



An
Bord
Pleanála

Inspector's Report ABP-302714-18

Question

Whether the use of existing auditorium bar within the Button Factory, under provision of a 7-day publicans licence instead of the existing publicans licence (ordinary) theatre type licence that will continue to apply to the rest of the building is or is not development and if it is development, whether it is exempt development.

Location

The Button Factory, Curved Street, Temple Bar, Dublin 2.

Declaration

Planning Authority

Dublin City Council

Planning Authority Reg. Ref.

0320/18

Applicant for Declaration

NOTTUB Limited

Planning Authority Decision

Is development and is not exempt development.

Referral

Referred by

NOTTUB Limited

Owner/ Occupier NOTTUB Limited / The Royal Exchange Assurance Corporation.

Observer(s) None

Date of Site Inspection 14/11/2018

Inspector Sarah Lynch

1.0 Site Location and Description

- 1.1. The site is located within an existing music theatre 'The Button Factory', which comprises a substantive four storey over basement corner building with access directly from Curved Street and Temple Lane. The building is located in the heart of the Temple Bar area where it is surrounded by a mix of uses. The building currently accommodates offices, music recording studios, music museum, music theatre and bar. Outdoor seating is provided along Curved street.
- 1.2. The Crowbar which is the subject of the referral is located in the south eastern corner of the building accessible from both the main entrance to the building at Curved Street and via direct access from Temple Lane. The bar whilst being an integral part of the Button Factory building has an independent access directly onto Temple Lane.

2.0 The Question

- 2.1. Whether the use of existing auditorium bar within the Button Factory, under provision of a 7-day publicans licence instead of the existing publicans licence (ordinary) theatre type licence that will continue to apply to the rest of the building is or is not development and if it is development, whether it is exempt development.

3.0 Planning Authority Declaration

3.1. Declaration

The Declaration issued by the planning authority concluded:

- That the use of the existing 50m² auditorium bar within The Button Factory, under provision of a '7-day publicans licence' instead of a the existing 'publicans licence (ordinary) theatre' type of licence that will continue to apply to the rest of the 1,200m² building is a material change of use which constitutes development that is not exempt development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

- The development is not exempt from the requirement to obtain planning permission under section 32 of the Planning and Development Act 2000.
- The proposed licence change makes the public house use separate to, or independent of, the theatre use. It forms a public bar in the premises. The addition of this new use to the premises constitutes a change of use. This change of use is material.

Other Technical Reports

- None requested.

4.0 Planning History

A number of applications and Section 5 declarations have been determined for this building in relation to signage.

Of note is the following:

1661/92 -Permission was **granted** for a four storey over basement music centre to accommodate 3 shop units, music auditorium, offices and ancillary accommodation.

5.0 Policy Context

5.1. Development Plan

Dublin City Development Plan 2016-2022

- Land use zoning objective Z5 'To consolidate and facilitate the development of the central area and to identify, reinforce and strengthen and protect its civic amenity'.

5.2. Natural Heritage Designations

None relevant.

6.0 The Referral

6.1. Referrer's Case

Simon Clear, an agent acting on behalf of the occupier, has referred a Section 5 Declaration from Dublin City Council which may be summarised as follows:

- The availability of a 7-day publican licence would not alter the pattern of, nature or intensity of trading such as to have a material effect.
- The auditorium bar was included as a bar in the original permission.
- There are irregular Rock n' Roll tours visiting throughout the day.
- The bar stays open throughout the day.
- To adhere to the provisions of a theatre licence which requires the bar to be closed within 30 minutes of the end of a tour and only reopen 30 minutes before a tour is disruptive and an inefficient use of daytime street side capacity of a permitted attraction in Temple Bar.
- The proposed change in licence does not give rise to a material change of use as the use exists as incidental and ancillary.
- No new use would be introduced into the premises.
- No intensification in use would occur.
- No new trading pattern would occur.
- There would be no material effects upon the amenities of the area.
- Possession of a Publicans licence does not per se give rise to a material change of use it is the way in which it is used that can give rise to a material change of use.

6.2. Planning Authority Response

- None

7.0 Statutory Provisions

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

- Section 2(1), the following interpretation of works:

“...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.....”
- Section 2(1), the following interpretation of use:

"use", in relation to land, does not include the use of the land by the carrying out of any works thereon;
- Section 3 (1), states the following:

“In this Act “*development*” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.”
- Section 4 (1)(a)- (i) set out what is exempted development for the purpose of the Act-

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.
- Section 4 (2) provides for the making of the Regulations, Planning and Development Regulations, 2001.
- Section 5 (3) (A) states the following:

“Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such a fee as may be prescribed, refer a declaration for review by the Board within 4weeks of the date of issuing the declaration.”

7.2. Planning and Development Regulations, 2001 (as amended)

- Article 5(1)

In this Part –

“business premises” means-

- (a) 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 or public house,
- (c) any structure or other land used for the purposes of, or in connection with, the functions of a State authority.

“excluded premises” means-

- (a) any premises used for purposes of a religious, educational, cultural, recreational or medical character,
- (b) any guest house or other premises (not being a hotel) providing overnight guest accommodation, block of flats or apartments, club, boarding house or hostel,
- (c) any structure which was designed for use as one or more dwellings, except such a structure which was used as business premises immediately before 1 October, 1964 or is so used with permission under the Act.

“shop” (as amended by Article 3 of the P & D Regs, 2005) 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-

- (a) for the retail sale of goods,
- (b) as a post office,
- (c) for the sale of tickets or as a travel agency,
- (d) for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and “wine” is defined as any intoxicating liquor

which may be sold under a wine retailer's off-licence (within the meaning of the Finance (1909-1910) Act, 1910),

(e) for hairdressing,

(f) for the display of goods for sale,

(g) for the hiring out of domestic or personal goods or articles,

(h) as a launderette or dry cleaners,

(i) for the reception of goods to be washed, cleaned or repaired,

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) above, or any use to which class 2 or 3 of Part 4 of Schedule 2 applies.

- Article 10 (1&2)

(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 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.

(2) 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-

(a) from use for the sale of hot food for consumption off the premises, or for the sale or leasing of motor vehicles, to use as a shop,

(b) from use as a public house, to use as a shop,

(c) from use for the direction of funerals, as a funeral home, as an amusement arcade or a restaurant, to use as a shop,

(d) from use to which class 2 of Part 4 of the Schedule applies, to use as a shop,

(e) from use as 2 or more dwellings, to use as a single dwelling, of any structure previously used as a single dwelling

(f) from use as a house, to use as a residence for persons with an intellectual or physical disability or mental illness and persons providing care for such persons.

- Schedule 2 Part 4: Exempted Development – Classes of Use

CLASS 1

Use as a shop.

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.

8.0 Assessment

Development can be exempted from the requirement for planning permission by virtue of either (a) section 4 of the Act, or (b) article 6 of the Regulations. These exemptions do not, however, apply where either:

- EIA or AA is required - s.4(4), or
- The development would materially affect the character of a protected structure (s.57).

8.1. Is or is not development

In the interest of clarity, it is important to note at the outset that 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.

The existing premises currently operate under a Publican's Licence (Ordinary) Theatre which restricts the sale of alcohol to specified times and only to:

- (a) Persons who have paid for seats for the performance taking place
- (b) Theatre employees

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

The purpose of this licence is to allow the premises to sell alcohol to theatre attendees and staff for a limited period and in an ancillary capacity to the overall use of the building as a theatre.

8.2. Article 10 allows for changes of use within any one of the classes of use specified in Schedule 2 Part 4 (Exempted Development – Classes of Use. I note that in the definitions and provisions under the Planning and Development Act, 2000 (as

amended), and the Planning and Development Regulations, 2001 (as amended), the existing use falls under Class 11 Theatre / Concert Hall. A public house does not however, fall within the description of Class 11, and cannot therefore constitute a change of use within that class.

- 8.3. There is no exemption for change of use from theatre to public house under Part 4 Schedule 2 and, consequently, there is no provision under the exempted development provisions of the Planning and Development Regulations.
- 8.4. Thus, it can only 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.
- 8.5. Consumption of alcohol on the premises to persons not in attendance to the theatre during the hours unrelated to a performance creates a new use, that being a public house, which is accessible to the general public.
- 8.6. The proposed licence change provides the option of operating the bar independently of the theatre use. The addition of this new use to the premises constitutes a change of use.
- 8.7. This change is a material change of use as it alters the functioning of the premises in a substantive way. It introduces a wholly different client or patron base. The change in licencing will significantly alter the operation of the bar in relation to trading patterns and opening hours and will create an opportunity for potential impacts on the surrounding residential amenity which should be assessed and regulated by way of a planning application. Thus, the proposal constitutes 'development'.

8.8. **Restrictions on exempted development**

The relevant provisions relating to a change of use under the Planning and Development Regulations, 2001 (as amended) are Article 10 and Part 4 Schedule 2 subject to certain restrictions. In the interest of clarity, I note Article 10(2) of the Planning and Development Regulations, 2001. The proposed use associated with a new Publicans Licence (7 Day Ordinary) in this instance would not be an incidental use to the main use as a theatre an additional use would arise.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the use of existing auditorium bar within the Button Factory, under provision of a 7-day publicans licence instead of the existing publicans licence (ordinary) theatre type licence that will continue to apply to the rest of the building is or is not development or is or is not exempted development:

AND WHEREAS NOTTUB Limited requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 10th day of September 2018 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 8th day of October 2018:

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, as amended
- (c) Section 4(1)(a) and (2) of the Planning and Development Act, 2000, as amended,
- (d) Article 5(1) of the Planning and Development Regulations, 2001, as amended,
- (e) article 10 (1) of the Planning and Development Regulations, 2001, as amended
- (f) Parts 1 and 4 (Class of use 1-11) of Schedule 2 to the Planning and

Development Regulations, 2001, as amended,

(g) the planning history of the site,

(h) 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 Licence (7 day Ordinary) in lieu of a Publicans Licence (Ordinary) Theatre, which is not an incidental use to the main use as a theatre;

(b) the public house use is materially different to from the established theatre by reason of changes to trading patterns 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 theatre to public house under the exempted development provisions of the Planning and Development Regulations.2001 (as amended)

NOW 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 existing auditorium bar within the Button Factory, under provision of a 7-day publicans licence instead of the existing publicans licence (ordinary) theatre type licence that will continue to apply to the rest of the building is development and is not exempted development.

Sarah Lynch
Planning Inspector

11th January 2019