA site code 004024, located less about 3.1km away.

## 7.0 The Referral

### 7.1. Referrer’s Case

7.1.1. The referral has been made by Simon Clear & Associates Planning and Development Consultants on behalf of NOTTUB Ltd, their case includes:

- The Button Factory is an 1,800 sq m, 5 storey, mixed use modern music cultural Venue in the centre of the Temple Bar district which hosts events and operates as a modern Rock Music Museum cultural facility during the daytime, including hosting visiting groups of tourists on the trail through Dublin. It is one of the few truly cultural centres located in the Temple Bar Cultural Quarter, tracing the history of the Dublin rock industry over 60 years; which has national and international tourist appeal.
- Its viability was threatened and the current owners secured funding to reinvest in the improvement of facilities throughout the building and to secure its future. They purchased a 500 year leasehold which is effectively a freehold ownership. The request for declaration must be regarded as a 3<sup>rd</sup> party submission.

- Additional to the cultural uses of Auditorium, Recording Studios, School of Music and Rock n'Roll Museum, there is a small (60 sqm) Bar on the ground floor that has been operating there since 1995. This is referred to as 'The Auditorium Bar' (aka Crowbar). It is ancillary to and essential for the continued successful operation of the cultural facility.
- The existing building already operates this Bar under a Publican's 'Licence (ordinary) Theatre' type of licence. This only permits the sale of alcohol within certain time limits, 30 minutes before a performance to 30 minutes after a performance. As there are regular Rock n'Roll Tours on-going through the day, this 60 sq m bar stays open throughout the day, keeping the same times as a typical Public House, which normally have a '7 day Publican's Licence'.
- If they lost the continuous Rock n'Roll Museum Tours it would de-legitimise their established opening hours of the ground floor Bar and their existing trading times would technically then become illegal. This led to the decision to change and operate the Auditorium Bar with the flexibility of a '7 day publican's licence'.
- The Auditorium Bar already opens 7 days of the week and for the same hours as the '7 day publican's licence'.
- There would be no change to the physical bar.
- The licensed use would be just maintaining and regularising its existing use, not intensifying it.
- The bar has been operated responsibly on the premises since it opened in 1995.
- Counsel opinion confirmed the proposed change of licence of the Auditorium Bar would not require planning permission. This information was shared with TBCT prior to the request for declaration. TBCT prepared the question and explanation provided to DCC.
- Precedent is referred to – PL.29A.RL2879 – there are differences between this decision and the subject referral, principally because of scale and established activity. The Auditorium exists as an incidental use, not a separate use in planning terms. The availability of a 7-day publican's licence

would not alter the pattern, nature or intensity of trading such as to have a material effect in planning terms.

- It is of a type of incidental use covered by Article 10(2)(a) of the Planning and Development Regulations 2001, as amended. It is not excluded from the permission namely by reason of its being specified in Part 4 of Schedule 2 (Classes of Use), by reason of its being specified as a separate use.
- There is no potential for the conversion of the Button Factory into a super pub by reference to the existing planning permission and to do so would not be facilitated merely by the possession of a 7-day publican's licence for the Auditorium Bar which will continue to exist as an incidental use.
- 5 Aston Quay previously declared that the type of licence held in a bar area is not development constituting a material change of use. The planning authority has been inconsistent. Where there is a bar, the type of licence is irrelevant.
- Carrickhall – this is precisely the type of outcome that would arise if a publican's licence was abused to give rise to a material change of use of the overall Button Factory premises by intensification.
- Tivoli – while licensing applies to the individual, development enures to the land. Planning enforcement is operated by the Courts which decide on unauthorised development. In the planning enforcement process the development must have already occurred before there is judgement and that is a matter solely for the Courts. It is inappropriate to speculate about how unauthorised development may occur.
- The proposition put forward that there might be a material change of use and that there might be unauthorised development extending to the primary use of the entire building as a public house, is hypothetical as is the extrapolation of the effects.
- The High Court judgement in Michael McDowell & Niamh Brennan v Roscommon County Council (2004 IEHC 396) determined that the planning authority is not entitled to adjudicate on an issue in respect of a particular section of the Act (in that case Part III) when there are wide powers conferred under Part VIII in the event of an unauthorised material change of use.

Provisions made under different Parts of the Act may not be operated for an improper use.

- The declaration falls to be assessed under Part 1, Section 5. The hypothetical extrapolation in the submission relates to anticipated material change of use requiring planning permission Part III, and unauthorised development which would be regulated under Part VIII. Determination and resolution of unauthorised development is a matter reserved to the Courts alone. All speculation as to what might ensue must be dismissed by the Board.
- The Auditorium Bar, represents approx. 3% of the total floor area, is incidental to and ancillary to the use of the premises, was included in the planning permission as a bar, has operated since the opening of the premises and is not excluded from the permitted use.
- To continue its existing established use does not require planning permission. The premises would continue to operate as a Theatre/ Museum and Cultural Facility as a tourist attraction with the full publicans licence in its ancillary Auditorium Bar.
- Other theatres with bars and a 7-day licence, such as the Olympia Theatre, Vicar Street of the Stella Cinema, operate responsibly and are recognised as theatres. This did not change with full bar Licence.
- The granting of a 7-day licence is made by a Court to authorise development operating within the provisions of a planning permission (unless an established premises) and is subject to annual review.
- Use consistent with the permitted established use and under the provisions of a 7-day publican's licence does not constitute development by way of material change of use or intensification of use, if operated to the same degree as already established.
- Serving refreshments and alcohol to customers attending the Rock Museum, or as tourists on a cultural trail, whether in a guided tour or not, does not materially alter the use to constitute a material change of use.

- It there is unauthorised development from a planning perspective there are powers of enforcement and such prosecution can lead to loss of renewal in the licensing court.
- The implication of the action in bringing this Section 5 into effect can have significant commercial effects for the current stakeholders in the property and the future viability of the cultural venue.
- The possession of a publicans licence relating to the percentage of the premises occupied as a bar will not give rise to a material change of use or intensification of use and is not development.
- Attached to the submission is a legal opinion dated 20<sup>th</sup> December 2017 and signed by Michael O'Donnell BL It includes that to be development the change must be material in planning terms. It must be demonstrated that the new use is materially different, either being a different category or class of use, or having some very significant impact in planning terms on the area relevant to the previous use. Mr O'Donnell is instructed that there will be no change of use. The premises will continue to be used as a theatre and therefore falls within the same category of use as it has always been used for, but merely permission under the Licensing Acts to authorise the activity from that perspective. Works are not being carried but if works are being carried out within a premises, then unless the premises are a protected structure these works will prima facie be exempted development. There is no suggestion that the existing premises or any part of it is unauthorised. In light of the nature of the use that is proposed it is his considered opinion that this cannot amount to a change of use much less a material change of use for the purposes of the Planning and Development Act 2000.

## 7.2. Planning Authority Response

7.2.1. The planning authority has not responded to the referral.

### 7.3. Applicant's Response

7.3.1. The application for a declaration was made to the planning authority by Temple Bar Cultural Trust Designated Activity Company (TBCT). Doyle Kent Planning Partnership Ltd have responded to the referral on behalf of TBCT. The response includes:

- TBCT is in agreement with the declaration of the Planning Authority.
- TBCT DAC has exercised a wide-ranging remit in Temple Bar over several years, encompassing cultural activities, development of property and carrying on of business. As a publicly owned company TBCT DAC has a responsibility also in relation to the local residential community.
- In April 2013 the Board of TBCT requested that Dublin City Council would begin the process of winding down the Trust and that the Council would take over the responsibilities, functions and assets of the Trust, including its property portfolio. This process is currently being implemented by TBCT DAC, which is gradually divesting itself of the property portfolio.
- In 2017 they sold the 500 year leasehold to NOTTUB (directors Mr Dunning and Mr Clinton). Also in 2017 they were requested by NOTTUB Ltd for their consent to the change of license but were not supplied with any detail in relation to the proposed change.
- They sought the declaration and made a detailed submission in that regard.
- They essential points being:
  - a) an additional use, namely a public house, is introduced for part of the premises arising from a publican's on-licence;
  - b) the public house use is a change of use and is materially different from the established uses by reason of changes to trading patterns, likely impacts on neighbouring residential amenity, and increased potential for anti-social behaviour, thus constituting development within the meaning of the Planning and Development Act 2000, as amended, and

- c) there is no provision for exemption for change of use from theatre or concert hall to public house under the exempted development provisions of the Planning and Development Regulations, 2001, as amended.
- Responding to the referral they state that it is generally similar to that submitted to the planning authority although a reference to judicial review has been omitted. They set out their responses and attach a legal submission in respect of various legal points.
  - The relevance of Carrickhall Holdings v Dublin Corporation is disputed. This case reinforces the arguments put forward on behalf of TBCT as set out in the legal opinion.
  - TBCT DAC own the freehold and have a legitimate interest in the issues now before the Board.
  - The starting point for assessment is the planning permission for the premises. Reg Ref 1661/92 was granted in 1992 for development described as '4 storey over basement music centre including auditorium, backstage facilities, foyer, offices, music rehearsal / experimental facilities, 3 no. shop units and ancillary accommodation with frontage onto new Curved Street, change of use and conversion of no 11 Temple Lane South including minor changes to listed Temple Lane South elevation and new roof and retention of listed façade of no 10/10A including minor changes to elevation.
  - There is no mention of a bar therefore any bar must be incidental to the permitted uses.
  - In a request to the planning authority under Section 5, EXPP 0359/17, Mr Dunning (director of NOTTUB) stated that the operation of the tour would only occupy 2% of the hourly capacity of the venue and sought a declaration that the 'ancillary and occasional and intermittent use of the premises for the purposes of the operation of guided tour does not result in a material change of use of the venue'. This description does not sit well with that now put forward and the operation of the bar as described by NOTTUB was not apparent when due diligence was carried out prior to the sale of the lease. Insofar as TBCT is aware these operational hours and methods are recent changes.

- It is not clear how the described modus operandi complies with the requirements of a theatre licence i.e. alcohol may be served to persons paying for a seat at a performance, but only 30 minutes before and 30 minutes after the performance.
- Once a seven day licence has been obtained it would be relatively easy to widen its scope.
- Regarding the percentage of the premises, this was brought up only after the Section 5 procedure and has not been shown on a drawing. Per Mr O'Donnell's legal opinion, internal changes are exempted development. The Tivoli cinema case finds that the intentions of a particular owner at a particular time are not determinative in planning terms, as referenced in the legal opinion supplied by TBCT.
- The assertion that the existing use of the Auditorium Bar is not separate in planning terms and the proposed seven day licence would not alter the pattern, nature or intensity of trading such as to have a material effect in planning terms, runs contrary to Carrickhall Holdings v Dublin Corporation (1983) ILRM 268 and PL.29A.RL2879.
- Article 10(2) of the Regulations (2001 is noted, a use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use. What is not proposed is a new use which would not be incidental to the permitted uses as granted per Reg Reg 1661/92, as noted in the legal opinion supplied by TBCT.
- There is no evidence of any link between the Rock n'Roll tours and the bar in the past, and this seems to be a recent innovation since NOTTUB took possession of the Button Factory in late 2017. TBCT rejects that this linkage could be regarded in any way as establishing a legitimate use in planning terms and does not accept this is a good explanation for seeking a seven day licence.
- It is clear that serving alcohol to customers who drop in casually for a drink is quite different to restricting such service to those specifically attending a performance.



- They disagree with the Counsel for NOTTUB that the premises will continue to be a theatre but with the facility to serve alcohol without such service being connected to a performance. They submit that this effectively would facilitate operating the Button Factory as a public house.
- They refer to the assertion that there is no potential for the conversion of the Button Factory into a super pub by reference to the existing planning permission and to do so would not be facilitated merely by the possession of a seven day publican's licence. If it is determined that the operation of the Button Factory with a new seven day licence is not development or that it is exempted development, the principle of use of the Button Factory as a public house will be established. It would be relatively easy to widen its scope, particularly if NOTTUB can show the licensing court that planning permission issues were not relevant to the obtaining the initial seven day licence.
- They note Counsel's advice that possible internal alterations will prima facie be exempted development, notwithstanding that a small part of the Button Factory is a protected structure, and against this background view the statements that sale of alcohol would be confined to a small bar of 60 sq m, with scepticism.
- They continue to assert the relevance of Section 5 case 29S.RL2879.
- No 5 Aston Quay refers to ~DCC Ref. EXPP 0269/15 the question was use of ground and basement floor as a licensed premises, namely a bar + nightclub, + separation of basement floor from adjoining premises, No. 4 Aston Quay. This was declared to be exempted development for one reason which in part stated that 'it is recommended that the applicant be advised that given that the proposed use will remain a bar and licensed premises that there is therefore no change of use occurring.' This is an entirely different set of circumstances to those pertaining to the Button Factory, the separation of the premises Nos 4 and 5 would give rise to planning considerations on all fours with those arising from the use already permitted (Reg ref 3782/05): for example in relation to trading patterns, likely impacts on neighbouring residential amenity and potential for anti-social behaviour.

- Re. other theatres that have a seven day licence – there is no information in relation to the licensing and planning status of these establishments with only the submission from NOTTUB which contains bald assertions. The Bord is being asked to determine the question in relation to the Button Factory on its own merits.
- Re. if there is unauthorised development, in planning terms, enforcement action can be taken in the Courts – this is correct. That is a separate process from the Section 5 declaration / referral procedure and with a different aim.
- Re. the statement that the Section 5 declaration misrepresents what the property owners wish to do – the question put is clear and addresses the applicant company’s stated intention to operate under a seven day licence. The Tivoli theatre HC case is referred to. On this basis and notwithstanding the case made by NOTTUB, if it were accepted by the Board that the use of the premises with a publican’s seven day licence, in lieu of the use of the premises with a Publican’s Licence (ordinary) Theatre, is not development, there would be no impediment under the planning code to prevent operation of the Button Factory principally as a public house in the future.
- Attached to the submission are enclosures which include Senior Counsel Written Legal Submission, signed by Garrett Simons SC, copies of documentation from planning files related to 5 Aston Quay; court report of the High Court case Tivoli Cinema Ltd (licensing act); court report of the Court of appeal, Kilross Properties v ESB and Eirgrid plc; and court report of the Supreme Court, case Michael Cronin (Readymix Ltd) v An Bord Pleanála.
- The Written Legal Submission includes –
  - the section 5 referral procedure may be invoked by any person,
  - the correct legal position is that the premises are held under a lease, and subject to the covenants mentioned.
  - The arguments made suggesting that whether or not a proposed change of use would represent a material change of use requiring planning permission is something which is regulated under Part VIII of the PDA 2000 and a matter reserved to the courts alone (HC McDowell v

Roscommon County Council cited), is in error. The law confirms that the determination of whether or not a proposed change of use is development or exempted development is a matter which falls squarely within the jurisdiction of the planning authority and An Bord Pleanála (Cronin Readymix Ltd) v An Bord Pleanála cited). The courts have recognised that planning authorities and An Bord Pleanála have a particular expertise in this regard (Kilross Properties v ESB and Eirgrid plc cited).

- It is clear that An Bord Pleanála has statutory jurisdiction to rule on the matter and is not required, contrary to what is suggested in the owner/occupier's submission, to defer to the courts in this regard.
- McDowell v Roscommon County Council, has nothing to say about Section 5 jurisdiction.
- The reference is not hypothetical – it is the stated intention to apply for a change in the type of liquor licence applicable to the premises.
- Material Change of Use - threshold issue – the starting point is the planning permission Reg Ref 1661/92. It appears from the description of the permitted development that the planning permission does not authorise a public bar. The holding of a theatre licence is consistent with the bar being incidental and ancillary to the principal use of the premises as a music centre. Restrictions attaching to a theatre licence - especially the restrictions on (i) the class of person to whom alcohol may be sold and (ii) the times at which it may be sold – ensure that there is a direct link between the sale of alcohol and the use as a music centre. Alcohol may only be sold during the period beginning half an hour before the commencement of a performance and ending half an hour after the termination of such performance. There are also certain restrictions on the admission of persons after 9.30pm (DPP v Tivoli Cinema Ltd (1999) 2 I. R. 260). The grant of a seven day licence would sever the organic link between the ancillary use and the principal use of the premises and elevate the bar use from an incidental and ancillary use to a principal use in its own right.

- The case law indicates that where an ancillary or incidental use becomes a principal use, it is then a question of fact and degree as to whether this is something which requires planning permission, (Dublin Corporation v Reagan Advertising Ltd (1989) I.R. 61 is cited). From a legal viewpoint the change in liquor licence type is capable of constituting a material change in use (29N. RL.2093 is cited).
- Rebuttal of owner/occupier's arguments – two arguments are made: that there is an established existing use whereby the bar opens seven days a week and for the same hours as a seven day publican's licence; and that the current operator does not intend to intensify the use of the premises. The owner/occupier has offered no evidence of the alleged established existing use. There is no indication given, for example, as to when this level of activity was said to have first commenced. It is important to bear in mind that the owner/occupier, as developer, bears the onus of proof in this regard.
- The fact, if fact it be, that the premises might have been used in the manner alleged does not alter the legal consequences which the grant of a seven day licence would have.
- A similar type of argument was rejected by the High Court in Carrick Hall Holdings Ltd. V Dublin Corporation (1983) I.L.R.M. 268, (cited) including: *'the evidence is conclusive that the change from a hotel licence without a public bar to an ordinary seven day licence with a public bar has changed the whole character of the business carried on in the premises and directly and for the first time caused the increase in traffic, parking, noise and other unsatisfactory changes in amenities for the local residents which I have already mentioned'*.
- The owner/occupier's attempt to distinguish the judgement in Carrick Hall Holdings is misplaced. It was not a prosecution case but a case under Section 5 of the LG(P&D) Act 1963. If anything, the judgement supports the proposition that the determination of whether or not a particular act requires planning permission is something to be determined by An Bord Pleanála as the expert body.

- Re. that the intentions of a particular occupier are not determinative in planning terms, in re. Tivoli Cinema Ltd (1992) I 412, is cited.
- The intoxicating liquor licensing legislation has been amended since the date of this judgement, in particular, by the Liquor Licensing Act 2008. For the present purposes what is relevant is that a change from a theatre licence to a seven day publican's licence has the legal effect of extending the hours during which, and the class of persons to whom, alcohol can be served; material in planning terms.
- This is confirmed by the use classes under Part 4 of the Second Schedule: a public house falls into a different class than theatre or concert hall. This indicates that they are regarded as materially different in planning terms.
- The owner/occupier's reliance on Article 10(2) is misplaced. '*A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use*'. This saver only applies where the second use is and remains 'ordinarily incidental' to the principal use. The grant of a seven day licence severs the organic link between the use of the bar as incidental to the principal use of the premises as a music centre. The use is no longer incidental.
- From a legal viewpoint the change in liquor licence type is capable of constituting a material change in use.

#### 7.4. Further Responses

7.4.1. Simon Clear & Associates Planning and Development Consultants have responded on behalf of NOTTUB Ltd, to the response to the referral by TBCT. The response includes:

- Further details of history of the premises and its current use. The bar at street level is the entry point and the focal point for arrivals. The theatre licence is not an appropriate licence for the street-level Crowbar, which by the terms of a Theatre Licence should open to coincide with particular events and close within a particular

time of these events. A 7-day licence would be the appropriate licence and confined to this part of the building.

- Due diligence in relation to the purchase in 2017 revealed that the operation of the intermittent guided tours through the Crowbar, which currently trades under the building's theatre licence would cause unnecessary disruption if operated strictly in accordance with such a licence, requiring constant closing and re-opening around events. This would cause difficulties with operations and staffing, which inefficiency would threaten the viability of the entire cultural centre.
- The question put to the planning authority referred to the premises 'in whole or in part'. They request the Board to rephrase the question to '*whether the use of the Auditorium Bar within the Button Factory, having a '7 day Publican's License' instead of the existing 'Publican's Licence (ordinary) Theatre' type of licence is or is not development and if it is development, whether it is exempted development.*'

If the question was to be rephrased, the answer to the Declaration request would be different.

Parent Permission – they have reviewed the parent permission referring to more than just the newspaper notice and refer the Board to drawings, Appendix 4, (this appears to refer to the extract showing the legend to a 'first floor' drawing and includes an item 'bar/coffee bar'). They state that the drawings show a bar, while the permitted bar was originally shown on the 1<sup>st</sup> floor, it is exempted development and within the provisions of the planning permission to relocate this internally to the ground floor. They refer to similar points as made previously in their referral in relation to extrapolation and exaggeration, vis a vis the extent of the floor area.

Superpub – there is no definition of a superpub including within the Dublin City Development Plan. They refer to ABP Ref 242410 Market Bar, and Ref 29S.249126 restaurant / café bar on Montague Street/ Montague lane. The layout of the floor plans meant that these establishments could not constitute superpubs. There is no potential for a superpub as suggested by TRCT. Other theatres which operate with the availability of a publican's licence have not changed the nature of the cultural/theatre activity in a material way; particularly they have not become superpubs.

Relevance of Precedents: Re. Carrickhall Holdings v Dublin Corporation – it was not the possession of the license per se but how the license was operated that gave rise to a material change in the use; this is what was found in the Court.

Re. Tivoli, the license was sought for the entirety of the premises which led the Judge to estimate the capacity of 800 people and if operated to that extent could constitute a material change of use. The reference to the owner/ operator was related to the fact that the Licensing Court deals with the suitability of the applicant. The court was careful and correct to note that the planning code and licensing code are separate and distinct. Breach of the planning code through the use of the license over a greater area could be restrained under the planning code and could then be used as a ground of objection to renewal of license.

Status of the Section 5 request – it should be expected from a responsible public body that the arguments should be kept within the realm of record, reality and practicality.

No reference was made to the plans and other particulars submitted with the planning application. TBCT is disingenuous in its interpretation of the parent permission and its suggestion that it has not been made aware of the intentions of the operators of the Button Factory. TBCT has been informed since 2017 of the limited extent and nature of the area for which licensing would be sought.

NOTTUB was not notified prior to the submission of the Section 5 declaration request.

The proposition put by TBCT that once a seven day licence has been obtained it would be relatively easy to widen its scope, is incorrect particularly in relation to what was held in the Tivoli judgement.

Such considerations must be based on the fact of the operation and the consequences thereof, which are adjudicated in the Courts through the enforcement procedures available under Part VIII, not through Part I. It is not the possession of a publican's license that gives rise to a material change of use but the abuse of such a license. This can only be determined in planning terms after the abuse occurs and is adjudicated through enforcement proceedings in the Courts, (or S160 in anticipation).

In Carrick Hall the court had regard to increased numbers, traffic and noise and the impact on the amenity of the residents of the area, because this had already occurred; an abuse and not a responsible use.

The Senior Counsel's speculation that the legal effect of the grant of a new license would be to elevate the bar use from an incidental and ancillary use to a principal use in its own right, is not based on any proposition ever put forward by NOTTUB Ltd. Serving alcohol to customers who drop in casually for a drink into a premises that is open to the public and which already has a bar service area on the ground floor, does not give rise to a material change or intensification of use of the existing premises as it is operated – as a cultural attraction open to the public and associated with the history and performance of modern music in Dublin.

Re PL 29S.RL2879 – the difference is that the Button Factory is in principle a public access establishment, whereas An Bord Pleanála has held that a guest house is not.

They dispute the implications taken by TBCT from the interpretation of the Judges comment in the Tivoli case that planning permission enures to the person.

Legal Points and Planning Practice – due to the briefing given, the Senior Counsel's description of the venue operations are incorrect. The current use of the Crowbar auditorium bar gives full access to patrons of the music c entre, tourists and the general public throughout the day and the facility operates the same times as a publicans 7 day licence allows.

It is noted that the Supreme Court case cited, Cronin Readymix Ltd v An Bord Pleanála, refers to Section 5 in the past tense. The judgement does not extend to cover what a person might do as a matter of unauthorised development, which is speculated in the TBCT submission. The issue of concern has nothing to do with attaching a sign to an external wall.

The possession of a license for a small part of a large venue would not elevate the existing bar use from incidental and ancillary use to a principal use in its own right.

The Senior Counsel is not definitive, holding that 'from a legal viewpoint the change in liquor licence type is capable of constituting a material change in use'. This confirms that an actual material change in use must be determined on the facts of use after possession and operation of a licence.



RL2093 is a determination after the fact, based on the fact that the bar had become a separate entity, with separate name, entrance, management, hours of operation, signage and car parking, with late night use having resulted in the intensification of use.

Temple Bar is a city centre location where activity is encouraged and car traffic almost totally banned. Carrick Hall was located in a quiet suburban setting and extraneous effects were intensified significantly. The possession of a particular licence does not instigate a material change of use, it depends on the degree of intensification after the fact and the sensitivity of the receiving environment.

Many restaurants now hold 7-day licenses. Restaurants are not separately defined in planning law and not contained in any of the classes of use nor are public houses. Possession of a publican's licence does not make a restaurant a pub or, per se, give rise to a material change of use in planning terms. The subject building does not fit into any single class of use.

Material change or material intensification of use must be based on the facts of the operation of the planning permission, on the detectable material impacts in the vicinity and how they impact on the amenities in the area on a case by case basis, in line with the supreme Court judgement in the Carrick Hall case.

Nub Issue – The nub of the issue is the phrase in whole or in part. TBCT have not put forward any grounds which refer to an 'in part' use of the premises but NOTTUB have put forward an explanation of the 'in part' content. They submit that if the Board rephrases the issue and address the limits of the intention, there is no potential for a materially different use or a material intensification of use.

If this question is not rephrased NOTTUB could ask another question, one based on actual intentions.

The Board should determine that the possession of a 7 day licence in respect of the existing Auditorium Bar, area within the Button Factory:

Is not development

Does not introduce a new category of use that was not envisaged in the original permission,

Does not represent a material change of use or a material intensification of use.

If the Board considers it inappropriate to rephrase the question they are requested to deal with the matter 'in whole or in part' as two separate questions.

Various items of correspondence between TBCT and NOTTUB are attached to the submission.

## **8.0 Statutory Provisions**

### **8.1. Planning and Development Act, 2000**

Section 2(1) 'exempted development' has the meaning specified in section 4.

Section 3(1)

In this Act, 'development' means, except where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any such structures or other land.

Section 4 – exempted development.

Section 4(2)(a) states 'The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that:-

- (i) By reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development.

### **8.2. Planning and Development Regulations, 2001**

Part 2 Exempted Development, Interpretation, for this Part

5 (1) in this Part

'business premises' means

any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any

structure (not being an excluded premises) which is normally used for the provision therein of services to persons

(b) a hotel, hostel (other than a hostel where care is provided) or public house, 'shop' means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public – listed (a) to (i)

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies;

6(1) Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1

10(1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—

(a) involve the carrying out of any works other than works which are exempted development,

(b) contravene a condition attached to a permission under the Act,

(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

10 (2) a) A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.

Schedule 2 Part 1: Exempted Development – General

Change of Use

CLASS 14

Development consisting of a change of use-  
b) from use as a public house, to use as a shop,

Schedule 2 Part 4: Exempted Development – Classes of Use

CLASS 2

Use for the provision of—

- (a) financial services,
- (b) professional services (other than health or medical services),
- (c) any other services (including use as a betting office),

where the services are provided principally to visiting members of the public.

CLASS 11

Use as—

- (a) a theatre,
- (b) a cinema,
- (c) a concert hall,
- (d) a bingo hall,
- (e) a skating rink or gymnasium or for other indoor sports or recreation not involving the use of motor vehicles or firearms.

**8.3. Referrals database**

8.3.1. I have examined the Board's database of references/referrals. The following cases are relevant in the context of the issues raised in the current referral.

RL2879-

Whether the use of a premises as a Guest House and Restaurant with a Publican's On-Licence in lieu of a Special Restaurant Licence is or is not development or is or is not exempted development.

This case related to a Guest House and Restaurant which had a Special Restaurant Licence (serving of alcohol restricted to those eating in the restaurant / resident in the B&B). The premises was a four storey over basement building with restaurant,

kitchen, reception at ground floor and bedrooms on the upper floors and ancillary accommodation in the basement. The operator was seeking a Publican's On-Licence to sell alcohol for consumption on the premises without food i.e. a public house, in place of the existing special restaurant license.

The Board decided that the development was not exempted development, as follows:

The change of licence would create a public house, therefore an additional use that would not be incidental the main use as a guest house and restaurant.

The new use would be materially different from a guest house and restaurant use with changes in terms of trading patterns, likely impacts on area etc.

There was no exempted development provision in the Planning Regulations for change of use from guest house to public house.

RL2419

Whether the bar at the Auburn House Hotel operating independently of the hotel is or is not development or is or is not exempted development

The case related to the use of a hotel bar as an independent entity separate from the hotel. There was a planning history pertaining to the site, whereby the bar was permitted as ancillary to hotel use.

The Board decided that the development was not exempted development, as follows:

The bar was permitted under the Planning and Development Acts as a use ancillary to and associated with the hotel use on the site, and that its operation as other than ancillary to or associated with the hotel use would constitute a material change in use.

## **9.0 Assessment**

### **9.1. Is or is not development**

- 9.1.1. There is no question of 'works' being undertaken associated with the proposal. There are no structural changes associated with the proposal. Thus, the proposal does not constitute 'development' by reason of works arising.

- 9.1.2. The existing premises has a Publican's Licence (ordinary) Theatre. The holder of a Publican's Licence (Ordinary) Theatre is entitled to sell alcohol to persons who have paid for seats for the performance taking place and theatre employees, 30 minutes before the commencement of the performance and ends 30 minutes after the performance ends
- 9.1.3. The serving of alcohol is thereby limited and it is definitively subsidiary to the main music centre uses.
- 9.1.4. The stated purpose of the proposed licence change is to permit the holder of the licence to sell alcohol for consumption on the premises without being tied to performance times.
- 9.1.5. In relation to persons to whom alcohol is sold, the referrer NOTTUB claims that serving refreshments and alcohol to customers attending the Rock Museum, or as tourists on a cultural trail, whether in a guided tour or not, does not materially alter the use to constitute a material change of use; and that the use is consistent with the permitted established use and under the provisions of a 7-day publican's licence does not constitute development by way of material change of use or intensification of use, if operated to the same degree as already established.
- 9.1.6. On behalf of the applicant TBCT it is pointed out that there is no evidence of any link between the Rock n'Roll tours and the bar in the past; that this seems to be a recent innovation since NOTTUB took possession of the Button Factory in late 2017. The owner/occupier has offered no evidence of the alleged established existing use. There is no indication given, for example, as to when this level of activity was said to have first commenced. They reject that this linkage could be regarded in any way as establishing a legitimate use in planning terms and do not accept this is a good explanation for seeking a seven day licence. The fact, if fact it be, that the premises might have been used in the manner alleged does not alter the legal consequences which the grant of a seven day licence would have. It is clear that serving alcohol to customers who drop in casually for a drink is quite different to restricting such service to those specifically attending a performance; and that the grant of a seven day licence would sever the organic link between the ancillary use and the principal use of the premises and elevate the bar use from an incidental and ancillary use to a principal use in its own right.

- 9.1.7. I agree with the applicant that a change from a theatre licence to a seven day publican's licence would have the legal effect of extending the hours during which, and the class of persons to whom, alcohol can be served; that this is material in planning terms and would result in a material change of use.
- 9.1.8. I disagree with the referrer that the answer to the Declaration request would be different, if the question was to be rephrased to refer only to the area currently used as a bar, i.e. as the question is stated on behalf of NOTTUB: *'whether the use of the Auditorium Bar within the Button Factory, having a '7 day Publican's License' instead of the existing 'Publican's Licence (ordinary) Theatre' type of licence is or is not development and if it is development, whether it is exempted development;'*
- 9.1.9. The Board should note in relation to the foregoing that the evidence presented on behalf of the referrer is that the bar area, which they state was shown on the original planning application drawings on the first floor, has moved to the ground floor, the inference appears to be that this did not require planning permission. The Board should also note their submission that any intensification of use would be a matter for adjudication by the Courts via enforcement proceedings.
- 9.1.10. The proposed licence change makes the public house use separate to, or independent of, the music centre uses. There is no public house use established in this premises. The addition of a new use to the premises constitutes a change of use. This change is a 'material' change of use as it alters the functioning of the premises in a substantive way. As a public house it would have different opening hours and a different client base introducing a range of potential substantive planning impacts including differing trading patterns, potential impacts on neighbouring amenity, social behaviour, etc.

## 9.2. **Is or is not exempted development**

- 9.2.1. The relevant provisions relating to a change of use under the Planning and Development Regulations, 2001 are Article 10 and Part 4 of Schedule 2.
- 9.2.2. I note Article 10(2) of the Planning and Development Regulations, 2001. The proposed use associated with a new publican's on-licence in this instance would not be an incidental use to the main use as a music centre and an additional use would result.

- 9.2.3. In relation to Part 4 of Schedule 2, this allows for changes of use within any one of the classes of use specified in accordance with Article 10(1) to be exempted development for the purposes of the Act. I note the definitions and provisions under the Planning and Development Act, 2000, as amended, and the Planning and Development Regulations, 2001. A public house is not a music centre or theatre. There is no provision for exemption for change of use from a music centre to a public house under Part 4 of Schedule 2 and, consequently, there is no provision under the exempted development provisions of the Planning and Development Regulations.
- 9.2.4. It can be concluded that the effect of the proposed change of licence, introducing an additional use which is a material change of use for which there is no exemption under the Regulations, constitutes a development that is not exempted development.

## 10.0 Recommendation

- 10.1. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** a question has arisen as to whether in the case of the premises known as the Button Factory (formerly The Temple Bar Music Centre), the use of the premises (in whole or in part) with a publican's seven day licence in lieu of the use of the premises with a Publican's Licence (ordinary) Theatre is or is not development or is or is not exempted development:

**AND WHEREAS** Temple Bar Cultural Trust Designated Activity Company requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 21 day of March, 2016 stating that the matter was development and was not exempted development:

**AND WHEREAS** NOTTUB Ltd referred this declaration for review to An Bord Pleanála on the 16<sup>th</sup> day of April, 2016:

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



particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(2) of the Planning and Development Act, 2000, as amended,
- (d) article 5(1), article 6(1) and article 10 of the Planning and Development Regulations, 2001, as amended,
- (e) Parts 1 and 4 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site, and
- (g) the pattern of development in the area:

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

- a) an additional use, that being a public house, is introduced for part of the premises arising from a publican's seven day licence in lieu of a publican's licence (ordinary) theatre, which is not an incidental use to the main use as a music centre;
- b) the public house use is materially different from the established uses by reason of changes to opening hours and trading patterns, likely impacts on neighbouring amenity, and social behaviour, thus constituting development within the meaning of the Planning and Development Act 2000, and
- c) there is no provision for exemption for change of use from music centre to public house under the exempted development provisions of the Planning and Development Regulations:

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 use of the premises (in whole or in part) with a publican's 'seven day licence' in lieu of the use of the premises with a Publican's Licence (ordinary) Theatre is development and is not exempted development.

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Planning Inspector

25 January 2019

Appendices

Appendix 1 Photographs

Appendix 2 Dublin City Council Development Plan 2017-2023 extract.