Doyle Kent Planning Partnership Ltd
71 Carysfort Avenue
Blackrock,
Co. Dublin

Company Reg No 513327
Vat Reg. No. IE 9829282N

An Bord Pleanála

64 Marlborough Street,

Dublin 1

28th May 2018

Re: ABP-301491-18

(Dublin City Council Reg. Ref. E0055/18)

Dear Sir or Madam,

We, Doyle Kent Ltd. of 71 Carysfort Avenue, Blackrock, Co. Dublin, on behalf of Temple Bar Cultural Trust Designated Activity Company (TBCT DAC), Block 1, Floor 3, Civic Offices, Dublin 8, wish to respond to the invitation from the Board in respect of the submission by NOTTUB Ltd for review by the Board of the declaration of the planning authority under Section 5 of the Planning and Development Act, 2000-2017, Reg. Ref. E0055/18. We particularly refer the Board to Senior Counsel's written legal submission (attached) in relation to the many legal points raised in the submission of NOTTUB Ltd. to the Board.

At the outset, we confirm that TBCT DAC is in agreement with the declaration of the Planning Authority.

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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 DACA 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.

The premises subject of this Section 5 referral, the *Button Factory*, are part of the Temple Bar Cultural Trust DAC property portfolio. The leasehold (500 year) of the property was sold by TBCT to a registered company, NOTTUB Ltd, in September 2017. The directors of NOTTUB are Mr. P. Dunning and Mr. P. Clinton. In terms of title, NOTTUB are leaseholders and TBCT DAC retains ownership of the head lease and must consent to any new licence for sale of alcohol.

In 2017, NOTTUB approached TBCT DAC to seek approval to a new seven day publican's licence for the *Button Factory*, In lieu of the existing Publican's Licence (Ordinary) Theatre. No details of the proposal were otherwise given. TBCT DAC raised the question of the need for planning permission in relation to this proposed change. NOTTUB denied that planning permission would be required and forwarded an opinion from Mr. Michael O'Donnell, Barrister at Law, to the effect that no planning permission issues would arise. At this stage, TBCT DAC decided that it would be appropriate to seek a declaration from the Planning Authority (Dublin City Council) under the provisions of Section 5 of the Planning and Development Act, 2000 (as amended), to put the issue beyond doubt.

The Question to the Planning Authority

In February, 2018, on behalf of TBCT DAC, the following question was put by Doyle Kent to the Planning Authority for declaration under Section 5 of the Planning and Development Act:

> ***Whether, in the case of the premises known as the Button Factory (formerly the Temple Bar Music Centre), Curved Street North, Temple Bar, Dublin 2, 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 and if it is development, whether it is exempted development.***

A detailed submission was made, in February 2018, by us on behalf of TBCT DAC to the Planning Authority in respect of the foregoing question, wherein we set out the main planning considerations pertinent to the question raised under Section 5 and which submission the Board will now have before it.

In that submission we examined the planning permission under which the *Button Factory* operates, cited precedent decisions of the Courts and of the Board and examined the legislative background. We showed that the effect of NOTTUB's proposals would be to establish a new use, namely a public bar. There is no provision for such use in the original planning permission for the *Button Factory,* such change of use without planning permission would run contrary to previous decisions of the Courts and the Board and which change of use is not exempt from planning permission under any part of the Planning and Development Act or the relevant Regulations. We concluded that the proposal to use the *Button Factory* 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.

Essential Point

The essential argument in the TBCT DAC submission to the Planning Authority is, if the *Button Factory* is operated with benefit of a publican's seven day licence in lieu of a Publican's Licence (Ordinary) Theatre, that:

(a) An additional use, namely a public house, would be introduced into the premises arising from the 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 a theatre or concert hall to a public house under the exempted development provisions of the Planning and Development Regulations, 2001, as amended.

This point was argued in considerable detail in our submission to the Planning Authority, in which we concluded that the proposal to move to a seven day liquor licence is development and is not exempted development.

Declaration of the Planning Authority

Having received the TBCT submission and having afforded NOTTUB an opportunity to make a submission, the Planning Authority addressed itself to the question raised per Section 5 of the Act. The DCC planner concluded:

> *"The existing premises has a 'Publican's Licence (Ordinary) Theatre'. With this licence, the serving of alcohol is restricted to those persons who have paid for seats for the performance taking place during the specified time, which is 30 minutes before the commencement of the performance and ceases 30 minutes after the performance ends. The serving of alcohol is thereby restricted to when a performance is taking place and is subsidiary to the main theatre use. The purpose of the proposed licence change is to permit the holder of the licence to sell alcohol for consumption on the premises without the caveat of being 30 minutes before or after a performance.*
>
> *The proposed licence change makes the public house use separate to, or independent of, the theatre use. It forms a public bar within the premises. The addition of this 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. There are a range of potential substantive planning impacts arising from the use of part of the premises as a public house, such as differing trading patterns and possible impacts on neighbouring residential amenity. Thus, the proposal constitutes a material change of use."*

The planner considered that a seven day Publican's Licence is not a use incidental to a theatre and that an additional use as a public house would result. The planner 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 development that is not exempted development. The Planning Authority confirmed this finding.

Submission of NOTTUB

NOTTUB has referred the Planning Authority declaration to the Board for review, via planning consultants Simon Clear and Associates. Counsel's opinion (Michael O'Donnell, Barrister at Law, of 20th December 2017) is attached. The submission to the Board is very wide ranging, but we have attempted to summarise the main points as follows:

1. The question posed under Section 5 is a hypothetical one. The Board is being invited by TBCT to speculate on the future use of the premises in a manner which goes beyond its jurisdiction and should be reserved to the Courts. It is not permissible to use a statutory power conferred for a particular purpose for some other purpose.
2. The relevance of the case of *Carrickhall Holdings v Dublin Corporation* [1983] ILRM 268, previously cited by Doyle Kent, is disputed.
3. NOTTUB effectively hold a freehold interest and TBCT are a third party.
4. The bar in the *Button Factory* (referred to as the "Auditorium Bar") is incidental and ancillary to the cultural facility and is only 60 sq.m in floor area. The bar stays open throughout the day, keeping the same times as a typical public house, as there are Rock n'Roll tours on-going during the day.
5. The possession of a Publican's Licence relating to the percentage of the premises occupied by the Auditorium Bar will not give rise to a material change of use or intensification of use and in this context is not development for the purposes of this determination.
6. 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.
7. The use of the bar comes within the scope of Article 10(2)(a) of the Planning and Development Regulations.
8. If the *Button Factory* were to lose the current Rock n'Roll tours, *"the 30 minute restriction would kick in and the existing trading times would technically then become illegal"*. Therefore, NOTTUB wish to secure a seven day publican's licence. The seven day licence would just be maintaining and regularising the existing use, not intensifying it.
9. Counsel's opinion (Michael O'Donnell, Barrister at Law) advises that the proposed change of licence would not require planning permission.

10. 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.
11. NOTTUB's consultants argue against the relevance of a previous decision of the Board, (Reg. No. PL 29S.RL2879), on grounds of scale and established activity.
12. The Planning Authority issued a Section 5 declaration in respect of No.5 Aston Quay, which is at odds with its declaration in the instant case.
13. Other theatres have a seven day licence (Olympia, Vicar Street, Stella Cinema).
14. If there is unauthorised development, in planning terms, enforcement action can be taken in the Courts.
15. The Section 5 declaration misrepresents what the property owners wish to do.

Response of Temple Bar Cultural Trust DAC

The submission to the Board from NOTTUB is generally similar to that submitted to the Planning Authority prior to the issue of the Section 5 declaration, although a reference to judicial review has now been omitted. We submit that there is little of substance added to that previous submission, with some additional emphasis on generally unrelated legal points. We attach Senior Counsel's written legal submission (Garrett Simons, SC) In respect of the various legal points. In relation to the overall issues raised (in italics) our comments are set out below:

The question posed under Section 5 is a hypothetical one. The Board is being invited by TBCT to speculate on the future use of the premises in a manner which goes beyond its jurisdiction and should be reserved to the Courts. It is not permissible to use a statutory power conferred for a particular purpose for some other purpose.

The jurisdiction of the Board in respect of Section 5 referrals is firmly established in statute law and this is strongly underpinned by many decisions of the Courts. The Board's jurisdiction is discussed at length in the Written Legal Submission of Senior Counsel (Garrett Simons, SC) submitted with this response and illustrated by reference to statute law and a number of decisions of the superior Courts.

In the interest of clarity, we wish to draw the attention of the Board to the following. NOTTUB acquired a long lease (500 years) of the premises, known as *the Button Factory,* in September 2017 from TBCT DAC. They subsequently indicated to TBCT that they wished to operate a seven day publican's licence (in lieu of a theatre licence). NOTTUB provided little detail to TBCT in relation to how they proposed to operate otherwise, including in respect of the proposed change in licence regime. Mindful of its own duties as the owner of the freehold and of its responsibility to the wider community in Temple Bar, and on the basis of the information given to it, TBCT DAC put it to NOTTUB that planning permission should be secured for this change.

In turn, NOTTUB rejected the view that planning permission is required but did not supply much in the way of specifics including any drawings. (It was only when the Section 5 submission was made by TBCT DAC to the Planning Authority that any specifics were supplied by NOTTUB). An opinion from Counsel (Michael O'Donnell, Barrister at Law) was forwarded to TBCT to the effect that planning permission was not required.

We submit that it is abundantly clear that a question has arisen in relation to the proposal of NOTTUB in respect of the proposed change to the licensing, as to whether this is or is not development and if it is or is not exempted development. Section 5 of the Planning and Development Act is specifically designed to address such question and it has been properly put to the Planning Authority[1]. It is NOTTUB who have submitted the declaration of the Planning Authority for review to the Board. It seems unusual to bring such referral and subsequently deny that the Board has jurisdiction.

The relevance of the Carrickhall Holdings v Dublin Corporation case is disputed.

The characterisation, in the submission to the Board by NOTTUB's consultant, of the case of *Carrickhall Holdings v Dublin Corporation* [1983] ILRM 268, is incorrect. In fact, the decision in that case reinforces the arguments put forward on behalf of TBCT. As noted by Senior Counsel (par 32 of Written Legal Submission):

> *"the case was an appeal to the High Court under the statutory predecessor to what is now section 5 of the PDA 2000, namely, section 5 of the Local Government (Planning & Development) Act 1963. If anything, the judgment 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."*

NOTTUB effectively hold a freehold interest and TBCT are a third party.

NOTTUB hold a long lease (500 years), but TBCT are the owners of the freehold. NOTTUB do not own the freehold and TBCT DAC have a very legitimate interest in the issues now before the Board.

The bar in the Button Factory (referred to as the "Auditorium Bar") is incidental and ancillary to the cultural facility and is only 60 sq.m in floor area. The bar stays open throughout the day, keeping the same times as a typical public house, as there are Rock n'Roll tours on-going during the day.

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[1] *Section 5(1) of the Planning and Development Act states:*
If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

As noted by Senior Counsel (par.21 of Written Legal Submission), the starting point for assessment of the issues is the planning permission for the premises. Reg. Ref. 1661/92 is the permission on foot of which the *Temple Bar Music Centre*, now the *Button Factory*, was developed. This was granted by Dublin Corporation in 1992 for development described as:

> *"4 storey over basement music centre, incl. 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 to No.10/10A including minor changes to elevation."*

There is no mention of a public bar and the planning permission for the Temple Bar Music Centre does not include a public bar. Therefore, any bar within the building must be incidental to the permitted uses. If a public bar is proposed, it requires planning permission, as argued in detail in our submission to the Planning Authority and in the attached Written Legal Submission of Senior Counsel.

We draw the Board's attention to the request to the Planning Authority, under Section 5, by Mr. Dunning in 2017 (Ref. EXPP 0359/17). Mr. Dunning informed the Planning Authority that the operation of the tour would only occupy 2% of the hourly capacity of the venue and he sought a declaration to the effect 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 in respect of the tours and the operation of the bar, as described by NOTTUB, was not apparent when due diligence was carried out prior to sale of the lease. Insofar as TBCT DAC is aware, these operational hours and methods are recent changes.

Regarding the NOTTUB description of the operation of the existing bar, 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). In any case, once a seven day licence has been obtained, it would be

relatively easy to widen its scope. TBCT DAC has strong concerns regarding what is the ultimate configuration being aimed at by NOTTUB.

The possession of a Publican's Licence relating to the percentage of the premises occupied by the Auditorium Bar will not give rise to a material change of use or intensification of use and in this context is not development for the purposes of this determination

We consider that the principle of a change of use is clearly established in this case. Regarding the percentage of the premises, it is only when the Section 5 procedure was initiated by TBCT that NOTTUB brought up the question of percentages of floor areas. At no time has NOTTUB clearly shown what is intended on a drawing.

We draw attention to the legal advice of Counsel to NOTTUB (Mr. M. O'Donnell, Barrister at Law) to the effect that internal changes are exempted development. In addition, we point to the findings of the judge in the *Tivoli Cinema* case that the intentions of a particular owner at a particular time are not determinative in planning terms (see Written Legal Submission of Senior Counsel, Mr. G. Simons).

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.

This assertion runs contrary to the findings of the Courts and the Board in analogous cases. In the case of *Carrickhall Holdings v Dublin Corporation* [1983] ILRM 268, where a hotel bar was changed to a public bar, the Court 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 from a hotel bar licence to a seven day licence resulted in a change in the character of the use of the premises, amounting to a material change of use requiring planning permission.

Similar considerations informed the Board's decision in PL29N.RL2093, whereby the Board decided that the use of part of premises, referred to as the "leisure centre", for use as a leisure centre together with the ancillary use for sale of intoxicating liquor, constituted development, which was a material change of use from the permitted development at Westwood Club, Clontarf, Dublin 3.

This proposal for the *Button Factory* is comparable.

The use of the bar comes within the scope of Article 10(2)(a) of the Planning Regulations.

The Planning and Development Regulations state at Article 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.*

What is now proposed is a new use, as found also by the Planning Authority, which would not be incidental to the permitted uses in the building, as granted permission per Reg. Ref. 1661/92. As noted by Senior Counsel (par.23 and 24 of Written Legal Submission),

> *"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.....By contrast, the grant of a seven day publican's licence would be to sever the organic link between the ancillary use and the principal use of the Premises. The legal effect of the grant of the new licence would be to elevate the bar use from an incidental and ancillary use to a principal use in its own right. Alcohol could be served to members of the public without the restrictions applicable to a theatre licence."*

If the Button Factory were to lose the said Rock n'Roll tours, "the 30 minute restriction would kick in and the existing trading times would technically then become illegal". Therefore, NOTTUB wish to secure a seven day publican's licence. The seven day licence would just be maintaining and regularising the existing use, not intensifying it.

NOTTUB initially gave no reason for seeking a seven day publican's licence, other than a desire to sell alcohol without the constraints of a theatre licence. In the legal opinion (Mr. M. O'Donnell, Barrister at Law) forwarded by NOTTUB, it is asserted that the *Button Factory* "*....will continue to be a theatre, but with the facility to serve alcohol without such service being connected to a 'performance'*"

Following submission by TBCT DAC of the application for a declaration under Section 5, NOTTUB then sought to link the use of the bar to the Rock n'Roll tours. There is no evidence of any such link between the Rock n'Roll tours and the bar in the past and this seems to be a recent innovation by NOTTUB since they took possession of the *Button Factory* in late 2017. TBCT DAC entirely rejects

that this linkage of the bar to the tours 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, if the *Button Factory* is to move from a theatre licence to a seven day licence, there will be both a material change of use and an intensification of use. Serving alcohol to customers who drop in casually for a drink is quite different to restricting such service to those specifically attending a performance.

Counsel's opinion (Michael O'Donnell, Barrister at Law) advises that the proposed change of licence would not require planning permission.

We respectfully disagree with Counsel for NOTTUB, for the reasons set out in our original submission to the Planning Authority and in further discussion in the Written Legal Submission (Garrett Simons, SC). Counsel for NOTTUB states that the use of the premises "*....will continue to be a theatre, but with the facility to serve alcohol without such service being connected to a 'performance'*. We submit that this effectively would facilitate operating the *Button Factory* as a public house.

We note Counsel's opinion of 20th December 2017 makes no reference to the serving of alcohol to the participants of guided tours throughout the day, or to the potential loss of such tours giving rise to the quest for a seven day licence. It would appear that Counsel compiled his expert opinion without benefit of this information from NOTTUB. It would further appear that the association of the selling of alcohol with guided tours is a new consideration, put forward by NOTTUB after receipt of Counsel's opinion of 20th December 2017 and subsequent to submission by TBCT DAC of the Section 5 question to the Planning Authority.

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 by the Board 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. Once a seven day licence has been obtained, 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 of the initial seven day licence.

In this regard, we note with concern Counsel's opinion of 20th December 2017 (Michael O'Donnell, Barrister at Law), in relation to the planning implications of a seven day licence for the *Button Factory*. Counsel states that, in addition to the question of possible change of use, he was also asked to consider "*possible alterations that might be required to comply with the Intoxicating Liquor Acts*". Counsel referred to the exempted development provisions of Section 4(1)(h) of the Planning and Development Act and concluded that:

> *"In simple terms, 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".*

Notwithstanding that a small part of the *Button Factory* property is a protected structure, it would appear that NOTTUB have been advised to proceed on the basis of the foregoing advice to the effect that internal changes require no planning permission. Against this background, recent statements that the sale of alcohol would be confined to a small bar of 60 sq.m. could be viewed with some scepticism.

NOTTUB's consultants argue against the relevance of the previous decision of the Board, PL 29S.RL2879, on grounds of scale and established activity

The decision of the Board in the case PL 29S.RL2879 is clearly of relevance, as it addresses many of the same principles inherent in the instant case. NOTTUB put forward no coherent argument against this point.

The Planning Authority issued a Section 5 declaration in respect of No.5 Aston Quay, which is at odds with its declaration in the instant case.

Reference to a Section 5 declaration in respect of No.5 Aston Quay was made in the planning consultant's letter of referral to the Board, on behalf of NOTTUB. It would appear that the case in question is DCC Ref. EXPP 0269/15 (few details and no reference number were given by the planning consultant). In that instance, the question raised under Section 5 was:

> *"Question of 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, generally as set out on the enclosed report exempted development."*

This was declared by the Planning Authority to be exempted development for one reason, in part stating:

> *"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."*

We note that the declaration issued by the Planning Authority under Ref. EXPP 0269/15 was not referred to the Board for review. In addition, we would not necessarily agree with the findings of the Planning Authority in that case, for reasons unrelated to the issues pertinent to the instant case of the *Button Factory*. Nevertheless, the comparison of the declaration in respect of No.5 Aston Quay with the *Button Factory* declaration has been made on behalf of NOTTUB.

NOTTUB's planning consultant seeks to equate the declaration per DCC Ref. EXPP 0269/15 with the circumstances pertaining in the instant case of the *Button Factory*. We submit that this is a false comparison. In the first instance, we submit that the permitted development at the *Button Factory* per Reg. Ref. 1661/92 could not reasonably be described to include a public bar. The *Button Factory* operates under the terms of the planning permission granted per Reg. Ref. 1661/92 essentially for a cultural centre, focussed on music.[2]

In contrast, No.5 Aston Quay (along with No.4 Aston Quay) was already operating under permission Reg. Ref. 3782/05, which was permission for a nightclub use. This is of direct relevance to the common test to determine if there is a material change of use, which is to consider the matters which the planning authority would take into account, if a planning application were made for the new use. If the matters of concern to the planning authority are materially different to those arising in the case of the original planning permission, it is evidence of a material change of use.

In the case of No.5 Aston Quay, it is clear that the proposed development subject of Ref. EXPP 0269/15, which development was the separation of the premises from No.4 Aston Quay, would give rise to planning considerations on all fours with those arising from the use already permitted per Reg. Ref. 3782/05, for example in relation to trading patterns, likely impacts on neighbouring residential amenity and increased potential for anti-social behaviour. In effect, the environmental

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[2] *The permitted Button Factory development is:*
"4 storey over basement music centre, incl. 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 to No.10/10A including minor changes to elevation."

impacts of concern were already present. This is an entirely different set of circumstances to those pertaining to the *Button Factory*.

Other theatres have a seven day licence (Olympia, Vicar Street, Stella Cinema).

We have no information in relation to the licensing and planning status of these establishments and have only the submission from NOTTUB to refer to. This contains no information, other than some bald assertions. In any case, the Board is being asked to determine the question in relation to the *Button Factory* on its own merits.

If there is unauthorised development, in planning terms, enforcement action can be taken in the Courts.

It is correct to state that enforcement action in the Courts is the correct remedy for unauthorised development. That is a separate process from the Section 5 declaration/referral procedure and with a different aim.

The Section 5 declaration misrepresents what the property owners wish to do.

The question put to the Planning Authority and now to the Board is clear and addresses the applicant company's stated intention to operate under a seven day licence. Beyond that, we again draw attention to the High Court judgement in *In re Tivoli Cinema Ltd* (1992), where 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. 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.

Conclusion

The essential points set out in both the TBCT submission to the Planning Authority and the declaration of the Planning Authority are clear. As stated in the report of the planner:

> *The proposed licence change makes the public house use separate to, or independent of, the theatre use. It forms a public bar within the premises. The addition of this 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. There are a range of potential substantive planning impacts arising from the use of part of the premises as a public house, such as differing trading patterns and possible impacts on neighbouring residential amenity. Thus, the proposal constitutes a material change of use.*

We submit the proposal to use the *Button Factory* 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.

Yours faithfully

Karl Kent

Encl:

- Senior Counsel Written Legal Submission
- Doyle Kent submission to Planning Authority
- Copy planner's report EXPP 0269/15
- Copy planner's report EXPP 0359/17
- Kilross Properties Ltd v ESB and Eirgrid plc (Court of Appeal)
- In re: Tivoli Cinema Ltd. (High Court)
- Ml Cronin (Readymix) Ltd v An Bord Pleanala (Supreme Court)

PLANNING & ARCHITECTURE

Doyle Kent Planning Partnership Ltd
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71 Carysfort Avenue
Vat Reg. No. IE 9829282N
Blackrock, Co. Dublin

Planning Department
Dublin City Council,
Civic Offices,
Wood Quay,
Dublin

21st February 2018

Re: The Button Factory, Temple Bar (former Temple Bar Music Centre)

Dear Sir or Madam,

We, Doyle Kent Planning Partnership Ltd of 71 Carysfort Avenue, Blackrock, Co. Dublin, on behalf of Temple Bar Cultural Trust Designated Activity Company (TBCT DAC), Block 1, Floor 3, Civic Offices, Dublin 8, wish to make an application for a declaration under Section 5 of the Planning and Development Act, 2000-2017, in respect of the question set out below:

Whether, in the case of the premises known as the Button Factory (formerly the Temple Bar Music Centre), Curved Street North, Temple Bar, Dublin 2, 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 and if it is development, whether it is exempted development.

The premises in question, the *Button Factory*, are part of a property portfolio, which has been in the ownership of the Temple Bar Cultural Trust DAC. The leasehold (500 year) of the property was sold by TBCT to a registered company, NOTTUB Ltd, (of No.8 Cecilia Street, Temple Bar, Dublin 2, D02 RW82) in September 2017. The directors of NOTTUB are Mr. Paraic Dunning and Mr. Paul Clinton. TBCT retains ownership of the head lease and must consent to any new licence for sale of alcohol.

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Planning permission Reg. Ref. 1661/92 is the permission on foot of which the *Temple Bar Music Centre*, now the *Button Factory*, was developed. This is a permission granted by Dublin Corporation in 1992 for development described as:

> *"4 storey over basement music centre, incl. 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 to No.10/10A including minor changes to elevation."*

The building currently accommodates a music venue, with seating and a stage, plus other culture related uses, and was developed of foot of the planning permission granted in 1992.

The venue is used for music / entertainment events typically on weekend evenings, commencing at 7.30pm and finishing at 10.30pm, although some events go beyond this time on foot of a special exemption order. The featured acts cover a broad spectrum of popular music from hip hop to vocal harmony. There are other facilities within the building, including a recording studio, offices and basement level rehearsal areas. In the main auditorium, there is a stage and a bar and there is a larger bar area in a separate space to the rear of the latter.

The premises were originally operated under the name "*Temple Bar Music Centre*", but the venue became known as the *Button Factory* around 2007. In addition to music performances, the premises have hosted a number of culture related activities by tenants, including use of the rehearsal studios and sound training facilities. Also accommodated were organisations such as the *Opera Theatre Company* (since departed) and the *Rock 'N Roll Museum*, which still provides a culture related tourism offering. The key component in all these uses has been culture through the medium of music and ancillary activities.

In licensing terms, the premises are subject of a *Publican's Licence (Ordinary) Theatre*. However, the owner (500 year lease) of the premises, NOTTUB Ltd, has now sought the consent of TBCT to a change of the "*permitted user*" under the lease from a premises with a bar with a theatre licence to one with an ordinary publican's seven day licence. However, TBCT has not been supplied with any detail in relation to the proposed change in licensing, including in respect of the extent of the area to be affected. As TBCT is of the view that planning permission is required for this proposed change, which view is opposed by NOTTUB Ltd, it is now considered necessary to seek a declaration under Section 5 of the Planning and Development Act to clarify the point. The issue is of wider concern to stakeholders in Temple Bar, for reasons set out below.

We appreciate that licensing for the sale of alcohol is not directly a planning matter, but it has been established in the Courts that there is a relationship between such licensing and the use of a premises (land) in planning terms, for example see *Carrickhall Holdings v Dublin Corporation* [1983] ILRM 268 or *Re: Tivoli Cinema Ltd* – decision of the High Court of 1992 (I 412).

A *Publican's Licence (Ordinary) Theatre* provides for restricted sale of alcohol, as permitted per Section 21 of the Intoxicating Liquor Act, 1927, as amended, and as summarised on the website of the Revenue Commissioners:

"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."

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 set out below:

- Monday to Thursday - 10.30 a.m. to 11.30 p.m.
- Friday and Saturday - 10.30 a.m. to 12.30 a.m.
- Sunday - 12.30 p.m. to 11.00 p.m.

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.

We consider that the proposal in relation to licensing the *Button Factory* will lead, in planning terms, to a significantly intensified and materially different use of the premises, which is not provided for under the terms of the planning permission, which differs significantly from the existing and permitted uses and for which no exemption is provided under the Planning and Development Acts or the associated Planning and Development Regulations. Notwithstanding the existence of bar areas within the premises, the proposal would amount to a material change of use, which is not provided for under the terms of the planning permission.

The normal or recurrent use of the *Button Factory*, insofar as members of the public are concerned, is the holding of music performances on a regular basis, generally once or twice per week, with a concentration of performances at the weekends. In addition to this use, the ancillary uses include the *Rock 'N Roll Museum*, the rehearsal and sound training facilities and other culture related tenancies. Essentially, activities in the premises revolve around culture, in particular music. Incidental to the principal 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. We consider that this restriction on the sale of alcohol is a significant factor in relation to the existing and permitted land use character of the *Button Factory* in planning terms.

The reason for NOTTUB seeking the change in the liquor licence for the premises is not at all clear. Notwithstanding the proposed acquisition of a seven day licence, NOTTUB Ltd. have indicated to TBCT, via their solicitor, that they do not intend to trade from the premises as a public house and will continue to use the premises as a theatre/venue. They have asserted that the use of the premises "*....will continue to be a theatre, but with the facility to serve alcohol without such service being connected to a 'performance'*"[1]. However, they have otherwise not provided any reason for seeking a seven day licence.

[1] *Legal opinion submitted on behalf of NOTTUB to TBCT.*

It therefore appears that the intention is to sell alcohol to the public in the relatively unconstrained fashion permitted under a seven day licence and without this being connected in any way to attendance at a performance.

In comparison with the existing and permitted uses of the premises, the pattern of use permissible within the constraints of a seven day licence is very different. The operation of the premises under a seven day publican's licence would permit the serving of alcohol at other times and for longer periods to persons not necessarily attending a performance in the *Button Factory*. It would facilitate an increase both in the hours during which alcohol can be served and in the class of persons to whom it may be served i.e. persons not attending a music performance. In comparison, a theatre Publican's Licence (Ordinary) Theatre limits the sale of alcohol only to persons attending a performance (and staff) and for the period 30 minutes before the commencement of the performance and for 30 minutes afterwards.

The result of such change would be to change the character of the use of the premises and to raise new issues in terms of the proper planning of the area. The primary reason for visiting the premises would change, the primary activity carried out by visitors to the premises would change from a cultural one to simply drinking alcohol and the hours during which this activity would be carried out would change. These changes would raise issues particularly in respect of protection of the amenity of the area, including of its residents, due to a different pattern of noise and disturbance (due to greater numbers of people and expanded hours of operation) and increased anti-social behaviour associated with alcohol consumption.

This would amount to both an intensification of use and a material change of use in planning terms. Even accepting the stated intention of NOTTUB in relation to the operation of the premises in the future, it should be pointed out that the principal of NOTTUB may not always be the person in charge of the premises or, indeed, at some future time NOTTUB may sell the building to another, with a seven day licence. Therefore, notwithstanding the stated intention of NOTTUB, there would be nothing to prevent the premises being operated as a *"super pub"* in the future.

The proposed change in the licensing of the *Button Factory* would create a precedent potentially affecting a large number of venues and theatres in the vicinity and in the wider city centre. It would potentially contribute to anti-social problems, which would be a cause of serious concern to TBCT, given its overall role in Temple Bar, and to other businesses and residents in the area.

One test set by the Courts to determine if there is a material change of use is to consider the matters which the planning authority would take into account, if a planning application were made for the new use. If the matters of concern to the planning authority are materially different to those arising in the case of the original planning permission, it is evidence of a material change of use. Clearly, such is the case here, particularly given concerns regarding the number of licensed premises in Temple Bar and associated public order problems, noise and disturbance. It should be borne in mind that, in addition to the various cultural and entertainment undertakings in Temple Bar, there is also a substantial resident population. Notwithstanding that Temple Bar is located in the city centre, it is clearly a planning issue that the amenity of the area be sufficiently protected to permit residential use. The addition of a further premises in the area selling alcohol under a seven day licence, in comparison with the current operation of the premises as a music and cultural centre, with restricted and ancillary sale of alcohol under a theatre licence, would bring issues of increased noise and disturbance over longer hours and would constitute a significant change in planning terms.

This concern is borne out by examination of the legislation covering liquor licensing, wherein issues of maintaining public order are strongly associated with the sale of alcohol.[2] This is evident in alcohol-related crime in the city centre area, as attested to by the Gardaí (Irish Times 15th November 2017: *"Alcohol-related crime booms in Dublin as nightlife picks up"*). Unfortunately, Temple Bar has become particularly associated with such crime.

This aspect might also be considered in the light of the decision of the Courts in the case of *Carrickhall Holdings v Dublin Corporation* [1983] ILRM 268. In that instance, a hotel bar was changed to a public bar. 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 from a hotel bar licence to a seven day licence resulted in a change in the character of the use of the premises, amounting to a material change of use requiring planning permission.

Generally analogous issues were considered by An Bord Pleanála in a referral case under Section 5 of the Planning and Development Act (Ref.29S.RL2879). This concerned the question of the use of 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 into the relevant part of the premises arising from the 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.

We have set out above the reasons we consider that the first two of the Board's reasons apply in the case of the Button Factory. Examination of the relevant parts of the Planning and Development Act and Regulations shows there is no provision for exemption for change of use from theatre or concert hall to a public house.

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 or in the Planning and Development Regulations. But, these particular land uses are given explicit and distinct recognition in the regulations. The Planning and Development Regulations, 2001, as amended, clearly distinguish between a public house and a theatre / concert hall, as can be seen from the various references to these uses set out below:

- Article 5(1) of the Planning and Development Regulations includes *"public house"* as being encompassed within the term *"business premises"*.
- Also in Article 5(1): the definition of a *"shop"* specifically excludes a *"public house"*.

[2] For example, Sections 4-8 of the Intoxicating Liquor Act, 2003, are titled:
4 – *Supply of intoxicating liquor to drunken persons by non licensees*; 5 – *Offences by drunken persons*;
6 – *Duty of licensee to preserve order*; 7 – *Disorderly conduct*.

- Article 5(1): the term *"business premises"* is stated not to encompass an *"excluded premises"*.
- Under Article 5(1) the term *"excluded premises"* encompasses:
  "any premises used for purposes of a religious, educational, cultural, recreational or medical character".
  We submit that, as a theatre is used for cultural or recreational purposes, it can be considered to fall within the scope of such *"excluded premises"*.
- Article 201 of the Planning and Development Regulations concerns licensing under Section 254 of the Planning and Development Act and, in particular, at paragraph (b) deals with licensing of tables and chairs outside a hotel, restaurant, **public house** or other establishment where food is sold for consumption on the premises.
- The Planning and Development Regulations, Schedule 2, Part 1, Class 14, sets out certain exemptions in relation to a limited list of changes of use, including a change of use from use as a *"public house"* to use as a shop.
- The Planning and Development Regulations, Schedule 2, Part 2, Class 6 sets out certain exemptions in respect of advertisements relating to, inter alia, a *"public house"*.
- The Planning and Development Regulations, Schedule 2, Part 4, sets out certain Classes of Use. Included in Class of Use 11 are:
  (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.

We submit that the Planning and Development Regulations, 2001, as amended, make a clear distinction between a public house and a theatre / concert hall. Furthermore, it is clear there is no provision for exempted development status for any change from one of these uses to the other.

Conclusion

If one accepts the argument put forward by NOTTUB to the effect that there is no material change of use intended, one must also take account of the remarks of the Court in the case of *Re Tivoli Cinema*. In that case, 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. On this basis and notwithstanding the case made by NOTTUB that no change of use is intended, if it were accepted 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.

We submit that, if the proposal is carried out to use the *Button Factory* with a publican's seven day licence in lieu of the use of the premises with a Publican's Licence (Ordinary) Theatre, that:

(a) An additional use, namely a public house, would be introduced into the premises arising from the 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 a theatre or concert hall to a public house under the exempted development provisions of the Planning and Development Regulations, 2001, as amended.

Accordingly, we submit the proposal to use the *Button Factory* 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.

We invite the City Council to issue a declaration to this effect. We attach two copies of a map (1:1000 scale) showing the location of the premises in question. We enclose fee of €80.

Yours faithfully

Karl Kent

Declaration and referral on development and exempted development

Section 5 of the Planning and Development Act 2000

EXPP: 0359/17

Location: Temple Bar Music Centre, Curved Street, Dublin 2

Date Received: 22/09/2017

Proposal:

EXPP: EXPP: The purpose of this request for a declaration is to confirm our understanding that no act of development would occur in respect of the following:

- Operation of a guided tour of a venue does not result in a material change of use of a venue.

In effect, we are principally seeking to confirm 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.

Site Description:

The subject site is named the Button Factory which is a 4 storey, part 5 storey music venue located between Eustace St and Temple Lane with a main entrance onto Curved St

Planning History:

Enforcement File: E0048/16

Erection of digital signs & use of basement as museum

Enforcement File: E0262/13

Change of Use

The relevant facts are as follows:

Section 9 (1) of the Planning and Development Act 2000 states: If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

In assessing Section 5 applications regard is given to Section 3 (1):

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.

Pr.1 S.2 "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 4 (1) (h) of the Planning and Development Act 2000 (as amended) states: The following shall be exempted development for the purposes of this Act-
"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"

Appraisal

The Applicant has stated that no development is proposed and the primary use of the subject site as a music venue will not change. The proposed tour will provide a showcase of the rehearsal rooms, the music venue, the recording studios and the music school. The Applicant states that the tour involves visiting each of the elements of the Temple Bar Music Centre to see how they operate and that the tour will take place on an occasional and intermittent basis.

Based on the evidence submitted by the Applicant it would appear that the concept of providing occasional and intermittent tours of the music venue may be ancillary to the main use as a music venue. It could be argued that the proposed tour does not appear to be a guide of a museum but rather a tour which showcases the operation of an existing music venue.

It is considered however that further information is required, in the interests of clarity/consistency and neighbouring amenity, regarding the frequency and duration of the proposed tours, including the perceived numbers of visitors per tour. This can be clarified by Additional Information Request

Additional Information Request and Response

The following AI was requested and a response was submitted on 1st November 2017 (AI request is highlighted in bold)

In the interests of clarity and consistency and neighbouring residential amenity, the Applicant is requested to provide Additional Information regarding the times, frequency and duration of the proposed tours of the venue, including the perceived numbers of visitors per tour.

The Applicant has submitted documentation which states that the operation of a tour would constitute approx 5% of the total turnover, 5% of the daily capacity and 2% of the hourly capacity for the facility. The remaining capacities are divided between use of the main venue, the sound training college and rehearsal room, all of which are established uses within the facility.

Based on the Additional Information received, the concept of providing partial and intermittent tours of the music venue would be ancillary to the main use as a music venue, is considered to be exempted development and would not require planning permission.

Recommendation:

I recommend that the referrer be advised that having regard to the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001, the Planning Authority has considered that based on the submitted plans, the proposal would be exempted development. Issue declaration confirming that the submitted proposal is acceptable under exempted development legislation.

Garrett Hughes
Senior Executive Planner

Comhairle Cathrach
Bhaile Átha Cliath
Dublin City Council

Planning Registry & Decisions, Planning Department
Civic Offices, Wood Quay, Dublin 8

Clárlann / Cinntí Pleanála
An Roinn Pleanála agus Forbartha, Clárlann / Cinntí
Oifigí na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8
Registry T: (01) 222 2149 / F: (01) 222 2675
Decision T: (01) 222 2288 / F: (01) 222 2271

07-Sep-2015

Patrick M. Kerr Architect
39A, Maynooth Road
Celbridge
Co. Kildare

Application Number	0269/15
Application Type	Section 5
Registration Date	12-Aug-2015
Decision Date	04-Sep-2015
Decision Order No.	P2685
Location	5, Aston Quay, Dublin 2
Proposal	EXPP: Question of 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, generally as set out on the enclosed report.
Applicant	Dermot O'Neill

NOTIFICATION OF DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

In pursuance of its functions under the Planning & Development Acts 2000 - 2013, Dublin City Council has by order dated 04-Sep-2015 decided to issue a Declaration that the above proposed development is EXEMPT from the requirement to obtain planning permission under Section 32 of the Planning & Development Acts 2000 - 2013.

Reasons & Considerations:

It is recommended that the applicant be advised that given that the proposed use will remain as a bar and licensed premises that the there is therefore no change of use occurring. The proposed works to separate the two buildings at basement level are internal only and are considered exempt under Section 4(1)(h) of the Planning and Development Act 2000-2013.

Signed on behalf of Dublin City Council

Ken Kelly
for Assistant Chief Executive

NOT1section5(Grant Exemption)

U. Expp

B-8. 03-09-2015.

EXPP: 0269/15
Section 5 received on: 12/8/15
Applicant: Dermot O'Neill
Address: 5, Aston Quay, Dublin 2

Proposed Development:
Question of 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, generally as set out on the enclosed report exempted development.

Zoning:
In the 2011 – 2017 Dublin City Development Plan the site is 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.*"

The Quays is a conservation area.

Legislative context:
Planning & Development Act 2000 (as amended)

In Section 2 (1) of the Act "works" are interpreted as including "*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure*".

Section 3 (1) of the 2000 Planning and Development Act states as follows:-

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

(2) For the purpose of subsection (1) and without prejudice to the generality of that subsection –
(a) where the structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or
(b) where land becomes used for any of the following purposes –
(i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods,
(ii) the storage of caravans or tents, or,
(iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders waste, rubbish or debris,
The use of the land shall be taken as materially changed."

Planning History:
3782/05: Planning permission granted for a development involving amendments to previously approved planning permission Register Reference No. 3264/04, to include change of use at basement level of previously approved staff accomodation & stores to extended nightclub, customer facilities, staff accommodation & stores. Also providing for revised fire escape

stairs to rear street level, & revised rear elevation treatment, & all associated works; all at Viper Room, No 4 & 5 Aston Quay, Dublin 2 on behalf of Dovedon Ltd.

3264/04: Planning Permission granted for development involving change of use at basement level No. 4 Aston Quay from existing stores to new toilets, cloakroom, staff accomodation, stores, fire stairs and provision of new access through to basement level No. 5 Aston Quay. Also the removal of ground floor level toilets and relocation of disabled toilet all at the Viperoom, 4 and 5 Aston Quay, Dublin 2 on behalf of Dovedon Ltd.

Report/Assessment:
This Section 5 application relates to No. 5 Aston Quay. As per planning application drawings for 3782/05 the ground and basement floor plan for no. 5 indicate a bar/nightclub. No. 5 Aston Quay is connected to no. 4 Aston Quay at basement level. No. 4 Aston Quay are indicated in these drawings as extension to night club at basement level and as a shop at ground floor level.

The question in this Section 5 application has two parts, firstly whether or not the use of the ground floor and basement floor of no.5 Aston Quay as a Licensed Premises in its own right not connected to No. 4 Aston Quay constitute development and if so can it be considered exempt. Secondly, does the re-insertion of the division from no.4 and no.5 Aston Quay at basement level so that no. 5 is completely separate to no. 5 constitute a material change of use to the building or comprise development works which require planning permission.

The applicant outlined in the supporting documentation that the established use of the ground floor and basement floors of no.5 are bar and nightclub use and this is confirmed by the permitted developments 3782/05 and 3264/04. The proposed use will remain as a bar and licensed premises. The Applicant argues that the there is therefore no change of use occurring and therefore does not amount to development.

The physical separation of no. 4 and 5 Aston Quay will involve the blocking up of two openings at basement level along the shared party wall between no. 4 and 5. These works will involve the construction of a suitable fire resistant concrete block wall into the existing openings. These walls will be made good to match the adjoining premises. It is considered that these works do constitute development however the applicant contends that given that the works are to the interior of the structure only and that the works are for the improvement or other alteration of the structure that they are considered exempt under 4(1)(h) of the Planning and Development Act 2000.

Having reviewed the supporting documentation it is considered that there is no change of use given that the existing use of the ground and basement floor of no. 5 Aston Quay are a licensed premises and shall continue to be that.

The proposed works to separate the two buildings at basement level are internal only and could be assessed under Section 4(1)(h) of the Planning and Development Act 2000-2013, which states:
"(h) Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures."

It is therefore considered that the proposed use and existing/permitted use are the same and therefore does not constitute a change of use and the proposed works fall under Section 4(1)(h) of the Planning and Development Act 2000-2013.

Recommendation:
It is recommended that the applicant be advised that given that the proposed use will remain as a bar and licensed premises that the there is therefore no change of use occurring. The proposed works to separate the two buildings at basement level are internal only and are considered exempt under Section 4(1)(h) of the Planning and Development Act 2000-2013.

Audrey Taylor 2/9/15.
Executive Planner

02/9/15

patrick m. kerr architect

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Monday 10th August 2015

Planning Registry Section
Dublin City Council
Block 4, Floor 0
Civic Offices
Woodquay
Dublin 8

RE: SECTION 5 REFERENCE IN RESPECT OF GROUND & BASEMENT FLOORS, NO. 5 ASTON QUAY

Dear Sir or Madam,

On behalf of Mr. Dermot O'Neill, owner of No. 5 Aston Quay and in accordance with Section 5 of the Planning & Development Act 2000 (as amended) we formally request the Local Authority to declare whether or not the work as described below is considered as development and if so whether or not it is an exempted development, and therefore by extension that Planning Permission is not required for same.

We note that section 5 states that

> *"5.—(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the pre- scribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter."*

In accordance with Section 5 we set out below details of the nature and extent of the development in question and our reasons for contending that same is an exempted development. In addition to this correspondence, and in support of this reference we enclose herewith the following:

- Completed Application Form x 1 copy
- Site location map x 2 copies
- Cheque in the sum of €80.00 being the prescribed fee payable

DESCRIPTION OF THE PROPERTY AND RELEVANT HISTORY:

The property relevant to this Section 5 reference is No. 5 Aston Quay, a mid terrace 4 storey over basement, 3 bay building with access from the front (Aston Quay) and secondary access for escape/deliveries to the rear (Bedford Row), finished with a flat roof. It has an attractively proportional brick facade with stone banding with a traditional timber shopfront typical of the area. The building forms part of a larger

block originally designed in a formal symmetrical larger facade arrangement but which has been broken up somewhat in the past and as a result has lost some of its original coherence. The building currently contains the following accommodation:

Basement Level:	Bar & Night Club
Ground Floor:	Bar
First Floor:	Office/Commerical accommodation
Second Floor:	Office/Commerical accommodation
Third Floor:	Office/Commerical accommodation

The ground and basement floors are connected and linked together, and used as a single unit, and are accessed separately from the upper floors. The upper floors are accessed via a separate doorway and staircase to the side, typical of such buildings. Currently the ground and basement are in use as a bar and nightclub/music venue, and the basement floor is interconnected to the adjoining basement floor at No. 4 Aston Quay. The upper fbors are vacant but were recently used as office/commercial space, and it is intended that they will continues to be used as such.

PLANNING HISTORY:

The building has a number of planning applications associated with it as follows:

File ref: no.: 858/90

Description:

Erect new shopfronts & carry out minor modifications to the facades of 1-6 Aston Quay.

Decision:

Permission granted, however no further information was available in respect of this application.

File ref: no.: 1538/92

Description:

Alterations to front and rear ground floor facades and change of use of basement from retail to night club.

Decision:

No decision was made. Further notice requested under Article 17 requested (i.e. Requested site notice be erected), Additional info received Oct 199 and subsequent Clarification requested, application appeared to have been abandoned.

From a review of the application and the documents and drawings available (albeit of very poor quality), it appears that the premises was already being used as a bar & restaurant at ground floor level.

File ref: no.: 3264/04

Description:

Planning Permission is sought for development involving change of use at basement level No. 4 Aston Quay from existing stores to new toilets, cloakroom, staff accommodation, stores, fire stairs and provision of new access through to basement level No. 5 Aston Quay. Also the removal of ground floor level toilets and relocation of disabled toilet all at the Viperoom, 4 and 5 Aston Quay, Dublin 2

Decision:

Permission Granted 15 Oct 2004 subject to 3 conditions: 1. Insofar as the Planning & Development Act 2000 and the Regulations made thereunder are concerned, the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application, save as may be amended by the plans,

particulars and specifications lodged as unsolicited additional information on 5th August 2004 and as additional information on 20th September 2004 and save as may be required by the conditions attached hereto. For the avoidance of doubt, this permission shall not be construed as approving any development shown on the plans, particulars and specifications, the nature and extent of which has not been adequately stated in the statutory public notices.
2. All of the acoustic treatment works outlined in detail in the Decibel Noise Control report, submitted as unsolicited additional information on 5th August 2004, shall be carried out as part of the development. (For the avoidance of doubt, such works shall include lining of the structural wall of the northernmost staircase between basement and ground floor levels in 5 Aston Quay, as stated on page 6 of the report.)
3. Prior to the commencement of any works the applicant shall contact the Environmental Health Section of Dublin City Council with regard to the development, shall ascertain any requirements they may have and shall comply with such requirements in full.
A copy of this decision is attached at Appendix B.

From a review of the application and the documents and drawings available it is clear that the premises was at the time being used as a bar at ground floor level and as a bar & night club at basement level in no. 5 Aston Quay. The bulk of the application related to works to the basement at No. 4, the adjoining premises (and not the subject matter of this reference).

File ref: no.: 3782/05
Description:
Planning permission is sought for a development involving amendments to previously approved planning permission Register Reference No. 3264/04, to include change of use at basement level of previously approved staff accommodation & stores to extended nightclub, customer facilities, staff accommodation & stores. Also providing for revised fire escape stairs to rear street level, & revised rear elevation treatment, & all associated works; all at Viper Room, No 4 & 5 Aston Quay, Dublin 2 on behalf of Dovedon Ltd.
Decision:
Permission granted Nov 2005 subject to 5 conditions.
A copy of this decision is attached at Appendix B.
Again, this application is a very similar application to 3264/04 above and the use of the ground fbor and basement of No. 5 is clearly stated as being Bar and Bar/Nightclub use.

DESCRIPTION OF THE QUESTIONS & CONSIDERATIONS FORMING THE SUBJECT MATTER OF THIS SECTION 5 REFERENCE:

The questions that now arise relate to two aspects of the ground and basement floors of No. 5 Aston Quay only, and can be set out as follows:

1. Does the use of the Ground Floor and Basement Floor of No. 5 as a Licensed Premises (i.e. Public House), in its own right not connected to No. 4 constitute development and if so can it be considered as exempted development (i.e. It is proposed to fully separate No. 4 & No. 5 Aston Quay).
2. Furthermore, does the re-insertion of the division from No.4 and No. 5 at basement level, so that No. 5 is completely separate from No.4, constitute either a material change of use to the building or comprise development

works which require a grant of planning permission, or can they be considered as exempted development.

It is noted that the premises currently has the benefit of a Publicans Theatre License and the owner now wishes to change this to a full Publicans License, which, in itself is not a planning matter and only relates to the type of Excise License attached to the property.

It is our contention, as demonstrated below, that the development as described above is in fact not development and therefore is exempted from the requirements to obtain planning permission. Also, regarding the physical works proposed, such works are accepted as development but can be considered as Exempted Development and as such does not require that Planning Permission be obtained. On behalf of our client, we respectively ask the Planning Authority to confirm this.

BASIS OF EXEMPTED DEVELOPMENT:

In assessing whether or not something is or is not to be considered as exempted development it must first be established if an action or activity is in fact development in the first instance.

Section 3.(1) of the Planning Act 2000 defines development as follows:

> *"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."*

Therefore in reviewing the question at hand, there appears to be two areas to consider, first the question of the use of the ground and basement floors (namely the use and whether or not there is a material change to this use) and second, the works required to separate the ground and basement floors of No. 5 from No. 4 Aston Quay.

Material Change of Use:

Regarding the matter of use, it is clear that the permitted use of the ground and basement floors of No. 5 are Bar and Nightclub use. This is clearly stated in both the continued and establish uses of the building and also confirmed by the permitted developments as outlined in files ref: no. 3782/05 & 3264/04. The use now intended does not change this existing use. The proposed use will remain as a bar and licensed premises. In fact the only change to this will relate to the change in the type of Publican's License, which in itself is not a planning matter. Notwithstanding, our client does require from the Planning Authority confirmation that this is indeed the case (hence this Section 5 reference).

Therefore, as there is no change of use (material or otherwise) occurring, then with reference to Section 3.(1) of the 2000 Act (above) this does not actually amount to development, and therefore the question of exempted development does not arise (as it is not development) and the requirement to obtain a prior grant of Planning Permission does not arise.

Physical works & separation of the basement floors:

As outlined above, there is, we contend, no change of use in the existing and proposed uses, as they are remaining the same, namely bar & nightclub use.

The other matter to consider is the actual physical alterations to the premises to separate it from No. 4 Aston Quay. This will involve the blocking up of two openings at basement level along the shared party wall between No. 4 & No. 5 (as indicated in red on the attached drawing at Appendix A). These works will involve the construction of a suitable fre resistant concrete block wall into the existing openings. Theses walls will be made good to match the adjoining premises as necessary. This is the extent of the works proposed. Notwithstanding the very limited nature of these works, being *works on, in, over or under land* they do fall under the category of development as set out in 3(1) above. Therefore we must consider how they would be argued as being exempted development.

We strongly contend that the development described above, namely the minor construction works, are in fact an exempted development as defined in Section 4(1)(H) of the Planning & Development Act 2000, which states:

> *"(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;"*

We note that the works in question are to the interior of the structure, and that they are works for the improvement or other alteration of the structure. Therefore the works in question satisiofy the tests as set out in Section 4(1)(H) of the 2000 Act and can be considered as exempted development and therefore do not require that Planning permission be obtained.

CONCLUSION:

In summary, we contend in the strongest way that we have comprehensively demonstrated that the use of the premises is not changing and as such does not comprise development and therefore does not require that Planning Permission be obtain. Furthermore, the physical alterations being undertaken, while they are considered development, these works as described above are in fact exempted development as set out under Section 4(1)(H) of the Planning & Development Act 2000, being minor internal alterations only.

We respectfully ask the Planning Authority to confirm same.

I trust that the above is in order and that a successful decision will be forthcoming in the near future. In the meantime however if you have any queries or require any further information please do not hesitate to contact me.

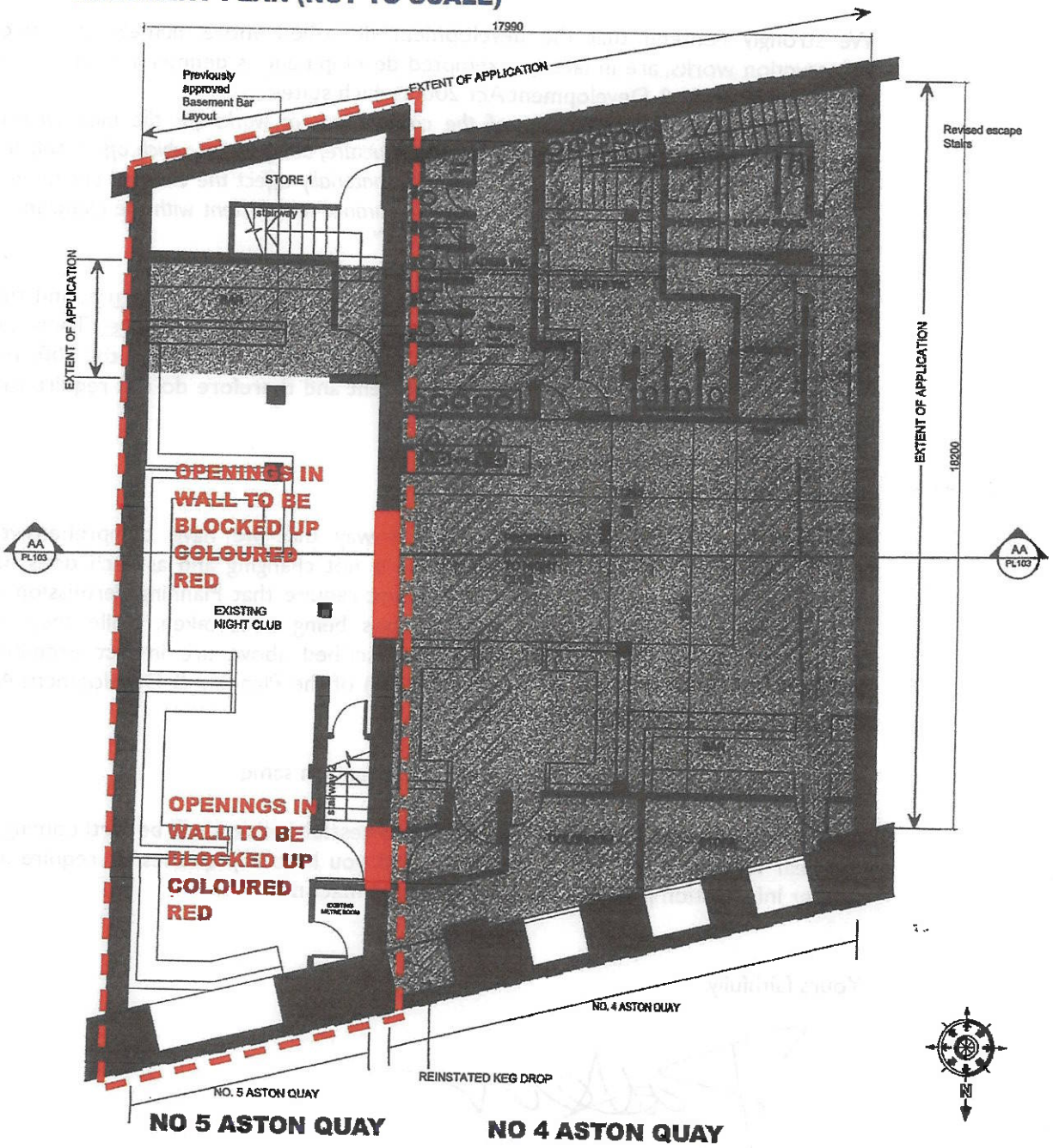
Yours faithfully,

Patrick M. Kerr.Architect
DIP.ARCH B.ARCH.SC.DIP.CONST.LAW M.R.I.A.I.

APPENDIX A:

Sketch of proposed works to the basement party wall, namely the blocking up of the openings connecting both basement properties and reinstatement of the party wall:

BASEMENT PLAN (NOT TO SCALE)



APPENDIX B:

Copies of Previous Planning Permissions and relevant planners reports on the property, namely file ref: no's:

- **3264/04**
- **3782/05**

Dublin City Council
Comhairle Cathrach Bhaile Átha Cliath

Planning Registry & Decisions, Planning Department
Civic Offices, Wood Quay, Dublin 8

Clárlann / Cinntí Pleanála
An Roinn Pleanála agus Forbartha, Clárlann / Cinntí
Oifigí na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8
T: (01) 672 2149 / F: (01) 670 7861

22/11/2004

John Duffy Architecture
24, The Crescent
Monkstown
Co. Dublin

THIS IS AN IMPORTANT LEGAL DOCUMENT AND SHOULD BE PLACED WITH YOUR TITLE DEEDS

Application No.	3264/04
Registration Date	20-Sep-2004
Decision Date	15-Oct-2004
Decision Order No	P5298
Date of Final Grant	22-Nov-2004
Grant Order No	P5862
Location	The Viperoom, 4 & 5, Aston Quay, Dublin 2
Proposal	Planning Permission is sought for development involving change of use at basement level No. 4 Aston Quay from existing stores to new toilets, cloakroom, staff accomodation, stores, fire stairs and provision of new access through to basement level No. 5 Aston Quay. Also the removal of ground floor level toilets and relocation of disabled toilet all at the Viperoom, 4 and 5 Aston Quay, Dublin 2 on behalf of Dovedon Ltd.
Applicant	Dovedon Limited 5, Aston Quay, Dublin 2
Application Type	Permission

NOTIFICATION OF GRANT OF PERMISSION

PERMISSION for the development described above has been granted under the Planning & Development Act 2000 subject to the following conditions.

CONDITIONS AND REASONS FOR CONDITIONS

---

1. Insofar as the Planning & Development Act 2000 and the Regulations made thereunder are concerned, the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application, save as may be amended by the plans, particulars and specifications lodged as unsolicited additional information on 5th August 2004 and as additional information on 20th September 2004 and save as may be required by the conditions attached hereto. For the avoidance of doubt, this permission shall not be construed as approving any development shown on the plans, particulars and specifications, the nature and extent of which has not been adequately stated in the statutory public notices.
Reason: To comply with permission regulations.

2. All of the acoustic treatment works outlined in detail in the Decibel Noise Control report, submitted as unsolicited additional information on 5th August 2004, shall be carried out as part of the development. (For the avoidance of doubt, such works shall include lining of the structural wall of the northernmost staircase between basement and ground

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Dublin City Council
Comhairle Cathrach Bhaile Átha Cliath

Planning Registry & Decisions, Planning Department
Civic Offices, Wood Quay, Dublin 8

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Oifigí na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8
T: (01) 672 2149 / F: (01) 670 7861

22/11/2004

floor levels in 5 Aston Quay, as stated on page 6 of the report.)
Reason: To prevent noise pollution from the premises in the interests of the amenities of other property in the vicinity.

3. Prior to the commencement of any works the applicant shall contact the Environmental Health Section of Dublin City Council with regard to the development, shall ascertain any requirements they may have and shall comply with such requirements in full.
Reason: To prevent noise pollution from the premises in the interests of the amenities of other property in the vicinity.

Signed on behalf of the Dublin City Council E. FitzPatrick
for Assistant City Manager

Date 22/11/04.

YOUR ATTENTION IS DRAWN TO THE REQUIREMENTS OF THE ATTACHED 'CODES OF PRACTICE'

N.B. IT SHOULD BE CLEARLY UNDERSTOOD THAT THE GRANTING OF PLANNING PERMISSION DOES NOT RELIEVE THE DEVELOPER OF THE RESPONSIBILITY OF COMPLYING WITH ANY REQUIREMENTS UNDER OTHER CODES OF LEGISLATION AFFECTING THE PROPOSAL AND THAT A PERSON SHALL NOT BE ENTITLED BY REASON OF A PLANNING PERMISSION TO CARRY OUT ANY DEVELOPMENT.

0301 - 06

Dublin City Council
Comhairle Cathrach Bhaile Átha Cliath

Planning Registry & Decisions, Planning Department
Civic Offices, Wood Quay, Dublin 8

Clárlann / Cinntí Pleanála
An Roinn Pleanála agus Forbartha, Clárlann / Cinntí
Oifigí na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8
Registry T: (01) 222 2149 / F: (01) 222 2675
Decision T: (01) 222 2288 / F: (01) 222 3097

09/11/2005

JOHN DUFFY DESIGN GROUP
Received 11/11/05
Attention
C. C.

John Duffy Architects
23/24, The Crescent
Monkstown
Co Dublin

THIS IS AN IMPORTANT LEGAL DOCUMENT AND SHOULD BE PLACED WITH YOUR TITLE DEEDS

Application No.	3782/05
Registration Date	13-Jul-2005
Decision Date	06-Sep-2005
Decision Order No	P4551
Date of Final Grant	09-Nov-2005
Grant Order No	P5564
Location	Viper Room, No 4 & 5 Aston Quay, Dublin 2
Proposal	Planning permission is sought for a development involving amendments to previously approved planning permission Register Reference No. 3264/04, to include change of use at basement level of previously approved staff accomodation & stores to extended nightclub, customer facilities, staff accommodation & stores. Also providing for revised fire escape stairs to rear street level, & revised rear elevation treatment, & all associated works; all at Viper Room, No 4 & 5 Aston Quay, Dublin 2 on behalf of Dovedon Ltd.
Applicant	Dovedon Limited 5, Aston Quay, Dublin 2
Application Type	Permission

NOTIFICATION OF GRANT OF PERMISSION

PERMISSION for the development described above has been granted under the Planning & Development Act 2000 subject to the following conditions.

CONDITIONS AND REASONS FOR CONDITIONS

(1): Insofar as the Planning and Development Act 2000 and the Regulations made thereunder are concerned the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application, save as may be required by the conditions attached hereto. For the avoidance of doubt, this permission shall not be construed as approving any development shown on the plans, particulars and specifications, the nature and extent of which has not been adequately stated in the statutory public notices.

Reason: To comply with the permission regulations.

(2): The conditions attached to the grant of planning permission under register reference number 3264/04 shall be

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Dublin City Council
Comhairle Cathrach Bhaile Átha Cliath

Planning Registry & Decisions, Planning Department
Civic Offices, Wood Quay, Dublin 8

Clárlann / Cinntí Pleanála
An Roinn Pleanála agus Forbartha, Clárlann / Cinntí
Oifigí na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8
Registry T: (01) 222 2149 / F: (01) 222 2675
Decision T: (01) 222 2288 / F: (01) 222 3097

09/11/2005

complied with, save as amended to conform with revisions indicated in the plans lodged with Dublin City Council in connection with this application.

Reason: In the interest of proper planning and sustainable development.

(3): The following requirements of the Drainage Division, Dublin City Council, shall be complied with:

a) The developer shall comply with the requirements of the Code of Practice for Development Works - Drainage.

b) All Drainage shall be brought to Ground Level before being discharged by gravity from the site to the Public Sewer.

c) Developers are not permitted to connect to the Public Sewerage System without written permission from the Drainage Division. Any unauthorised connections shall be removed by the Drainage Division at the Developer's expense.

d) The drainage for the proposed development shall be designed on a completely separate system with a combined final connection discharging into the public combined sewer system.

e) All private drain fittings such as, downpipes, gullies, manholes, Armstrong Junctions, etc. are to be located within the final site boundary.

f) A grease trap shall be installed on the waste outlet from the kitchen sink subject to Dublin City Council requirements. Please contact the Water Pollution Control Section of Dublin City Council. The use of food macerators/food grinders are not acceptable.

Reason: In the interest of the proper planning and development of the area.

4. This development shall not be carried out without the payment of a development contribution.
REASON: Investment by Dublin City Council in Local Authority works has facilitated and will facilitate the proposed development. It is considered appropriate and reasonable that the developer should contribute to the cost of same.

5. Before this development commences a financial contribution in the sum of Euro 32,068.58 shall be paid by the applicant to Dublin City Council, in accordance with the Development Contribution Scheme made under Section 48 of the Planning & Development Act 2000.
This contribution shall be payable at the Tender Price Index adjusted rate pertaining to the year in which implementation of this planning permission is commenced, as provided for in the Development Contribution Scheme.

REASON : Investment by Dublin City council in public infrastructure and facilities that has been provided, and will be provided for the benefit of the proposed development.

Signed on behalf of the Dublin City Council E. FitzPatrick
for Assistant City Manager

Date 9/11/05

YOUR ATTENTION IS DRAWN TO THE REQUIREMENTS OF THE ATTACHED 'CODES OF PRACTICE'

N.B. IT SHOULD BE CLEARLY UNDERSTOOD THAT THE GRANTING OF PLANNING PERMISSION DOES NOT RELIEVE THE DEVELOPER OF THE RESPONSIBILITY OF COMPLYING WITH ANY REQUIREMENTS UNDER

New ctd. 2. GI Fees Levy Rec'd 07/09/05 SB

PLANNING & DEVELOPMENT DEPARTMENT
Date: 05-Sep-2005

DEPUTY PLANNING OFFICER

APPLICATION NO.	3782/05
PROPOSAL	Planning permission is sought for a development involving amendments to previously approved planning permission Register Reference No. 3264/04, to include change of use at basement level of previously approved staff accomodation & stores to extended nightclub, customer facilities, staff accommodation & stores. Also providing for revised fire escape stairs to rear street level, & revised rear elevation treatment, & all associated works; all at Viperoom, No 4 & 5 Aston Quay, Dublin 2 on behalf of Dovedon Ltd.
LOCATION	SB Viperoom, No 4 & 5 Aston Quay, Dublin 2
APPLICANT	Dovedon Limited 5, Aston Quay, Dublin 2
DATE LODGED	13-Jul-2005
ZONING	
APPLICATION TYPE	Permission

HM/MC

Site Inspections

16th & 29th August 2005.

Dublin City Development Plan 1999 Zoning
Zone Z5, the objective of which is 'to consolidate and facilitate the development of the central area and to identify, reinforce and strengthen and protect its civic design character and dignity'.

The Quays is a conservation area.

Interdepartmental Reports
Drainage – No objection report attached.

Representations
No Objections.

Planning History
Planning Reg. Ref. Number 3264/04 granted permission for

- Change of use of the basement of 4 Aston Quay from storage associated with the ground floor retail unit, to customer toilets, cloakroom, offices, bottle store, cold room, staff accommodation and fire stairs associated with the Viperoom at basement and ground floor level in the adjoining building (5 Aston Quay);
- Creation of 2 no. openings between the basements of 4 and 5 Aston Quay; and
- Removal of the existing toilets and relocation of the disabled toilet at ground floor level in the existing Viperoom premises (5 Aston Quay).

Appraisal
The proposed development is located on part of the ground floor and basement of 3 & 4 Aston Quay which is zoned Z5 in the Development Plan. The use is permitted within this zone and there is an earlier grant of permission on the site. There are no external changes proposed.

The present proposed development comprises a redesign of the previously approved ground floor and basement layout for the Viperoom Nightclub.

On the ground floor part of the permitted bar (circa 30 sq.m.) is being changed over to storage and disabled w.c. In the basement there is extensive to circulation/lobby space, bottle storage, office/strong room and male/female changing facilities. Here the area of ladies and men's toilets is being maintained but much office/storage/circulation space is being given over to dancing. The rearrangement of space will give a net increase of dance/bar floor area of about 40sq.m.

The arrangements for refuse disposal and deliveries will remain as set out in the original grant of planning permission. Noise penetration was dealt with in the earlier grant of permission.

Recommendation
Having regard to the zoning of the site, the permitted use and subject to the conditions set out below I recommend a grant of permission.

(1): Insofar as the Planning and Development Act 2000 and the Regulations made thereunder are concerned the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application, save as may be required by the conditions attached hereto. For the avoidance of doubt, this permission shall not be construed as approving any development shown on the plans, particulars and specifications, the nature and extent of which has not been adequately stated in the statutory public notices.

Reason: To comply with the permission regulations.

(2): The conditions attached to the grant of planning permission under register reference number 3264/04 shall be complied with, save as amended to conform with revisions indicated in the plans lodged with Dublin City Council in connection with this application.

Reason: In the interest of proper planning and sustainable development.

(3): The following requirements of the Drainage Division, Dublin City Council, shall be complied with:

a) The developer shall comply with the requirements of the Code of Practice for Development Works - Drainage.

b) All Drainage shall be brought to Ground Level before being discharged by gravity from the site to the Public Sewer.

c) Developers are not permitted to connect to the Public Sewerage System without written permission from the Drainage Division. Any unauthorised connections shall be removed by the Drainage Division at the Developer's expense.

d) The drainage for the proposed development shall be designed on a completely separate system with a combined final connection discharging into the public combined sewer system.

e) All private drain fittings such as, downpipes, gullies, manholes, Armstrong Junctions, etc. are to be located within the final site boundary.

f) A grease trap shall be installed on the waste outlet from the kitchen sink subject to Dublin City Council requirements. Please contact the Water Pollution Control Section of Dublin City Council. The use of food macerators/food grinders are not acceptable.

Reason: In the interest of the proper planning and development of the area.

Hugh Mannion

5-9-06

Levy 274.09 x 117.

€32,068.53.

6/9/06

In the matter of the Licensing Acts, 1833 to 1988, and in the matter of an application for a new licence under s. 3 of the Licensing (Ireland) Act, 1902. Application of **Tivoli Cinema Limited**

High Court 24th January, 1992

Licensing - Intoxicating liquor - New licence - Theatre - Premises - Suitability - Seven-day publican's on licence - Extinguishment and transfer to theatre sought - Planning - Permission - Area to be licensed greater than planning permission grant - Theatre licence - Lease - Extension - Cesser of trading - Whether capable of transfer - "Immediate vicinity" - Licensing (Ireland) Act, 1902 (1 & 2 Edw. 7, c.18), s. 3 - Intoxicating Liquor Act, 1927 (No. 15), ss. 20 and 21 - Intoxicating Liquor Act, 1943 (No. 7), s. 23.

Constitution - High Court - Jurisdiction - Interpretation - Acts of 1786 and 1931 - Whether re-enacted by Constitution of 1937 - Appeal from Circuit Court - Constitutionality - Whether jurisdiction in High Court to decide constitutionality of law - An Act for Regulating the Stage in the City and County of Dublin, 1786 (26 Geo. III, c. 47) - Adaptation of Enactments Act, 1931 (No. 34) - Constitution of Ireland, 1937, Article 34, s. 3, sub-ss. 1 and 5 and Article 50.

Section 3 of the Licensing (Ireland) Act, 1902, as amended by s. 23 of the Intoxicating Liquor Act, 1943, provides:-

> "Where by reason of the expiration of a lease, a licence for the sale of intoxicating liquor for consumption on or off the premises comprised in the lease is extinguished or surrendered, the licensing authority may, notwithstanding anything in this Act, grant a licence for suitable premises in the immediate vicinity of the premises to which the licence so extinguished or surrendered was attached."

The applicant had refurbished a former cinema in Francis Street, Dublin, and operated it as a theatre with a wine licence limited to its mezzanine floor and comprising ca. 800 sq. ft., just less than one-tenth of its total capacity. L. had operated a seven-day publican's on licence from 7 Dean Street, 472 yds. as the crow flies and 510 yds. by road from the theatre. L. renewed the licence to his premises in September, 1989, which were acquired by Dublin Corporation by compulsory purchase order in December, 1989. L. thereupon took a lease from Dublin Corporation for five months which expired on the 24th June, 1990, but did not trade from the premises during that time. By agreement made with the applicant on the 10th October, 1990, L. agreed to extinguish his licence and co-operate in its effective transfer to the theatre by an application initiated on the 14th September, 1990, for a new licence to the Circuit Court which was granted on the 13th November, 1990. Certain local residents who had objected in the Circuit Court appealed the decision to the High Court on the grounds that the new licence extended over the entire theatre in conflict with the grant of planning permission which limited use for drinking purposes to the mezzanine floor only; that the theatre was not in the

"immediate vicinity" of the previously licensed premises; that there were shortcomings in the expiration of L.'s lease and/or licence; that the theatre was unfit or unsuitable for the operation of a publican's on licence and that the number of existing licensed premises in the neighbourhood was sufficient. At the close of the hearing in the High Court, the case was adjourned for counsel to consider the impact, if any, of "an Act for Regulating the Stage in the City and County of Dublin, 1786" as adapted under statutory instrument under the Adaptation of Enactments Act, 1931, which essentially limited on pain of criminal conviction the operation of theatres to grantees of letters patent of the Governor General of the Irish Free State. The applicant contended that that Act was inconsistent with the provisions of the Constitution and accordingly, the Attorney General was notified under O. 60, r.1 of the Rules of the Superior Courts, 1986, and was represented by counsel at a further hearing.

Held by Lynch J., in allowing the objectors' appeal and refusing the application for a new licence under s. 3 of the Act of 1902, 1, that since the planning code and licensing code were separate and distinct codes of law, the fact that the area to be licensed might exceed that authorised for use by grant of planning permission did not prevent a new license from being granted for the greater area; however, breach of the planning code through use of the licence over a greater area could be restrained under the planning code and might then be used as a ground of objection to renewal of the licence.

2. That since the theatre and previously licensed premises were within the same civil parish and Roman Catholic parish and within the same historic liberty of St. Sepulchre and within easy walking distance of each other and within the same shopping or business and social area (and notwithstanding separation by a substantial traffic artery), the theatre was a "suitable premises in the immediate vicinity" of the previously licensed premises within the meaning of s. 3 of the Act of 1902.

3. That although L. had ceased trading at the end of June, 1989, his licence had been validly renewed in September, 1989, and was not extinguished until the expiration of the lease on the 24th June, 1990, and was thus a valid and appropriate licence within the meaning of s. 3 of the Act of 1902.

In re Irish Cinemas Ltd. (1967) 106 I.L.T.R. 17 applied.

4. That although it was common case that the premises were suitable for a theatre licence under ss. 20 and 21 of the Intoxicating Liquor Act, 1927 (restricting the sale of drink to half an hour before, half an hour after, and throughout theatrical performances), and taking into account the grant of planning permission made, the seven-day publican's on licence was not suitable for the entire theatre premises of so many thousand square feet.

5. That although there had been some daytime increase in working and shopping visitors off-setting a 40% decline in residential population between 1971 and 1986 of the area within a radius of 250 yds. of the theatre, and a reduction of five licensed premises down to fourteen within that 250 yd. radius, and although the theatre during performances attracted additional people who were not adequately catered for by other public houses in the neighbourhood, the seven-day publican's on licence was not appropriate for the increase of that nature and overall the number of licensed premises in the area was sufficient for the ordinary licensed trade of that area.

6. That the issue as to whether previous enactments survived the coming into force of the Constitution of Ireland, 1937, came under the settled principle that in the absence of exceptional circumstances, a court should not pronounce on the validity of any law where the case before it could be decided on other grounds and the court would decline

to decide a moot, including whether it had jurisdiction therefor on appeal from the Circuit Court.

McDaid v. Judge Sheehy [1991] 1 I.R. 1 applied.

Cases mentioned in this report:-

Carrickhall Holdings Ltd. v. Dublin Corporation (Unreported, High Court, McWilliam J., 30th June, 1982).

In re Charton Investments Ltd. (Unreported, High Court, O'Hanlon J., 4th August, 1987).

Dublin Corporation v. Mulligan (Unreported, High Court, Finlay P., 6th May, 1980).

Foyle Fisheries Commission v. Gallen [1960] Ir. Jur. Rep. 35.

In re Gorman [1971] I.R. 1; (1971) 105 I.L.T.R. 93.

Greaney v. Scully [1981] I.L.R.M. 340.

In re Guiney (1941) 75 I.L.T.R. 110.

In re Irish Cinemas Ltd. (1967) 106 I.L.T.R. 17.

Jaggers Restaurant v. Ahearne [1988] I.R. 308; [1988] I.L.R.M. 553.

In re Kitterick (1967) 105 I.L.T.R. 105.

Macklin v. Greacen & Co. [1983] I.R. 61; [1981] I.L.R.M. 315; [1982] I.L.R.M. 182.

McDaid v. Judge Sheehy [1991] 1 I.R. 1; [1991] I.L.R.M. 250.

In re McGrath (Unreported, High Court, O'Hanlon J., 4th August, 1987).

Morrison v. Commissioners of Customs [1927] N.I. 115.

Murnane v. Adams [1910] 2 I.R. 175.

In re Power Supermarkets Ltd. (1969) 103 I.L.T.R. 137.

In re Powers Supermarket Ltd. [1981] I.L.R.M. 270.

Prendergast v. Carlow County Council [1990] I.L.R.M. 749.

Rex v. Beesly, ex p. Hodson [1912] 3 K.B. 583.

Rex v. Bowman [1898] 1 Q.B. 663.

Rex v. Mann (1873) L.R. 8 Q.B. 235.

Rex (Beirne) v. Liston (1909) 44 I.L.T.R. 82.

Rex (Blackburn) v. Justices of Down [1905] 2 I.R. 74; (1904) 38 I.L.T.R. 67.

Rex (Bourke) v. Justices of Dublin [1903] 2 I.R. 429.

Rex (Wright) v. Cork Justices [1906] 2 I.R. 349; (1906) 40 I.L.T.R. 103.

In re Riordan [1981] I.L.R.M. 2.

Sligo Corporation v. Gilbride [1929] I.R. 351; (1929) 63 I.L.T.R. 105.

The State (Abenglen Properties) v. Corporation of Dublin [1984] I.R. 381; [1982] I.L.R.M. 590.
The State (Attorney General) v. Judge Durcan [1964] I.R. 279.
The State (Attorney General) v. Mangan [1961] Ir. Jur. Rep. 17.
The State (Browne) v. Feran [1967] I.R. 147.
The State (Reddy) v. District Justice Johnson (Unreported, High Court, McWilliam J., 31st July, 1980).
The State (Sheerin) v. Kennedy [1966] I.R. 379.
The State (Walsh) v. Judge Shannon (1936) 70 I.L.T.R. 149.
In re Walls (1968) 103 I.L.T.R. 113.
In re Ward [1966] I.R. 413; (1965) 101 I.L.T.R. 161.

Licensing application.

The facts are summarised in the headnote and are fully set out in the judgment of Lynch J., *post*. The appeal from the Circuit Court came on for hearing in the High Court on the 14th, 15th and 16th May, 1991, and the 17th January, 1992. The authorities listed in the case list, *supra*, were cited in argument.

Thomas C. Smyth S.C. (with him *Thomas Morgan*) for the applicant.

Philip O'Sullivan S.C. (with him *Constance Cassidy*) for the objectors.

Mary Finlay S.C. (with her *James Connolly*) for the Attorney General.

Cur. adv. vult.

Lynch J. 24th January, 1992

This is an appeal by some local inhabitants against an order of the Dublin Circuit Court granting to the applicants, Tivoli Cinema Limited, a certificate under s. 3 of the Licensing (Ireland) Act, 1902, in respect of portions of the applicant's premises situate at Francis Street in the city of Dublin.

The application was initiated in the Circuit Court by a notice to the appropriate parties dated the 14th September, 1990, entitled as above and in the following form:-

> "Take Notice that Tivoli Cinema Limited having its registered office at 135/138 Francis Street in the City of Dublin will apply to the Circuit Court sitting at Dublin at 10.30 a.m. on Thursday the 18th day of October 1990 or at the first opportunity thereafter for a certificate entitling and enabling the applicant to receive an ordinary seven day on publican's licence for the sale of intoxicating liquors at premises known as 'the Tivoli Theatre' comprising of the ground floor foyer the mezzanine floor and first floor theatre situated at Francis Street in the civil parish of St. Nicholas Without in the city of Dublin as more particularly shown on the plans to be adduced at the hearing of this application and thereon surrounded with red verge lines."

Section 3 of the Act of 1902 as amended by s. 23 of the Intoxicating Liquor Act, 1943, provides as follows:-

> "Where by reason of the expiration of a lease, a licence for the sale of intoxicating liquor for consumption on or off the premises comprised in the lease is extinguished or surrendered, the licensing authority may, notwithstanding anything in this Act, grant a licence for suitable premises in the immediate vicinity of the premises to which the licence so extinguished or surrendered was attached."

The premises at 135/138 Francis Street including the whole of the ground floor thereof was built in or about the year 1935 as a cinema and was used as such until sometime in the 1960s when the cinema closed. The ownership and control of the applicant company was acquired by Mr. Anthony Byrne in 1981 and with it the premises No. 135/138 Francis Street. The applicant re-opened the premises as a theatre about the year 1982 but then closed the premises again between 1986 and 1988 when a very large sum of money was expended in restoring and improving the premises and in converting the first floor thereof into an excellent theatre and thereafter providing a mezzanine floor with bar therein. Since 1988 the applicant has used the premises as a theatre and from about October, 1990, with a fairly small bar on the mezzanine floor in respect of which the applicant is the holder of a wine licence. The applicant was and is anxious to obtain a licence which would enable it to sell beer and spirits as well as wine.

William Lowe and his wife Nancy Lowe owned the premises No. 7 Dean Street in the city of Dublin which is situate 472 yards as the crow

flies and 510 yards by road from the Tivoli Theatre. Mr. and Mrs. Lowe owned No. 7 Dean Street since about the year 1955 from which time they carried on a licensed business with the benefit of an ordinary seven day publican's licence in the sole name of William Lowe. The licence extended to the whole of the said premises No. 7 Dean Street which comprised three storeys but only the ground floor thereof with an area of about 1,070 square feet was used for the sale of intoxicating liquors and could accommodate in or about 150 people at the one time. The middle floor was used for storage purposes and Mr. and Mrs. Lowe lived in the top floor.

Towards the end of the 1980s Dublin Corporation sought to acquire (*inter alia*) No. 7 Dean Street as part of the development plan for the area. Dublin Corporation therefore made a compulsory purchase order in respect of No. 7 Dean Street and this order was duly confirmed by the appropriate Government Minister in or about the month of December, 1989, and Dublin Corporation accordingly became owners of the premises No. 7 Dean Street. William Lowe had duly renewed his ordinary seven day pubican's licence at the September licensing sessions in 1989 although he and his wife had ceased to trade as a licensed premises at the end of June, 1989.

Mr. and Mrs. Lowe took a lease of No. 7 Dean Street for the period of five months from the 24th January, 1990, from Dublin Corporation but did not trade therein during that time. That lease expired on the 24th June, 1990, since when Mr. and Mrs. Lowe have had no further interest in the said premises and the said ordinary seven day publican's licence has been extinguished. By an agreement dated the 10th October, 1990, William Lowe with the consent of his wife, Nancy Lowe, agreed to sell any rights he might have arising out of his having been the holder of the said licence to the applicant and to co-operate with the applicant in its application to the Circuit Court and on this appeal to the High Court. What the applicant seeks to acquire for the Tivoli Theatre is an ordinary seven day publican's licence in lieu of the licence now extinguished in relation to No. 7 Dean Street.

By order dated the 13th November, 1990, the Circuit Court granted a:-

> "Certificate under s. 3 of the Licensing (Ireland) Act, 1902, entitling and enabling the applicant to receive a full publican's licence for the premises known as the Tivoli Theatre comprising of the ground floor foyer the mezzanine floor and first floor theatre situate at Francis Street in the civil parish of St. Nicholas Without

in the City of Dublin being more particularly described and delineated on plans lodged in Court and therein surrounded by a red verge line. And the Court doth order that the publican's licence in the name of William Lowe 7 Dean Street Dublin 8 be and the same is hereby extinguished."

By a notice of appeal dated the 22nd November, 1990, the objectors appealed to the High Court "from the entire of the judgment given herein". The appeal came for hearing before me on the 14th, 15th and 16th May, 1991, and at the end of all of the evidence and the submissions of counsel on each side I raised a question as to the effect of s. 2 of the statute of the old Irish Parliament, *viz.* 26 George III, ch. 47, "An Act for Regulating the Stage in the City and County of Dublin, 1786" on the right to use the Tivoli Theatre as a theatre for gain or reward. Counsel requested time to consider this point and the matter was adjourned from time to time at the request of counsel and was ultimately re-listed for hearing on that point on the 17th January, 1992, on notice to the Attorney General because counsel for the applicant wished to challenge the survival of the said Act contending that it was inconsistent with the Constitution and therefore no longer law in the State.

A composite notice of objection dated the 30th April, 1991, was relied on by the objectors on the hearing of the appeal before me. That notice contains 11 grounds of objection but there is some duplication between these grounds and I shall deal with them in the order which I consider most convenient. Ground no. 9 merely asserts that the application before the court is not a *bona fide* application. That ground was not argued before me and clearly there is no substance in it. Ground no. 11 reads as follows:-

> "The premises the subject matter of the application are not built and constructed in accordance with the laws relating to town planning and building bye-law approval."

The premises have been constructed in accordance with planning and bye-law requirements. The point made however is that such approval is for use only of the existing bar on the mezzanine floor as a bar and that no other part of the premises has approval for such use. The area of such bar is only 810 square feet whereas the remainder of the theatre has an area of 9,763 square feet including staircases, stage, toilets *etc.* The intoxicating liquor licence is being sought for the whole of such premises. The reason for seeking a licence for the whole theatre is to comply with garda requirements that the gardaí should have proper and effective rights of entry and inspection to ensure that the licensing laws

are being observed. Neither the garda authorities nor the local authorities nor fire authorities have any objection to the application. I have come to the conclusion that this ground of objection must fail. The planning code and the licensing code are separate and distinct codes of law and the fact that the area to be licensed may exceed that authorised for use as a bar by the planning permission does not prevent the licence from being granted for the greater area. However a use of any part of the premises other than the bar for supplying and/or consuming intoxicating liquor would involve an unauthorised use of such other part of the premises which could be restrained under the planning code and might then be used as a ground of objection to renewal of the licence if such wrongful use were to be allowed by the applicant.

Ground no. 3 of the objections reads as follows:-

"The premises which the applicant proposes to license are not in the immediate vicinity of the premises to which the licence which it is proposed to surrender or extinguish is attached."

I accept the evidence of Miss Auveen Byrne on this aspect of the case. The Tivoli Theatre and No. 7 Dean Street are in the same south inner city area: they are within easy walking distance of each other: they are within the same civil parish and the same Roman Catholic parish: they are within the same historic liberty of St. Sepulchre: and they are in the same shopping or business and social area. As regards their being in the same shopping or business area there is some element of doubt raised by the point made by Dr. Brian Meehan that No. 7 Dean Street is on the southside of that street which is a substantial traffic artery and is cut off from Francis Street by Dean Street itself unlike the premises on the northside of that street. However having carefully considered all the relevant factors as contained in the reports of Dr. Meehan and Miss Byrne which were given in evidence on oath before me I have come to the conclusion that the Tivoli Theatre is in the immediate vicinity of No. 7 Dean Street within the meaning of that term as used in s. 3 of the Licensing (Ireland) Act, 1902.

Grounds of objection nos. 5, 6 and 7 read as follows:-

"5. The licence referred to in s. 3 of the Act of 1902 has not been extinguished or surrendered by reason of the due expiration of a lease.

6. The said lease referred to in the said section has not duly expired within the meaning of the said section.

7. The licence prior to the expiration of the lease was not a valid or subsisting licence."

Mr. and Mrs. Lowe carried on their licensed trade up to the end of June, 1989. Mr. Lowe renewed the licence in September, 1989, for the year 1989/1990. In the case of *In re Irish Cinemas Ltd.* (1967) 106 I.L.T.R. 17 Butler J. said at p. 21:-

> "Mr. Liston on behalf of the objectors did submit that the original premises were not validly licensed at the time they were demolished, because clearly, as he said, no business had been carried on in the premises during the year prior to the granting of the last renewal. That may be so. However, there is now and was at the relevant date a licence in existence granted on foot of a certificate issued by a court of competent jurisdiction. This Court is bound to accept that licence as having been properly granted and as being valid and subsisting unless and until the order of that court is quashed on certiorari."

The present case is much stronger than *In re Irish Cinemas Ltd.* because Mr. Lowe had traded during the licensing year 1988/1989 up to the end of June, 1989, and even though he was not trading in September, 1989, he was in a position to show that he had conducted the licensed business and premises in a proper manner during the year 1988/1989 and he was therefore entitled to renew the licence in Autumn 1989. That licence for 1989/1990 then ceased to exist on the 25th June, 1990, because the licensee, Mr. Lowe, then ceased to have any right, title or estate in the premises 7 Dean Street the subject-matter of the licence. I am satisfied that the licence of No. 7 Dean Street was a valid subsisting licence up to the 24th June, 1990, and thereafter became extinguished by reason of the expiration of the lease dated the 24th January, 1990, on the 24th June, 1990. Accordingly, these grounds of objection nos. 5, 6 and 7 fail.

Grounds of objection nos. 1, 2, 8 and 10 read as follows:-

"1. The premises proposed to be licensed are unfit and unsuitable for the carrying out of a publican's licensed trade therein.

2. The premises proposed to be licensed are inconvenient for the carrying on of a publican's licensed trade therein.

8. The premises the subject-matter of the application are not suitable premises within the meaning of s. 3 of the Act of 1902.

10. The premises the subject-matter of the application is a theatre. The statutory provisions invoked by the applicant are not appropriate to the grant of retail licences for theatres but relate to the granting of publicans' licences. The applicants'

theatre does not come within the statutory provisions invoked in its notice of application."

Broadly speaking these objections relate to the suitability of the Tivoli Theatre to be the subject-matter of an ordinary seven day publican's licence. There is no contest as to the suitability of the premises for a theatre licence with the restrictions appropriate to such a licence: see ss. 20 and 21 of the Intoxicating Liquor Act, 1927. What is sought by the applicant however is a full ordinary seven day publican's licence in lieu of such licence now extinguished in relation to No. 7 Dean Street. The bar on the mezzanine floor of the Tivoli Theatre is only 810 square feet in area and capable of accommodating no more than 170 to 180 people. There is approximately another 8,000 square feet excluding stairs *etc.*, where drink might be consumed by up to 800 people if this licence is granted and planning permission for such extended use were obtained. Mr. Byrne is undoubtedly a committed theatre enthusiast and not interested in running a mere public house but Mr. Byrne may not always be the person in charge of these premises. He himself indicated a desire to use the premises during the day time for business conferences and lunches and other like functions but even if so used how can intoxicating liquor be consumed other than in the small bar area without contravening the planning code? A theatre licence would not allow the use of the bar at all except during theatrical performances and for half an hour before and half an hour after such performances but the ordinary seven day publican's licence would allow the sale of drink throughout the whole of the day and during the same hours as any public house. I have come to the conclusion that the premises are not suitable for that sort of trade and are therefore not suitable premises within the meaning of that term as used in s. 3 of the Licensing (Ireland) Act, 1902.

Ground of objection no. 4 reads as follows:-

"The number of previously licensed premises in the neighbourhood is sufficient."

There are 14 existing licensed premises within a radius of 250 yards of the Tivoli Theatre. There has been a 40 per cent decline in the residential population of the area between 1971 and 1986. This has been offset to some extent during business hours by office blocks and shops attracting additional people into the area and by a reduction in the number of licensed premises. For the area relevant to the Tivoli Theatre and 7 Dean Street there has been a gain of one licensed premises in Francis Street; a loss of five licensed premises from Patrick Street and a loss of one licensed premised from New Street giving a net reduction

in that area of five licensed premises. Nevertheless there remain 14 licensed premised within 250 yards of the Tivoli Theatre and six within 250 yards of 7 Dean Street as well as a scatter of other licensed premises in the general area. The Tivoli Theatre undoubtedly brings in an additional number of people during theatre performances and they are not adequately catered for by the other public-houses in the neighbourhood and would be so catered for by a theatre licence but that form of licence is not what the applicant seeks on this application and I am satisfied that the number of licensed premises in the area is sufficient for the ordinary licensed trade of that area.

For the reasons therefore that the Tivoli Theatre is not suitable as a premises to be the subject of an ordinary seven day publican's licence and that the number of previously so licensed premises in the area is sufficient for the requirements of the neighbourhood for that form of trade I reverse the order of the learned Circuit Court judge and I refuse the application.

As I have already mentioned on the 16th May, 1991, at the end of the evidence and submissions of counsel, I raised the question as to the effect of "An Act for Regulating the Stage in the City and County of Dublin, 1786" if I were otherwise of the view that the application should be granted. Sections 1 and 2 of that Act of the old Irish Parliament, 26 George III, ch. 47, "An Act for Regulating the Stage in the City and County of Dublin, 1786" as adapted by S.I. No. 69 of 1931 made pursuant to the Adaptation of Enactments Act, 1931 (No. 34 of 1931) provide as follows:-

> "Whereas the establishing of a well regulated theatre in the City of Dublin being the residence of the chief governor or governors of Ireland, will be productive of publick advantage, and tend to improve the morals of the people: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful to and for the Governor General of the Irish Free State acting on the advice of the Executive Council of the Irish Free State to grant under the Great Seal of Saorstát Éireann for such term not exceeding twenty-one years, and under such restrictions, conditions, and limitations as to him shall seem meet from time to time, and when and as often as he shall think fit, one or more letters patent, to one or more person or persons for establishing and keeping one or more well-regulated theatre or theatres, playhouse,

or playhouses in the city of Dublin, and in the liberties, suburbs, and county thereof, and in the County of Dublin.

II. And be it further enacted by the authority aforesaid, That from and after the first day of June, one thousand seven hundred and eighty-six, no person or persons shall, for hire, gain, or any kind of reward whatsoever or howsoever, act, represent, or perform, or cause to be acted, represented, or performed, any interlude, tragedy, comedy, prelude, opera, burletta, play, farce, pantomime, or any part or parts therein, on any stage, or in any theatre, house, booth, tent or other place within the said city of Dublin, or the liberties or suburbs, or county thereof, or within the county of Dublin, under any colour or pretense whatsoever, save and except in such theatre or play-house as shall be so established or kept by letters patent as aforesaid, under the penalty of forfeiting the sum of three hundred pounds Sterling for every such offence."

For the present meaning of "The Governor General of the Irish Free State" and "The Executive Council of the Irish Free State" and, "The Great Seal of Saorstát Éireann" see the Constitution (Consequential Provisions) Act, 1937. That aspect of the case came for hearing before me on notice to the Attorney General pursuant to O. 60, r. 1 of the Rules of the Superior Courts, 1986, on the 17th January, 1992: the point being whether the Act of 1786 survived the enactment of the Constitution as being consistent therewith or did not so survive as being inconsistent with the Constitution having regard to Article 50 thereof. I heard arguments on a preliminary issue as to whether I had any jurisdiction to deal with such an issue on an appeal from the Circuit Court. I was referred to a submitted distinction between the jurisdiction of the High Court as a court of first instance under Article 34, s. 3, sub-s. 1 of the Constitution and its jurisdiction as a court of appeal from the Circuit Court pursuant to Article 34, s. 3, sub-section 5. In addition to the Constitution of Ireland, 1937, I was also referred to the Constitution of Saorstát Éireann, 1922, the Courts (Establishment and Constitution) Act, 1961, the Courts (Supplemental Provisions) Act, 1961, the Courts of Justice Act, 1924, the Courts of Justice Act, 1936, the Constitution (Amendment No. 27) Act, 1936, and the Constitution (Consequential Provisions) Act, 1937. I was also referred to the following cases on the constitutional aspect of this appeal namely: *McDaid v. Judge Sheehy* [1991] 1 I.R. 1; *The State (Sheerin) v. Kennedy* [1966] I.R. 379; *Sligo Corporation v. Gilbride* [1929] I.R. 351; *The State (Pheasantry Limited)*

v. District Justice Donnelly and The Attorney General [1982] I.L.R.M. 512; Kelly on the Constitution, 2nd ed., pp. 271 to 273; *Foyle Fisheries Commission v. Gallen* [1960] Ir. Jur. Rep. 35; *Greaney v. Scully* [1981] I.L.R.M. 340; *The State (Browne) v. Feran* [1967] I.R. 147; *The State (Attorney General) v. Mangan* [1961] Ir. Jur. Rep. 17 and *Prendergast v. Carlow County Council* [1990] I.L.R.M. 749.

It is settled law that in the absence of exceptional circumstances a court should not pronounce on the validity of a law where the case can be decided on other grounds and I think that this principle applies to the question of the consistency or inconsistency of a pre-Constitution law under Article 50 as well as the validity or invalidity of a post-Constitution law under Article 34, s. 3, sub-section 2. I have already decided this appeal on the substantive facts and law relating to the grant of intoxicating liquor licences. If I were now to embark on a consideration of the constitutional issue I would really be considering a moot and this is so even in relation to the preliminary issue argued before me as to whether I would have any jurisdiction as a court of appeal from the Circuit Court to decide the constitutional issue. In these circumstances and following the decision of the Supreme Court in *McDaid v. Judge Sheehy* [1991] 1 I.R. 1 and the cases referred to therein I refrain from expressing any views on this aspect of the case.

The appeal is therefore allowed and the application for a new ordinary seven day publican's licence is refused for the reasons already stated.

Solicitors for the applicant: *Kevans.*

Solicitors for the objectors: *Patrick F. O'Reilly & Co.*

Solicitor for the Attorney General: *Chief State Solicitor.*

Éanna Mulloy, B.L.

Killross Properties Limited, Applicant v. **Electricity Supply Board** and **Eirgrid plc**, Respondents [2016] IECA 207, [C.A. No. 214 of 2015]

Court of Appeal 11 July 2016

Planning and development – Enforcement – Unauthorised development – Exempted development – Determination by planning authority that works constituted exempted development – Application to restrain as unauthorised development – Jurisdiction of court in s. 160 proceedings – Whether court could declare development unauthorised notwithstanding planning authority determination that development exempted – Whether s.160 proceedings formed impermissible collateral challenge to planning authority determination – Planning and Development Act 2000 (No. 30), ss. 4(1)(g), 4(1)(h), 5 and 160.

Section 160 of the Planning and Development Act 2000 provides that where unauthorised development has been, is being or is likely be to carried out or continued, the High Court or Circuit Court may, on application by a planning authority or any other person, make such orders as are considered necessary, *inter alia,* to restrain that unauthorised development from taking place or continuing.

Section 5 of the 2000 Act provides that where a question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of the Act, a declaration on that question can be requested from the relevant planning authority.

The applicant applied to the High Court pursuant to s. 160 of the 2000 Act to restrain works by the respondents to upgrade pre-existing electricity lines situated on the applicant's lands. It was contended that these works amounted to unauthorised development for which planning permission was required. The works at issue had been the subject of references pursuant to s. 5 of the 2000 Act made prior to the initiation of the s. 160 proceedings and, in each instance, the relevant planning authority or An Bord Pleanála determined that the works in question constituted exempted development.

The High Court (Hedigan J.) held that it had no jurisdiction to entertain the s. 160 proceedings as to do so would allow an impermissible collateral challenge to the s. 5 determinations and accordingly refused to grant the reliefs sought by the applicant. The applicant appealed to the Court of Appeal.

Held by the Court of Appeal (Peart, Hogan and Cregan JJ.), in dismissing the appeal, that where a valid determination had been made pursuant to s. 5 of the 2000 Act to the effect that a particular development constituted exempted development, the court could not go behind that determination by granting relief in proceedings pursuant to s. 160 of the Act on the basis that the development was unauthorised. As the effect of such a determination was that planning permission was not required, the development could not by definition be unauthorised within the meaning of s. 160 and any applica-

tion pursuant to s. 160 represented an impermissible collateral attack on the decision of the planning authority and was bound to fail.

Grianán an Aileach Centre v. Donegal County Council (No. 2) [2004] IESC 43, [2004] 2 I.R. 625, *Wicklow County Council v. Fortune* [2013] IEHC 397, (Unreported, High Court, Hogan J., 5 September 2013) and *Wicklow County Council v. O'Reilly* [2015] IEHC 667, (Unreported, High Court, O'Malley J., 29 October 2015) considered.

Cases mentioned in this report:-

Grianán an Aileach Centre v. Donegal County Council (No. 2) [2004] IESC 43, [2004] 2 I.R. 625; [2005] 1 I.L.R.M. 106.

O'Connor v. Kerry County Council [1988] I.L.R.M. 660.

Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1.

Roadstone Provinces Ltd. v. An Bord Pleanála [2008] IEHC 210, (Unreported, High Court, Finlay Geoghegan J., 4 July 2008).

Tormey v. Ireland [1985] I.R. 289; [1985] I.L.R.M. 375.

Wicklow County Council v. Fortune [2013] IEHC 397, (Unreported, High Court, Hogan J., 5 September 2013).

Wicklow County Council v. O'Reilly [2015] IEHC 667, (Unreported, High Court, O'Malley J., 29 October 2015).

Appeal from the High Court

The facts have been summarised in the headnote and are more fully set out in the judgment of Hogan J., *infra.*

The applicant initiated proceedings by way of originating notice of motion dated 7 August 2013, seeking orders pursuant to s. 160 of the Planning and Development Act 2000 prohibiting the respondents from carrying out certain construction works. By judgment dated 28 August 2014 and order dated 13 January 2015, the High Court (Hedigan J.) refused the reliefs sought and dismissed the proceedings.

By notice of appeal dated 29 April 2015, the applicant appealed to the Court of Appeal against the judgment of the High Court. The appeal was heard by the Court of Appeal (Peart, Hogan and Cregan JJ.) on 3 March 2016.

Michael O'Donnell (with him *Conleth Bradley S.C.*) for the applicant.

Paul Sreenan S.C. (with him *Jarlath Fitzsimons S.C.* and *Stephen Dodd*) for the respondents.

Cur. adv. vult.

Peart J. 11 July 2016

[1] I have read the judgment about to be delivered by Hogan J. and I agree with it.

Hogan J.

[2] Where a planning authority or, as the case may be, An Bord Pleanála, determines pursuant to s. 5 of the Planning and Development Act 2000 ("the 2000 Act") that certain works constitute exempted development and, accordingly, do not require planning permission, is it open to this court in the course of an application to restrain unauthorised development pursuant to s. 160 of the 2000 Act to arrive at a different conclusion? This, in essence, is the important legal issue which arises on this appeal from the decision of Hedigan J. in the High Court delivered on 28 August 2014.

[3] The background to these proceedings is as follows: the appellant, Killross Properties Ltd. ("Killross"), seeks an order pursuant to s. 160 of the 2000 Act restraining what it contends is unauthorised development on the part of the respondent, namely, the Electricity Supply Board. The development in question consisted of the entry by the respondents onto lands of Killross for the purposes of upgrading certain pre-existing electricity lines.

[4] In the motion seeking s. 160 relief, Killross contends that the upgrading of the capacity of six electricity lines in the general East Kildare area amounts to unauthorised development for which separate planning permission is required. These electricity lines were, however, already situated on these lands at the time they were acquired by Killross in 2007. The main object of these works was to replace (or to "restring") existing overhead lines with higher conducting capacity. These works do not affect the voltage which remains at 110kV. The existing pylons were, it is true, replaced in some cases. But where this happened the lower portions and the foundations of the pylons remained unaltered, although admittedly in some instances the pylons themselves were moved to immediately adjacent locations.

[5] A critical fact, however, is that all of the works which are the subject of the s. 160 application were the subject of references under s. 5 of the 2000 Act to the relevant planning authority or, as the case may be, An Bord Pleanála. Three of these six references had been instigated either by Killross or by its agents. It had, accordingly, been determined by either the relevant planning authority or An Bord Pleanála (as the case may be) in all such six such references at the time of the commencement of the s. 160 proceedings that the developments in question constituted exempted development. Three of these determinations were challenged in subsequent judicial review proceedings heard by Hedigan J. in conjunction with the present s. 160 application. He rejected the challenge to the validity of those determinations and did not grant leave to Killross to appeal in respect of these three judicial review applications to this court pursuant to s. 50 of the 2000 Act.

The individual s. 5 determinations

[6] The six individual s. 5 determinations can be summarised as follows:-

Reference FS5W/08/2012 (Corduff-Ryebrook, Fingal)

[7] Fingal County Council issued a s. 5 determination on 6 November 2012 to the effect that the renewing and altering of the portion of the 110kV overhead electricity transmission line within its administrative area was exempted development for the purposes of s. 4(1)(g) and s. 4(1)(h) of the 2000 Act. This decision was not referred to An Bord Pleanála and the time for challenge to the validity of such decision in judicial review proceedings has expired.

Reference ED/00439 (Corduff-Ryebrook, Kildare)

[8] Kildare County Council issued a s. 5 determination on 1 March 2013 to the effect that the proposed renewing and altering of the portion of the existing Corduff/Ryebrook 110kV overhead electricity transmission line situated within the administrative area of Kildare County Council constitutes development and is exempted development under s. 4(1)(g) and s. 4(1)(h) of the 2000 Act. This decision was not referred to An Bord Pleanála for its review and is outside the time for any challenge by way of judicial review.

Reference ED/00440 (Maynooth-Ryebrook)

[9] Kildare County Council issued a s. 5 determination on 1 March 2013 to the effect that the proposed renewing and altering of the existing Maynooth-Ryebrook 110kV overhead electricity transmission line is development and is exempted development under s. 4(1)(g) and s. 4(1)(h) of the 2000 Act. Following an appeal by Rossmore Properties Ltd. (a sister company of Killross), An Bord Pleanála decided on 25 April 2014 that the development was exempted development under s. 4(1)(g) of the 2000 Act and that neither an appropriate assessment nor an environmental impact assessment was required. Although the validity of this reference was subsequently challenged in judicial review proceedings, that challenge was rejected by Hedigan J. As I have indicated, no leave to appeal to this court was granted by the High Court pursuant to s. 50 of the 2000 Act.

Reference ED/00441 (Rinawade Tee)

[10] Kildare County Council issued a s. 5 determination on 1 March 2013 to the effect that the renewing and altering of the existing equipment within the Rinawade 110kV substation, and the renewing and associated alternation of the existing busbar equipment along the Rinawade Tee 110kV overhead line, is development and is exempted development under s. 4(1)(g) and s. 4(1)(h) of the 2000 Act. This decision was not referred to An Bord Pleanála for its review and the time for challenge by way of judicial review has long since expired.

Reference ED/00451 (Maynooth-Ryebrook)

[11] On 24 April 2014, An Bord Pleanála determined pursuant to s. 5 that the renewal and alteration of the Maynooth-Ryebrook 110kV overhead line was exempted development under s. 4(1)(g) of the 2000 Act and that neither an appropriate assessment nor an environmental impact assessment was required. A challenge to the validity of this determination was refused by Hedigan J. in the judicial review proceedings. Again, no leave to appeal to this court pursuant to s. 50 of the 2000 Act was granted by the High Court.

Reference ED/00464 (temporary line diversion)

[12] This was an application for a determination made by Mr. Lar McKenna on behalf of Killross to Kildare County Council relating to the status of the proposed 0.5 kilometre temporary diversion (or bypass) line on double wood pole sets in connection with the Maynooth-Ryebrook 110kV line update. This matter was subsequently referred to An Bord Pleanála. On 25 April 2014, An Bord Pleanála decided that the development was exempted development under class 16 of Part 1 of Schedule 2 to the Planning and Development Regulations 2001 (as amended) and that neither an appropriate assessment nor an environmental impact assessment was required. A challenge to the validity of this determination was rejected by Hedigan J. in the judicial review proceedings. No leave to appeal to this court pursuant to s. 50 of the 2000 Act was granted by the High Court.

The effect of the failure to grant leave to appeal to this court in the judicial review proceedings

[13] As we have just seen, three of these s. 5 references had been challenged in judicial review proceedings before Hedigan J. (who heard these applications in conjunction with the s. 160 proceedings) and three other references were never the subject of a judicial review application. It is important to note that Hedigan J. rejected the challenge in the judicial review proceedings to the *vires* of the three s. 5 references. He further refused to grant leave to appeal to this court pursuant to s. 50 of the 2000 Act. In effect, therefore, the position so far as the appeal to this court is concerned is that the determinations in all six s. 5 references must be presumed to be valid and unimpeachable.

[14] The logical corollary of that decision is that the planning authorities have determined in the s. 5 references that the developments in question are exempted development and do not need planning permission. This, then, squarely presents the issue as to whether this court can determine in s. 160 proceedings that the developments are unauthorised. In order to answer to that question, it is necessary first to consider the jurisdiction of this court under s. 160 in relation to unauthorised developments. Before doing so, it may be convenient to summarise the decision of Hedigan J.

The decision of the High Court

[15] In his judgment Hedigan J. took the view that the High Court could not in s. 160 proceedings determine matters which had in substance already been determined in the s. 5 references. He noted first that s. 50(2) of the 2000 Act had provided that challenges to the validity of decisions of planning authorities or An Bord Pleanála:-

> "... may not be questioned as to their validity save by way of judicial review. This was a deliberate decision by the Oireachtas to withdraw a then existing right of appeal to the High Court from planning decisions."

[16] Hedigan J. then went on to consider the impact of s. 5 of the 2000 Act and concluded:-

> "The inescapable conclusion from the above is that this court has no jurisdiction to entertain the s. 160 proceedings brought herein, because to do so would be to allow an impermissible collateral challenge to the decisions of Fingal County Council, Kildare County Council and An Bord Pleanála that the works in question are exempt development."

[17] Killross was, of course, entitled to appeal this aspect of the decision of the High Court as of right to this court and no leave of the court pursuant to s. 50 of the 2000 Act was required for this purpose. To repeat, therefore, the issue presented squarely on this appeal is the extent to which the High Court can – so to speak – look behind a s. 5 determination in the course of exercising its s. 160 jurisdiction. It is to that issue to which we can now turn.

The jurisdiction of the High Court in s. 160 proceedings

[18] One of the difficulties in this general area is that at the core of our planning laws there are a variety of different enforcement mechanisms, each of which gives rise to the potential for overlap, anomaly and even confusion in terms of the different roles of the planners and the courts. Nowhere is this more evident than in the case of the interaction of the s. 5 procedure on the one hand and the s. 160 statutory injunction procedure on the other. Section 160 vests the courts with a jurisdiction to restrain "unauthorised" development, while s. 5 enables the planning authority (or, as the case may be, An Bord Pleanála) to determine "what, in any particular case, is or is not development or is or is not exempted development".

[19] In some ways, many of the difficulties I am about to describe have their origins in the broad definition of the concept of development in s. 3 of

the 2000 Act: "development" is defined as meaning the carrying out of any works or the making of any material change in the use of any structures or other land. If s. 3 stood alone, then even minor works and, adopting Simons's graphic phrase, some "unexceptionable changes of use" would all require planning permission: see Simons, *Planning and Development Law* (2nd ed., Thomson Round Hall, 2007) at p. 92.

[20] Section 4 of the 2000 Act therefore allows for certain categories of exempted development, of which, perhaps, s. 4(1)(g) is the most relevant in the present context, permitting as it does the "repairing, renewing, altering or removing … cables, overheard wires, or other apparatus". Section 4(1)(h) is also of some importance since it provides that structural repairs and other maintenance works are exempt provided that there is no material change in the external appearance of the structure as a result. Both s. 4(1)(g) and, in some instances, s. 4(1)(h), were invoked by the planning authorities and, as the case may be, by An Bord Pleanála in the course of the various s. 5 determinations.

[21] The essential difficulty which is presented here is that the concepts of development, exempted development and unauthorised use are all, to some extent, interrelated. It is true that, as Finlay Geoghegan J. held in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210, (Unreported, High Court, Finlay Geoghegan J., 4 July 2008), An Bord Pleanála has no jurisdiction on a s. 5 reference to determine whether or not there was unauthorised development. Yet if An Bord Pleanála (or, as the case may be, a planning authority) rules that a particular development is not exempted development, the logical corollary of that decision is that planning permission is required. In practice, there is often only a very slender line between ruling that a development is not exempted development since this will generally – perhaps, even, invariably – imply that the development is unauthorised on the one hand and a finding that a particular development is unauthorised on the other. Conversely, where (as here) An Bord Pleanála (or the planning authority) rules that the development is exempt, this necessarily implies that the development is lawful from a planning perspective since, by definition, it has been determined that no planning permission is required.

[22] This brings us to the question of whether the court enjoys a jurisdiction in s. 160 proceedings to declare that a particular development is unauthorised even where the development in question has been ruled to be an exempted development following a s. 5 reference. As I pointed out in a judgment delivered by me as a judge of the High Court in *Wicklow County Council v. Fortune* [2013] IEHC 397, (Unreported, High Court, Hogan J., 5

September 2013), the resolution of this question is a difficult one and one which is not straightforward.

[23] The starting point of any analysis of this question may be found in the judgment of the Supreme Court in *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625. In that case the High Court had originally granted a declaration that the holding of certain evening social events at an interpretative centre did not constitute a material change of use and represented exempted development. The Supreme Court, however, set aside this decision, holding that the courts enjoyed no freestanding jurisdiction to grant a declaration in respect of what user did or did not constitute exempted development. As Keane C.J. explained at pp. 638 and 639:-

> "32 Thus, in the present case, if the jurisdiction of the planning authority or An Bord Pleanála under s. 5 were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court. No doubt a person carrying out a development which he claims is not a material change of use is not obliged to refer the question to the planning authority or An Bord Pleanála and may resist enforcement proceedings subsequently brought against him by the planning authority on the ground that permission was not required. In that event, if the enforcement proceedings are brought in the High Court, that court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission, as happened in *O'Connor v. Kerry County Council* [1988] I.L.R.M. 660. But for the High Court to determine an issue of that nature, as though it were the planning authority or An Bord Pleanála, in proceedings such as the present would seem to me to create the danger of overlapping and unworkable jurisdictions referred to by Henchy J. [in *Tormey v. Ireland* [1985] I.R. 289 at p. 295].
>
> 33 The decision of the House of Lords in *Pyx Granite Co. Ltd. v. Minister of Housing and Local Government* [1960] A.C. 260 is, in my view, distinguishable from the present case. That was a case in which a company engaged in quarrying claimed to be entitled to carry it out under the provisions of a private and local Act of Parliament, *i.e.*, the Malvern Hills Act 1924. Since the relevant legislation in England pro-

vided that planning permission was not required for development authorised by local or private Acts, the company further claimed that they were not obliged to invoke the procedure under the planning legislation whereby the Minister of Housing and Local Government could determine whether planning permission was required. The Minister raised a preliminary objection to the court determining the company's claim, on the ground that its jurisdiction had been ousted by the provisions of the planning legislation entitling the Minister to decide whether planning permission was required. That submission was rejected by the House of Lords on the ground that the right of a person to have recourse to the courts for a determination of his rights was not to be excluded except by clear words.

34 That, however, was a case in which the company claimed that it was were not in any way affected by the provisions of the planning code, having regard to the provisions of the local and private Act of Parliament authorising its operations. One could well understand why that was thought to be an issue which could be resolved only by the courts. No such considerations arise in this case, where the plaintiff is admittedly required to obtain planning permission for any operations which constitute 'development' within the meaning of the Act of 2000 and are not exempted development.

35 In the present case, the trial judge, quite understandably, was concerned to resolve issues which had been brought before the High Court in a manner which was fair to both the defendant and the public interest which it represents on the one hand and the legitimate interests of the plaintiff on the other hand. This resulted, however, in the granting of a declaration in a form which had not been sought by either party and which clearly creates further difficulties. Can it be said that the prohibition on weddings (presumably intended to exclude the social function which normally takes place in a hotel or restaurant following the wedding itself) extends to other social functions and, if so, how are they to be defined? Does the prohibition on 'non-cultural activities' extend to every form of pop or rock concert? What precisely is meant by 'use as a nightclub'?

36 Some responsibility may be attributed to the defendant for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of

planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that court might find itself having to determine whether particular operations constituted a 'development' which required permission and the same issue could arise in other circumstances, *e.g.*, where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. But in every such case, however it came before the court, the court would resolve the issue by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting a permission."

[24] It is true that the underlying issues in *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625 were slightly different than those presented in the present appeal. It seems clear, nevertheless, from this statement of principle that the Supreme Court envisaged that the courts should be careful not to trespass into the exclusive domain of the planning authorities as envisaged by the s. 5 jurisdiction.

[25] This question was, however, considered by me as a judge of the High Court in *Wicklow County Council v. Fortune* [2013] IEHC 397, (Unreported, High Court, Hogan J., 5 September 2013). In that case one of the issues was whether in s. 160 proceedings the High Court had a jurisdiction to determine whether a particular development constituted exempted development where the relevant local authority had already determined following a s. 5 reference that the development in question was not exempted development. I nevertheless expressed the view at p. 9 that the effect of *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625 was that:-

"12. ... this decision must be taken impliedly to preclude the High Court from dealing with this matter in enforcement proceedings *in these precise circumstances* where a s. 5 application for a certificate of exemption has been refused and has not been quashed in judicial review proceedings.

13. Here it must be recalled that a s. 5 refusal forms part of the formal planning history and the details of the refusal are entered on a public register: see s. 5(3) of the 2000 Act. If this court could grant a form of declaration in enforcement proceedings that the development was exempt, there would be in existence two contradictory official

determinations of this question, with the real potential for confusion and uncertainty of the very kind which so exercised the Supreme Court in [*Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625] (emphasis in original)."

[26] A similar issue confronted O'Malley J. in *Wicklow County Council v. O'Reilly* [2015] IEHC 667, (Unreported, High Court, O'Malley J., 29 October 2015). In that case the respondent had applied for a s. 5 declaration to the effect that a recycling facility constituted exempted development. This declaration was refused on the ground that the activity represented a material change of use from earlier activity on the site. No challenge was brought by way of judicial review to the determination by the council to this effect.

[27] The council later brought s. 160 proceedings and the respondent sought to argue that the use was, indeed, an exempted one. O'Malley J. would not, however, permit the respondent to rely on this defence since it had already been determined by the planning authority. She stated at p. 62:-

"175. ... The respondent did not appeal the refusal of the declaration and did not take any step to quash it. In the circumstances I agree with the reasoning of Hogan J. [in Wicklow County Council v. Fortune [2013] IEHC 397, (Unreported, High Court, Hogan J., 5 September 2013)] and can therefore not accede to the argument that no planning permission was required for the respondent's business. It follows that, in my view, the Circuit Court Judge was correct to find that there had been an unauthorised development."

[28] In my view, it is clear both from a consideration of these authorities and an examination of this question from first principles that the High Court cannot go behind a determination in a s. 5 reference in the course of a s. 160 application. One can arrive at this conclusion for a variety of different – if overlapping – reasons.

[29] First, it can be said that as the planning authorities (or, An Bord Pleanála, as the case may be) determined that the works in question represent exempted development, it necessarily follows that no planning permission is required. The logical corollary of this conclusion is that the development in question cannot by definition be "unauthorised" within the meaning of s. 160 if no planning permission is required so that consequently any such s. 160 application is bound to fail.

[30] Second, it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the court to revisit the merits of the issue which had already been determined in the course of the s. 5 determination. This is

further reinforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.

[31] Third (and related to it the second argument), it could be said that the s. 160 proceedings represent an attempt indirectly to challenge the validity of the s. 5 determinations otherwise than by means of the judicial review requirement specified by s. 50 of the 2000 Act.

Conclusions

[32] In many ways while these arguments run into each other, the ultimate conclusion is clear: the High Court cannot go behind an otherwise valid s. 5 determination to the effect that the development in question represented exempted development in the course of a s. 160 application. The effect of such a determination is that planning permission is not required, so that by definition the development cannot be unauthorised. It follows that the High Court cannot grant the relief claimed in the s. 160 proceedings.

[33] As that is the situation in the present case, it follows, therefore, that the developments at issue must be adjudged to have been lawful so that no planning permission was required. In these circumstances, the High Court was correct not to grant the s. 160 relief sought by Killross. I would accordingly dismiss the appeal and affirm the decision of Hedigan J.

Cregan J.
[34] I agree.

[*Reporter's note*: The judgment of the High Court (Hedigan J.) of 28 August 2014 has not been circulated.]

Solicitors for the applicant: *Harrington & Co.*

Solicitor for the first respondent: *Ray Clarke.*

Solicitor for the second respondent: *Deirdre Nagle.*

David Perry, Barrister

The High Court (Ryan J.) found that the respondent incorrectly interpreted s. 4(1)(h) of the 2000 Act in determining that the construction of an extension on the quarry site was not exempted development (see [2009] IEHC 553, [2009] 3 I.R. 736). The court held that, in interpreting s. 4(1)(h), the purpose and effect of the works had to be analysed and if the work did not make the structure inconsistent with its character and was done for the maintenance, improvement or other alteration of the structure, it could constitute exempted development.

The respondent sought leave to appeal to the Supreme Court and the High Court (Ryan J.) certified a question of exceptional public importance on the point of whether his interpretation of s. 4(1)(h) of the 2000 Act was correct.

On appeal to the Supreme Court, the respondent submitted, *inter alia*, that the exemption from the requirement to obtain planning permission meant that the section ought to be given a narrow construction. The applicant submitted that the principle of strict construction of penal provisions was applicable on the basis that s. 151 of the 2000 Act created the offence of carrying out unauthorised development.

Held by the Supreme Court (MacMenamin, Laffoy and O'Malley JJ.), in allowing the appeal, 1, that the plain intention of the legislature was to provide in s. 4(1)(h) an exemption for a limited category of works that amounted to alterations that were either wholly internal, or if external, were insignificant and an extension was a development that did not come within that exemption.

Dillon v. Irish Cement Ltd. (Unreported, Supreme Court, 26 November 1986) and *South Dublin County Council v. Fallowvale Ltd.* [2005] IEHC 408, (Unreported, High Court, McKechnie J., 28 April 2005) considered.

2. That it was not the intention of the legislature to make the necessity to apply for planning permission dependent on the motive and purpose of the developer.

3. That while there was no single definition of the word "alteration" for the purposes of the 2000 Act and, for at least some purposes of the Act, an "alteration" might involve something that changed the external appearance of a structure in a way that was inconsistent with its character, or with the character of neighbouring structures, for the purposes of the exemption, an "alteration" could not have that effect.

4. That for the purposes of an exemption an "improvement" had to be something that related to the internal use and function of the structure, resulting in either no externally noticeable difference or an insignificant difference.

5. That it was entirely inappropriate to read the provisions of s. 4 of the 2000 Act as if they related to the imposition of a penal or other sanction. The 2000 Act was not a penal statute in the sense of having as its objective the creation of a criminal offence with the provision of a range of defences. Notwithstanding s. 151 of the 2000 Act, the purpose and scheme of the 2000 Act was to create a regulatory regime within an administrative framework which, in the interests of the common good, placed limits on the rights of landowners to develop their land as they might wish.

Obiter dictum, per O'Malley J.: Section 156(6) of the 2000 Act created a reverse burden or onus of proof. While it would be inappropriate to determine in the instant proceedings what the precise parameters of that burden might be, if necessary it would fall to be considered in the light of authority holding that such a burden, in general, required an accused person only to demonstrate the existence of a reasonable doubt.

The People (Director of Public Prosecutions) v. Heffernan [2017] IESC 5, [2017] 1 I.R. 82 considered.

Michael Cronin (Readymix) Limited, Applicant v. **An Bord Pleanála**, Respondent and **Kerry County Council** and **The Department of the Environment, Heritage and Local Government**, Notice Parties [2017] IESC 36, [S.C. No. 304 of 2010]

Supreme Court 30 May 2017

Planning and development – Exempted development – Works – Alteration – Extension of quarry for manufacture of cement blocks – Whether extension works constituting exempted development – Planning and Development Act 2000 (No. 30), ss. 2(1) and 4(1)(h).

Statutory interpretation – Planning – Statutory context – Provision exempting from general requirement to seek permission – Overall scheme of statute – Whether principle of strict construction of penal provisions applicable – Planning and Development Act 2000 (No. 30), s. (4)(1)(h).

Section 4(1) of the Planning and Development Act 2000 provides:-

"The following shall be exempted developments for the purposes of this 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 ..."

The applicant operated a quarry where it produced readymix concrete and concrete blocks. A yard on the quarry site had been extended to facilitate the manufacturing of cement blocks. The first notice party took the view that the extension was an unauthorised development. The applicant contended that it was exempted development within the meaning of s. 4(1)(h) of the 2000 Act. The first notice party referred the matter to the respondent pursuant to s. 5(4) of the 2000 Act for a determination on the question of exempted development. The respondent decided that the construction of the extension on the site for block making was not exempted development as it did not constitute works carried out for the "maintenance, improvement or other alteration" of the structure within the meaning of s. 4(1)(h) of the 2000 Act.

The applicant challenged the decision of the respondent on the basis, *inter alia*, that the respondent incorrectly interpreted the exempted development provision in s. 4(1)(h) of the 2000 Act. The applicant argued that the extension works were an alteration or improvement of the quarry within the meaning of s. 4(1)(h) of the 2000 Act.

Cases mentioned in this report:-

Dillon v. Irish Cement Ltd. (Unreported, Supreme Court, 26 November 1986).

Grianán an Aileach Centre v. Donegal County Council (No. 2) [2004] IESC 43, [2004] 2 I.R. 625; [2005] 1 I.L.R.M. 106.

Michael Cronin Readymix Ltd. v. An Bord Pleanála [2009] IEHC 553, [2009] 4 I.R. 736.

The People (Director of Public Prosecutions) v. Heffernan [2017] IESC 5, [2017] 1 I.R. 82; [2017] 2 I.L.R.M. 118.

South Dublin County Council v. Fallowvale Ltd. [2005] IEHC 408, (Unreported, High Court, McKechnie J., 28 April 2005).

Wicklow County Council v. Fortune [2013] IEHC 397, (Unreported, High Court, Hogan J., 5 September 2013).

Wicklow County Council v. O'Reilly [2015] IEHC 667, (Unreported, High Court, O'Malley J., 29 October 2015).

Appeal from the High Court

The facts have been summarised in the headnote and are more fully set out in the judgment of O'Malley J., *infra.*

By judgment and order dated 16 December 2009, the High Court (Ryan J.) granted orders of *certiorari* in respect of a ruling made by the respondent that works undertaken at the applicant's premises constituted development and were not exempted development (see [2009] IEHC 553, [2009] 4 I.R. 736).

The High Court (Ryan J.), by order dated 29 July 2010, granted the respondent's application for leave to appeal pursuant to s. 50A(7) of the 2000 Act, certifying the question "whether the High Court was correct in its interpretation of s. 4(1)(h)".

By notice of appeal dated 17 August 2010, the respondent appealed to the Supreme Court. The appeal was heard by the Supreme Court (Mac-Menamin, Laffoy and O'Malley JJ.) on 19 October 2016 and 28 March 2017.

Nuala Butler S.C. (with her *Fintan Valentine*) for the respondent.

Eamon Galligan S.C. (with him *Michael O'Donnell)* for the applicant.

Cur. adv. vult.

MacMenamin J. 30 May 2017

[1] I have read the judgment about to be delivered by O'Malley J. and I agree with it.

Laffoy J.

[2] I also agree with O'Malley J.

O'Malley J.

Introduction

[3] In these judicial review proceedings the respondent to the appeal (hereafter "Cronin") sought an order of *certiorari* in respect of a ruling made by An Bord Pleanála ("the Board") pursuant to the terms of s. 5 of the Planning and Development Act 2000 ("the 2000 Act"). The Board had determined that works carried out by Cronin amounted to development and were not exempt from the requirement to obtain planning permission. The High Court judge (Ryan J.) granted the relief sought but also granted a certificate for appeal to this court pursuant to s. 50A(7) of the 2000 Act. The question certified is whether or not he was correct in his interpretation of s. 4(1)(h) of the 2000 Act, which led him to hold that the contentious works carried out by Cronin constituted exempted development within the meaning of the 2000 Act.

[4] The facts relevant to the appeal can be briefly stated. Cronin operates a quarry at Coolcaslagh in Co. Kerry. The site owned by the company covers about 130 acres, of which 96 acres are used for excavation. It produces both readymix concrete and concrete blocks at the site.

[5] In late 2003 Kerry County Council ("the planning authority") became concerned about the extent of the operations and inspected the site with a view to enforcement proceedings. The inspector found a hard surfaced yard, of some two acres in extent, being used for the purposes of the block making operation. The company's position was that quarrying and the production of concrete at the site pre-dated the Local Government (Planning and Development) Act 1963 ("the 1963 Act"); that making concrete blocks was not different in kind to the manufacture of readymix concrete since the same ingredients were used; and that there was no new structure on the site but simply the replacement and extension of an old

yard for the purpose of drying and storing the blocks prior to despatch to customers.

[6] In May 2006 the planning authority applied for a determination from the Board under the procedure provided for in s. 5 of the 2000 Act as to whether or not there had been development, and, if so, whether or not it was exempted development. The planning authority believed that the quarry and the concrete plant had been in existence for longer than seven years and accordingly no enforcement action could be taken in that regard. However, it considered that they were both unauthorised developments. It also said that it had established that the block manufacturing business was a recent development and therefore amenable to enforcement.

[7] The case made by Cronin was that the works had not required planning permission. It was asserted, firstly, that the entire quarry site and related processing activities pre-dated the time of commencement of the 1963 Act. It was submitted, in relation to the repaving and extension of the yard, that no new structure had been erected and that the previously existing concrete yard had been in use as part of the established readymix concrete batching operation. The space taken up was less than 2 acres of a site of 130 acres. There was no appreciable increase in the extent of manufacturing operations, no perceptible traffic impact, and no perceptible noise or dust impact. The works had been carried out in a low lying, worked out area of the quarry and were not visible from any public road or any residence in the vicinity. In those circumstances the exemption provided for in s. 4(1)(h) of the 2000 Act was relied upon. The development, it was submitted, came within that provision because it constituted works for the "improvement" or "alteration" of a structure, which affected only the interior of the structure or which did not materially affect the external appearance of that structure so as to render its appearance inconsistent with the character of the structure.

[8] It was also submitted that the planning authority had failed to demonstrate that the block making amounted to a material change of use, rather than being ancillary to the overall quarry use. The batching process for the blocks was said to be no different to the process for readymix concrete, up to the point that the wet concrete emerged from the batching plant. At that point readymix concrete was poured directly into delivery trucks and taken to construction sites, whereas the blocks had to be shaped and were then laid out for three days on the paved area to dry out before delivery. The overall level of production of concrete had not changed.

[9] The inspector who reported to the Board took the view that on the evidence, the Board could only conclude that some form of quarry opera-

tion and block manufacture was in place prior to the commencement of the 1963 Act, but that it could not be determined that no material change of use by reason of intensification had not occurred. She pointed to evidence suggesting that production had increased in 1984. In the circumstances she felt that it could not be determined that the quarry was authorised, and she therefore could not accept that the use of the batching plant was ancillary to an authorised quarry.

[10] The inspector considered that the laying out of the hard surfaced area and the use of the two acre part of the site for purposes related to block manufacture was of critical importance. Her conclusion was that the laying out of the hard surface area was development and was not exempted development. Her reasons were as follows:-

> "In relation to the enlargement of the yard, which is stated to be about two acres in extent, there is no dispute between the parties that the yard has been extended to facilitate drying and storage essential to the production of concrete blocks. The operator's case is that the replacement of the old yard and the extension of the yard are not visible and that an exemption under s. 4(1)(h) applies. Section 4(1)(h) relates to 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 …'
>
> I submit that the replacement /repaving *and extension* of a concrete yard would not be described as either maintenance or improvement of a structure as neither would allow for an extension of the area. The term 'alteration' is defined to include plastering or painting, removal of plaster or stucco or the replacement of a door, window or roof that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures'.
>
> I consider that neither the legal definition nor the ordinary dictionary definition of 'alteration' encompasses the concept of an extension or enlargement as a defining characteristic but rather relates to more minor changes to a structure. I consider that an extension of the yard has taken place and that this is 'works' and is 'development', but would not be described as 'maintenance, improvement or other alteration of any structure' and does not therefore fall within the exempted development provisions set out in s. 4(1)(h) of the 2000 Act and I reject the operator's arguments in this regard" (emphasis in original).

[11] The inspector accepted Cronin's argument that the production of concrete blocks, as opposed to readymix concrete, did not have a material

planning impact in terms of the type and quantity of raw materials used or in relation to the traffic implications. Nor did it constitute an intensification of use in terms of materials sourced from the site and then processed and exported from the site. However, it was likely to give rise to additional noise and dust related disturbance. On this aspect, she noted that there was a private residence nearby. In addition, concrete block production required an extensive area of land for the purpose of open area storage. In this respect she considered that there had been a significant change in the nature of the process and an intensification of use of the lands. She said:-

> "The production of concrete blocks is reliant on the laying out of 2 acres of a 130 acre site, of which only 96 acres is used for excavation, and the use of that land for the drying and storage of blocks. I consider that this use of land has material planning consequences in terms of the visual impact of the development when viewed from surrounding lands – natural regeneration of the site could have occurred if this area was not surfaced. There are changes in terms of the surface water flows in the area and the extensive nature of the operation in land use terms compared with the production of readymix with possible resulting impacts on geology and hydrology. The development of an extensive hard surface area at this location would also militate against the development of a habitat which would potentially be of ecological importance and this is a further consequence in terms of the proper planning and sustainable development of the area. I conclude that the development of a 2 acre hard surfaced area has material planning consequences. The process of production of concrete blocks is therefore materially different to that of the production of readymix concrete and constitutes a material change of use."

[12] In coming to the conclusion that there had been development and that it was not exempted development, the Board ruled, *inter alia*, as follows:-

(a) that the laying out of a hard surfaced area of two acres in extent was development;

(b) that the laying out of a hard surfaced area of two acres in extent did not fall within the scope of s. 4(1)(h) of the 2000 Act, in that it did not constitute works for the maintenance, improvement or other alteration to a structure;

(c) that the manufacture of blocks was dependent on the use of a large area of land for drying and storage which gave rise to material planning effects; and

(d) that the production of concrete blocks was an intensification of use that consisted of a material change of use of the land.

[13] Cronin thereafter instituted judicial review proceedings. The two reliefs claimed were an order of *certiorari* of the decision that the block making operation was development, and was not exempted development, and a declaration that the Board did not have jurisdiction to make that decision in the absence of sufficient evidence as to the use of the lands at 1 October 1964 and/or prior to the alleged material change of use of the lands. It should be noted that, having regard to the certified question, this appeal is not concerned with the concept of "material change of use" but only with the issue of exempted development.

The relevant legislative provisions

[14] It is relevant to consider, to begin with, the general policy of the planning permission regime as set out in the 2000 Act. Section 32 provides that, subject to the other provisions of the 2000 Act, permission is required in respect of any development that is not exempted. Subsection (2) of that section stipulates that, where permission is required, development is not to be carried out except under and in accordance with permission granted under the 2000 Act.

[15] In the vast majority of cases, an application for permission to develop land is to be made to the local planning authority. In deciding whether or not to grant permission, or to grant permission subject to conditions, the planning authority is constrained by the provisions of s. 34 of the 2000 Act to consider the proper planning and sustainable development of the area. Regard must be had to, *inter alia*, the development plan for the area; the provisions of any special amenity area order relating to the area; any European site or other prescribed area; where relevant, the policy of the Government or any minister of the Government; and any other relevant provisions of the 2000 Act or regulations made thereunder. Section 34(4) provides for a non-exhaustive list of matters that may be the subject of conditions attached to planning permission, including measures to regulate the use of any adjoining land owned by the applicant, the control of noise and vibration, and conditions relating to the carrying out of the necessary works.

[16] Development, for the purposes of the 2000 Act, is defined in s.3 as meaning, except where the context otherwise requires:-

> "the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or other land."

[17] Section 2(1) provides in relevant part that the word "works" includes:-

> "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal."

[18] Section 4(1) of the 2000 Act sets out a list of categories of developments which do not require permission. These are referred to as exempted developments. As far as non-State developers are concerned, the notable classes are perhaps those dealing with the use of agricultural land and those dealing with forestry-related activities. There is also an exemption for house occupiers in relation to the use of any structure or land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such.

[19] Section 4(2) of the 2000 Act empowers the Minister to provide, by regulation, for any class of development to be exempted development for the purposes of the 2000 Act where, *inter alia*, in his or her opinion, the carrying out of that class of development would not offend against principles of proper planning and sustainable development by reason of its size, nature or limited effect on its surroundings.

[20] The 2000 Act has been amended in recent years but as of the date of hearing of this matter in the High Court the category of exemption in issue in the case was s. 4(1)(h), which refers to:-

> "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."

[21] The word "structure" as defined in s. 2(1) of the 2000 Act means "any building, structure, excavation or other thing constructed or made on, in or under any land, or any part of a structure so defined". Where the context so admits it also "includes the land on, in or under which the structure is situate".

[22] It is also necessary to consider the meaning of the word "alteration". It is not defined as such, but s. 2(1) of the Act provides that it:-

> "includes
> (a) plastering or painting or the removal of plaster or stucco, or
> (b) the replacement of a door, window or roof,
> that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures."

The High Court judgment

[23] It was contended on behalf of Cronin that the work done to the yard surface was an alteration or an improvement, or perhaps even maintenance, of the structure. The structure in question was either the quarry as a whole, or the concrete yard surface.

[24] The Board submitted that the laying down of the yard was an extension, whether considered as an extension of the quarry itself or of the concrete area. Extensions are specifically mentioned in the definition of "works" and must be seen as a separate and distinct category within that definition. They cannot be subsumed into the concepts of "alteration" or "improvement" and are not specifically included in the exemption provisions. The works therefore could not be exempt, whether they materially affected the appearance of the structure or not.

[25] The trial judge considered that the Board's approach required the exclusion from s. 4(1)(h) of some of the meanings of "works" set out in s. 2(1) of the 2000 Act (see [2009] IEHC 553, [2009] 4 I.R. 736 at para. 24, pp. 744 and 745. He preferred to assume that the word was to be given the same meaning in both sections, so that an extended version of the provision for exempted development under the relevant heading, set out at p. 746, would read:-

> "[25] ... the *carrying out* of works (includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal) ...
>
> *for* the maintenance, improvement or other alteration of any structure, ...
>
> being works which do not materially affect the external appearance of the structure so as to *render the appearance inconsistent* with the character of the structure ..." (emphasis in original).

[26] Ryan J. rejected the argument that extensions were excluded from s. 4(1)(h), stating that an extension could be considered an improvement or an alteration. The words should not be construed as a term of art in a criminal statute or a tax act. At p. 745 he said:-

> "[25] The [Board] was wrong in its interpretation of s. 4(1)(h), in my view. An extension is not excluded as a matter of definition. An extension can be an improvement or an alteration. Maintenance and improvement (and other alteration) are the *purposes* for which the work is done in exempted development. The definition of works in s. 2(1) lists the kind of *activities* of which any *act or operation* constitutes works. So, an act of demolition amounts to works; so does an

operation of renewal, *etc.* An act or operation of construction or repair may be required for the *purpose* of maintenance of a structure and that is obviously intended to be exempted development, but it would be excluded if the [Board's] submissions are correct. By insisting that the work done must be actual maintenance, improvement or other alteration, rather than for [the purpose of] maintenance *etc.*, the [Board] confuses purpose and act and overlooks 'the carrying out of works' in s.4(1)(h)" (emphasis in original).

[27] The trial judge considered that his was, in any event, a more practical approach because otherwise permission would be required for every small extension to a private house. He acknowledged, however, that his interpretation required the giving of two different meanings to the word "alteration". This was because, in his view, "alteration" in s. 2(1) of the 2000 Act described acts, including painting and plastering, which resulted in a material impact on the external appearance of a building while "alteration" in s. 4(1)(h) related to purpose. He found it necessary to take this approach in order to avoid attributing meanings to the word which were actually in conflict with each other.

[28] In his concluding remarks on the issue the judge said at p. 747:-

> "[28] In the result, the inspector and the [Board] did not ask the correct question or questions. It was clear that works had been carried out. The fundamental question therefore was not about the nature of the work done but rather about its purpose and effect. Did the work make the structure inconsistent with its character? If it did not, the next question was whether the work done was for the maintenance, improvement or other alteration of the structure. In the circumstances of this case, I think that neighbouring structures did not enter into the question of whether the works made the quarry inconsistent with them.
>
> [29] This misunderstanding of s. 4(1)(h) in its statutory context is fatal to the decision made by the [Board]."

Submissions in the appeal

[29] Counsel for the Board summarises the effect of the ruling of the trial judge as being that all types of works described in s. 2(1) can be exempt under s. 4(1)(h), provided they are for the specified purposes and do not materially affect the appearance of the structure in question. This would be so even if the development bore no relationship to the original structure. It is submitted that this approach overlooks the fact that the 2000 Act deals with a regulatory scheme, which imposes a general requirement

that all development should be the subject of planning permission. This general requirement should, it is submitted, be interpreted broadly while the discrete exemptions provided for should be interpreted narrowly. By including all s. 2 descriptions of "works" within the exemption in s. 4(1)(h), depending only on purpose and visual impact, the trial judge's reading of the legislation ignored the importance of other planning considerations such as environmental impact. Appearance is of very slight relevance in the case of a quarry but issues relating to water, noise and traffic could be very significant.

[30] It is submitted that it was an error on the part of the trial judge to consider that the purposive reading adopted by him was required in order to allow for small extensions to private houses, since the power of the Minister under s. 4(2) of the 2000 Act to exempt specified classes of development, by way of statutory instrument, has already been utilised for that and many other categories.

[31] Looking specifically at s. 4(1)(h) of the 2000 Act, counsel submits that it provides for a limited category of works that amount to alterations (with the concepts of maintenance and improvement being subsets), which are either wholly internal or, if external, are insignificant. It is unnecessary in such cases to subject the development to the whole range of planning considerations, precisely because the paragraph only applies to a limited range of works. It would be absurd to construe it as covering any works, no matter what the scale and no matter how slight the relationship with the original structure, just because they are intended as improvements.

[32] Counsel for the Board relies on *Dillon v. Irish Cement Ltd.* (Unreported, Supreme Court, 26 November 1986) as an authority dealing specifically with the proper approach to interpretation of an exemption under the 2000 Act. The category of exempted works in question in that case was set out in regulations made under the then applicable legislation. Finlay C.J. said at pp. 2 and 3:-

> "... I am satisfied that in construing the provisions of the exemption regulations the appropriate approach for a court is to look upon them as being regulations which put certain users or proposed development of land into a special and, in a sense, privileged category. They permit the person who has that in mind to do so without being in the same position as everyone else who seeks to develop his lands, namely, subject to the opposition or views or interests of adjoining landowners or persons concerned with the amenity and general development of the countryside. To that extent, I am satisfied that these regulations should by a court be strictly construed in the sense that for a developer to put

himself within them he must be clearly and unambiguously within them in regard to what he proposes to do ..."

[33] Reliance is also placed on *South Dublin County Council v. Fallowvale Ltd.* [2005] IEHC 408, (Unreported, High Court, McKechnie J., 28 April 2015). In that case McKechnie J. was dealing with an application for an injunction under s. 160 of the 2000 Act where the respondent developer claimed the benefit of an exemption. In determining where the onus of proof lay in such proceedings he considered a number of authorities, including *Dillon v. Irish Cement Ltd.* (Unreported, Supreme Court, 26 November 1986) and subsequent authorities where it had been cited. His conclusion at para. 70, p. 53, was that there was a clear preponderance of authority for the proposition that when the development complained of was sought to be excused under an exemption provision, the onus of establishing that point was on the person asserting it.

[34] On behalf of Cronin, it is submitted that the court should give the words of the legislation their natural and ordinary meaning. Counsel argues that *Dillon v. Irish Cement Ltd.* (Unreported, Supreme Court, 26 November 1986) and *South Dublin County Council v. Fallowvale Ltd.* [2005] IEHC 408, (Unreported, High Court, McKechnie J., 28 April 2015) were both concerned with the question of the onus of proof rather than the appropriate principles of statutory construction, and do not govern the issue in this case. If the Oireachtas had intended to limit the "works" concerned to certain subcategories it would have referred to "works *of* ... maintenance, improvement or other alteration". Use of the word "*for*" is said to express the concept of purpose.

[35] However, it is also submitted that the principle of strict construction of penal provisions is applicable, on the basis that the 2000 Act creates, in s. 151, an offence of carrying out "unauthorised" development (that is, post-1964 development that has no permission and is not exempted development). On this basis, s. 5 of the Interpretation Act 2005 is relied upon for the proposition that the words used should not be given a purposive meaning.

[36] Counsel for Cronin argues that the High Court judge was correct in holding that the exemption in question is limited only by the purpose of the development and its effect in terms of visual impact. It is said that the "structure" that has been altered in this case could be considered to be either the yard or the quarry. The previous hard-standing area was in itself an alteration to the quarry, so any alteration to that area might be said to be an alteration to the quarry. Counsel contended that there was no limitation of a permissible development in terms of size, provided that it remained

within the quarry structure. It would be permissible to concrete over the entire floor of the quarry.

[37] On this aspect, counsel for the Board refers to s. 261 of the 2000 Act and the definition of "quarry" therein, which specifically excludes a place at which manufacturing is carried out.

[38] It is accepted by Cronin that the interpretation now urged might be said to weaken the framework created by the 2000 Act for environmental protection in the planning process. However, it is submitted that the existing controls relating to intensification and material change of use still apply. In any event, if the provision has an adverse effect it is a matter for the Oireachtas and not for intervention by the court.

A penal statute?

[39] Section 5 of the Interpretation Act 2005 provides as follows:-

"(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which *paragraph (a)* of the definition of "Act" in *section 2(1)* relates, the Oireachtas, or

(ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or Parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

[40] Section 151 of the 2000 Act provides that any person who has carried out or who is carrying out "unauthorised" development shall be guilty of an offence. The offence is triable either summarily or on indictment. Section 156(6) of the 2000 Act provides that in such proceedings:-

"... it shall not be necessary for the prosecution to show, and it shall be assumed until the contrary is shown by the defendant, that the subject matter of the prosecution was development and was not exempted development."

[41] Section 156(6) thus creates a reverse burden or onus of proof. It would be inappropriate to determine in these proceedings what the precise parameters of that burden might be. If necessary it would fall to be

considered in the light of authority holding that such a burden, in general, requires an accused person only to demonstrate the existence of a reasonable doubt (for a recent discussion of this topic, see *The People (Director of Public Prosecutions) v. Heffernan* [2017] IESC 5, [2017] 1 I.R. 82).

[42] I am satisfied that the 2000 Act is not a penal statute in the sense of having as its objective the creation of a criminal offence, with the provision of a range of defences. The purpose and scheme of the 2000 Act is to create a regulatory regime within an administrative framework which, in the interests of the common good, places limits on the right of landowners to develop their land as they might wish. The principal objectives of the regime are proper planning and sustainable development, and the chief method of ensuring the attainment of those objectives is the planning permission process. It is based on the principle that developments that might have some significant impact, having regard to the range of factors encompassed within the concepts of proper planning and sustainable development, should go through the assessment process necessary for the grant of planning permission. The primary roles in that process are given to the planning authorities and the Board. The main powers of enforcement provided for in the 2000 Act are conferred on them.

[43] A crucial point, for the purposes of this case, is that those bodies are responsible for deciding what is or is not exempted development. They do so by exercising civil powers conferred by the 2000 Act, not in the context of a criminal prosecution. It is necessary to point out again that the issue in this case arises from a ruling made in the procedure provided under s. 5 of the 2000 Act. That provision sets out a scheme whereby, in the first instance, any person may apply to the relevant planning authority for a declaration as to whether what has occurred in a particular development is or is not development, or whether it is exempted development. A planning authority may, on its own initiative, make a similar application to the Board. The procedure is an expedient method of determining the status, within the regulatory regime, of a particular development about which some doubt may exist.

[44] In *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625 the Supreme Court held that, having regard to the availability of the s. 5 procedure, the High Court had no jurisdiction to grant a declaration that certain proposed activities at a venue were covered by the terms of its planning permission. While such a question might legitimately come before the courts in, for example, enforcement proceedings, the jurisdiction to determine the issue in the first place had been conferred on the planning authority and on the Board.

In *Wicklow County Council v. Fortune* [2013] IEHC 397, (Unreported, High Court, Hogan J., 5 September 2013) Hogan J. held at para. 12, p. 9, that this reasoning must be taken as impliedly precluding the High Court from finding that a development was exempted where there was an unchallenged decision by the Board that it was not. I agreed with his conclusion in my judgment in *Wicklow County Council v. O'Reilly* [2015] IEHC 667, (Unreported, High Court, O'Malley J., 29 October 2015).

[45] It follows that the primary role in determining whether a development is exempted or not is given to (depending on the circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for judicial review. However, it plainly does not, and could not, result in a determination of guilt or innocence of a criminal offence. There was no suggestion to the contrary at any stage of these proceedings. In my view, therefore, it is entirely inappropriate to read the provisions of s. 4 of the 2000 Act as if they related to "the imposition of a penal or other sanction". What they are concerned with is the exemption of categories of development from the general requirement to obtain permission.

[46] In any event, I consider that s. 5 of the Interpretation Act 2005 has no application to the matter before the court. Section 4(1)(h) is not obscure or ambiguous and does not lead to an absurd result.

Conclusion

[47] The issue, then, is whether the plain intention of the Oireachtas can be ascertained. In my view it can. I agree with the argument of counsel for the Board, as summarised in paras. 30 to 32 above, that the effect of the High Court judgment would be to render exempt a range of developments far in excess of the intention of the Oireachtas. One must bear in mind the overall framework and scheme of the 2000 Act, with the many considerations that come into play in the planning process, and look at the context of the provision in question within that framework. I think it is manifestly unlikely that the intention was to render exempt all works carried out on any existing structure, including unlimited extensions in size, subject only to considerations of visual appearance (and subsequent considerations arising from any intensification of use). Nor do I consider that the words used in the section compel the court to the conclusion that this is the meaning of the section.

[48] In the first place, it seems necessary to stress that there is no single definition of the word "alteration" for the purposes of the 2000 Act. Thus,

for at least some purposes of the 2000 Act an "alteration" may involve something that changes the external appearance in a way that is inconsistent with the character of the structure in question, or with the character of neighbouring structures. However, for the purposes of the exemption an "alteration" must not have that effect.

[49] Given the different ways in which the word is used, it is best taken as simply bearing its ordinary meaning of "change". Obviously, an extension is an alteration but that does not really advance the argument in any direction.

[50] It is true that, in principle, an extension could be considered to be an improvement. However, that is a concept that requires further examination. Almost by definition, any proposed development will be an improvement from the point of view of the developer. In my view the trial judge fell into error in ascribing such significance to the word "for" in the phrase "works for the maintenance" *etc.* as to make the purpose for which the works were carried out of paramount importance. In the context of the overall framework, policies and purposes of the 2000 Act, that is to ascribe a weight which I do not believe the word can bear. I do not consider that it was the intention of the legislature to make the necessity to apply for planning permission dependent on the motive and purpose of the developer. It seems to me that an "improvement", for the purposes of an exemption, must be something that relates to the internal use and function of the structure, resulting in either no externally noticeable difference or an insignificant difference.

[51] In my view the interpretation placed on s. 4(1)(h) of the 2000 Act by the High Court was incorrect. I accept the arguments of the Board as to its true meaning, and consider that an extension is a development that does not come within the exemption. In the circumstances I would allow the appeal.

Solicitors for the respondent: *Barry Doyle & Co.*

Solicitors for the applicant: *O'Leary & Co.*

Alan V. Meehan, Barrister

APPENDIX

WRITTEN LEGAL SUBMISSION

BY GARRETT SIMONS, SENIOR COUNSEL

25 MAY 2018

Abbreviations

Referrer	Temple Bar Cultural Trust DAC
Owner/Occupier	NOTTUB Ltd.
PDA 2000	Planning and Development Act 2000 (as amended)
Premises	Button Factory (formerly The Temple Bar Music Centre)

INTRODUCTION

1. P. & F. O'Reilly Solicitors act on behalf of Temple Bar Cultural Trust DAC ("***TBCT***"). TBCT are the respondent to an application for a review of a section 5 declaration issued by Dublin City Council. The planning authority's declaration bears the Reg. Ref. E0055/118.

2. The initial referral was made by TBCT. The application for a review has been prepared by Simon Clear & Associates on behalf of a company called NOTTUB Ltd. This company hold the Premises under a five hundred year lease. The application for a review is dated 16th April 2018, and bears the Board Reference ABP-301491-18.

3. The principal response to the application for a review has been prepared on behalf of TBCT by Doyle Kent Planning Partnership ("***Doyle Kent***"). In addition, I have been asked to prepare a written submission which addresses the legal issues arising in the section 5

referral. This written submission should be read in conjunction with the principal response prepared by Doyle Kent.

4. For ease of reference, the shorthand "***Referrer***" will be employed to describe TBCT, and "***Owner/Occupier***" to describe NOTTUB Ltd.

SECTION 5 JURISDICTION

5. For the reasons set out in detail below, it is submitted that much of the application for a review is based on a misconception of the nature of the statutory jurisdiction under section 5 of the Planning and Development Act (as amended) ("***PDA 2000***"). In particular, the application for a review is based on an allegation that the section 5 referral is "*hypothetical*", and that the issues raised are ones which are more properly dealt with in enforcement proceedings under Part VIII of the PDA 2000. With respect, neither of these arguments is correct.

6. Section 5 of the PDA 2000 provides a procedure whereby any person may request a declaration in writing from the relevant planning authority where a question arises as to what, in any particular case is or is not development or is or is not exempted development. The planning authority's decision of first-instance may thereafter be the subject of a review before An Bord Pleanála.

7. It is expressly provided that the referral procedure is available to "*any person*". On the facts of the present case, the referral was made by a party which has a direct interest in the question as to whether the proposed use of the Premises requires planning permission. The referral was made by Temple Bar Cultural Trust DAC ("***TBCT***"). TBCT has a freehold interest in the Premises. More specifically, the Premises are held under a five hundred year lease granted by TBCT to NOTTUB Ltd. The lease is subject to covenants in respect of *inter alia* the user of the premises and in respect of compliance with the planning legislation. In addition, TBCT also has a general interest in the proper functioning of Temple Bar in its role as as a development company for the Temple Bar area of Dublin, pursuant to the provisions of the Temple Bar Area Renewal and Development Act 1991, and its objectives include the maintenance of a mix of users in the area so as to maintain its status as a cultural quarter.

8. At a number of points in the submission made by Simon Clear & Associates on behalf of NOTTUB Ltd., mention is made of the fact that the initial referral was made by a "third party". If and insofar as this is intended to be a criticism of the referral, it is misplaced as a matter of law. The section 5 referral procedure may be invoked by *any person*; and can certainly be invoked by a party such as TBCT which has a proprietary interest in the Premises. The submission is also in error insofar as it describes NOTTUB Ltd. as "*effectively freehold owners*". The correct legal position is that the Premises are held under a lease, and subject to the covenants mentioned above.

9. A more fundamental error which undermines the application for review is to be found in its description of the interaction between section 5 of the PDA 2000 and the enforcement provisions under Part VIII of the PDA 2000. More specifically, at pages 11, 12 and 13 of Simon Clear & Associates' submission on behalf of the Owner/Occupier, it is suggested that the determination of 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 is a matter reserved to the courts alone. The submission cites the judgment of the High Court in *McDowell v. Roscommon County Council* [2004] IEHC 396.

10. With respect, the arguments in this regard are in error. The case 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 local planning authority and An Bord Pleanála under section 5 of the PDA 2000. Far from An Bord Pleanála having to defer to the courts by awaiting enforcement proceedings, the case law indicates that the Board has the primary role.

11. The Supreme Court described the nature of the section 5 referral jurisdiction as follows in *Cronin (Readymix) Ltd v An Bord Pleanála* [2017] IESC 36; [2017] 2 I.R. 658 at [41] to [43].

> *"A crucial point, for the purposes of this case, is that those bodies are responsible for deciding what is or is not exempted development. They do so by exercising civil powers conferred by the Act, not in the context of a criminal prosecution. It is necessary to point out again that the issue in this case arises from a ruling made in the procedure provided under s.5 of the Act. That provision sets out a scheme whereby, in the first instance, any person may apply to the relevant planning authority for a declaration as to whether what has occurred in a particular development is or is not*

development; or whether it is exempt development. A planning authority may, on its own initiative, make a similar application to the Board. The procedure is an expedient method of determining the status, within the regulatory regime, of a particular development about which some doubt may exist.

In Grianán an Aileach Interpretative Centre v. Donegal County Council (No.2) [2004] 2 I.R. 625 the Supreme Court held that, having regard to the availability of the s. 5 procedure, the High Court had no jurisdiction to grant a declaration that certain proposed activities at a venue were covered by the terms of its planning permission. While such a question might legitimately come before the courts in, for example, enforcement proceedings, the jurisdiction to determine the issue in the first place had been conferred on the planning authority and on the Board. In Wicklow County Council v. Fortune [2013] IEHC 397 Hogan J. held that this reasoning must be taken as impliedly precluding the High Court from finding that a development was exempted where there was an unchallenged decision by the Board that it was not. I agreed with his conclusion in my judgment in Wicklow County Council v. O'Reilly [2015] IEHC 667.

It follows that the primary role in determining whether a development is exempted or not is given to (depending on the circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for judicial review. However, it plainly does not, and could not, result in a determination of guilt or innocence of a criminal offence. There was no suggestion to the contrary at any stage of these proceedings. In my view, therefore, it is entirely inappropriate to read the provisions of s.4 as if they related to "the imposition of a penal or other sanction". What they are concerned with is the exemption of categories of development from the general requirement to obtain permission.

12. As appears from the foregoing, the Supreme Court has held that the "*primary role*" in determining whether a development is exempted or not is given to the local planning authority or An Bord Pleanála, and that a decision by one of those bodies is an authoritative ruling on the issue.

13. The courts have recognised that the local planning authorities and An Bord Pleanála have a particular expertise in this regard. In *Killross Properties Ltd v Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541, the Court of Appeal addressed the relationship between a section 5 determination and enforcement proceedings. The Court of Appeal indicated that the courts cannot go behind an otherwise valid section 5 determination in the course of enforcement proceedings under section 160 of the PDA 2000. The judgment of the Court of Appeal emphasises that the determination of a section 5 referral is something which should be respected by the courts.

14. Against this background, it is clear that An Bord Pleanála has statutory jurisdiction under section 5 of the PDA 2000 to determine the issue raised in the within referral. It is common case between the parties that the Owner/Occupier intends to apply for a seven day licence in lieu of its existing theatre licence. The question which has come before the Board is as to whether this proposed change in use amounts to a material change of use. The question is thus squarely within the jurisdiction conferred under section 5 of the PDA 2000. An Bord Pleanála is empowered to rule upon 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.

15. Finally, for the sake of completeness, it should be noted that the reliance which Owner/Occupier seeks to place upon the judgment in *McDowell v. Roscommon County Council* is misplaced. The facts of that case are entirely distinguishable from the present one. More specifically, the case concerned an application for an extension of duration of planning permission under the statutory predecessor to what is now section 42 of the PDA 2000. Roscommon County Council had purported to refuse the extension on the basis that the dwelling house in course of construction was not in compliance with the planning permission. The High Court judgment makes it clear that an application for an extension of duration must be determined solely by reference to the statutory criteria prescribed, and that the planning authority cannot decide to refuse an extension of duration in order to penalise a developer for what it considers to have been unauthorised development. The judgment is concerned, therefore, with the relationship between the jurisdiction to grant an extension of duration and the enforcement provisions under the planning legislation. It has nothing to say about the section 5 jurisdiction.

16. By contrast, the present case is concerned with the statutory jurisdiction under section 5 of the PDA 2000. For the reasons set out above—and in accordance with the case law cited—it is submitted that the precise purpose of section 5 of the PDA 2000 is to allow An Bord Pleanála (on review) to determine whether or not a proposed change in use constitutes a material change in use such as to require planning permission.

REFERENCE IS NOT HYPOTHETICAL

17. At a number of points in its submission, the Owner/Occupier seeks to argue that the within section 5 referral is hypothetical. For example, it is stated as follows at page 11 of Simon Clear & Associates' submission.

"As put, the proposition put forward by TBCT is hypothetical and the extrapolation of effects that would amount to a consideration of potential material change of use derives from that hypothesis as extrapolated – 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, or as a 'super-pub'."

18. This argument that the referral is hypothetical is, with respect, incorrect. It is common case between the parties that the Owner/Occupier intends to apply for a change in the type of liquor licence applicable to the premises. See, for example, page 3 of its submission, where it is stated that the Owner/Occupier decided to apply to change the licence to a seven day publicans licence. Moreover, the Owner/Occupier had written to the Referrer to seek the latter's consent to a change of use under the terms of the lease of the Premises.

19. The central factual predicate for the section 5 referral is not, therefore, in dispute. The Owner/Occupier intends to apply for a change of liquor licence. The question for An Bord Pleanála is whether this proposed change constitutes a material change in use such as to require planning permission. This is addressed under the next heading below.

MATERIAL CHANGE IN USE

20. Before turning to consider the detail of the referral, it is perhaps worthwhile recalling at the outset that the issue before the Board is the *threshold issue* of whether or not the proposed change requires an application for planning permission. To state the obvious, An Bord Pleanála is not actually determining an application for planning permission, i.e. the Board is not saying whether or not the introduction of a public bar into the Premises would be in accordance with proper planning and sustainable development. Rather, the Board is determining the anterior question as to whether an application for planning permission should be made at all. The answer to this question turns on the narrow issue of whether the change is a material change in use.

21. The starting point for the Board's analysis must be the terms of the planning permission itself. The planning permission for the Premises bears Reg. Ref. 1661/92. I am instructed that the description of the permitted development as *per* the planning permission reads as follows.

"4 storey over basement music centre, incl. auditorium, backstage facilities, foyer, offices, music rehearsal/experimental facilities, three 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 facade to No. 10/10A including minor changes to elevation."

22. As appears from the foregoing, the planning permission does not authorise a public bar. Indeed, the Owner/Occupier does not go so far as to assert that the planning permission has this effect. Rather, as appears in particular from page 12 and 13 of Simon Clear & Associates' submission, the Owner/Occupier accepts that any use as a bar must be incidental to and ancillary to the use of the Premises for its principal use as a music centre.

23. 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. The 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 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. See *DPP v. Tivoli Cinema Ltd.* [1999] 2 I.R. 260.

24. By contrast, the grant of a seven day publican's licence would be to sever the organic link between the ancillary use and the principal use of the Premises. The legal effect of the grant of the new licence would be to elevate the bar use from an incidental and ancillary use to a principal use in its own right. Alcohol could be served to members of the public without the restrictions applicable to a theatre licence.

25. 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. This point is illustrated by the Supreme Court judgment in *Dublin Corporation v. Regan Advertising Ltd.* [1989] I.R. 61. On the facts of that case, the upper portion of the facade or front elevation of industrial premises had been used for advertising. Originally, the advertising had related to the business being carried out in the premises, but more recently, it had been used to carry commercial advertisements for third parties.

The Supreme Court held that the original form of advertising has been authorised as ancillary to the principal use of the premises, but that the new form of advertisement was unauthorised.

26. The same logic applies to the present case. The grant of a seven day licence would be to elevate the bar use from an incidental and ancillary use to a principal use in its own right, i.e. unconnected to the principal use. This issue is addressed in more detail in the submission prepared by Doyle Kent and, in particular, the materiality of the change in terms of, for example, impact on residential amenity is dealt with in detail. I do not propose to replicate that analysis here. Suffice it to say, from a legal viewpoint, the change in liquor licence type is capable of constituting a material change in use.

27. A useful analogy can be drawn with An Bord Pleanála declaration in 29N RL.2093. There, An Bord Pleanála held that the use of that portion of the premises referred to as the "leisure centre" for use as a leisure centre together with the ancillary use for the sale of intoxicating liquor constituted "development". The inspector's report addresses the issue of change of use as follows.

> *"[...] The introduction of a public bar with late night use has altered the use as a sports facility and could only have resulted in a significant intensification of use of the premises. The intensification of use of this premises, unrelated to the sports centre use, would have a significantly different effect on the local environment than the use as a sports facility. It would lead to planning considerations arising from the change of use that would be materially different from those pertaining to the leisure centre use such as resultant noise, potential general disturbance associated with a public bar facility, etc. in considering the proper planning and development of this area. This change of use would be a material change in the use of the premises which comes within the meaning of "development" in section 3(1) of the 2000 Act."*

REBUTTAL OF OWNER/OCCUPIER'S ARGUMENTS

28. It appears from the Owner/Occupier's submission that two arguments are made as to why it is said that the change in liquor licence type will not constitute a material change in use. First, it is alleged 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. Secondly, it is stated that the current operator does not intend to intensify the use of the premises. It is

not at all clear, however, from the submission as to what the precise intentions of the Owner/Occupier are.

29. With respect, neither of these two arguments is well-founded. Insofar as the first argument is concerned, 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. In this regard, it is important to bear in mind that the Owner/Occupier, as developer, bears the onus of proof in this regard.

30. More importantly, however, the fact—if fact it be—that the Premises might have been used in the manner alleged by the Owner/Occupier does not alter the *legal consequences* which the grant of a seven day licence would have. As discussed under the previous heading, the nature of the restrictions imposed on a theatre licence are such that the operation of such a licence is consistent with a bar being ancillary or incidental to the principal use of the premises as a music centre. Once this organic link is broken, however, then use of the public bar would become a principal use in its own right.

31. A similar type of argument has rejected by the High Court in in *Carrick Hall Holdings Ltd. v. Dublin Corporation* [1983] I.L.R.M. 268.

> *"It has been urged on behalf of the Plaintiff that the hotel licence was an ordinary publican's licence although there was a restriction preventing the installation of a public bar, and that the change to an ordinary seven day licence merely removed this restriction without altering the essential nature of the licence; the suggestion being that there is therefore no change of use. It is difficult to ascertain the effect of the long series of Licensing and Intoxicating Liquor Acts from 1833 to 1962, but it does appear that a hotel licence is an ordinary publican's licence and does not contain any restriction on sales to the public.*
>
> *I have been referred to the judgments of the Supreme Court in the case of Readymix (Eire) Ltd. -v- Dublin Co. Co. delivered on 30th July, 1974, and to the judgment of Costello, J., in Patterson -v- Murphy delivered on 4th May, 1980. The decision in the Readymix case did not turn on the point, but Griffin, J., laid emphasis on the relevance of the very substantial increase in the volume of vehicular traffic, indicating that it was a matter which it might to appropriate to consider. Costello, J., in Patterson -v- Murphy held that an increased scale of operations bearing no relation to the scale of operation previously carried on is a factor which may be taken into account when considering whether there has been a material change in use or not. He referred with approval to the case of Brooks and Burton Ltd. -v- Environment Secretary (1977) 1 W.L.R. 1294 , in which Lawton, L.J., said at page 1306*

> *'We have no doubt that the intensification of use can be a material change of use. Whether it is or not depends upon the degree of intensification.'*
>
> *In the present case, 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."*

32. The Owner/Occupier's attempt to distinguish the judgment in *Carrick Hall Holdings* is misplaced. In particular, it is incorrect to say that the judgment was a prosecution case. In fact, the case was an appeal to the High Court under the statutory predecessor to what is now section 5 of the PDA 2000, namely, section 5 of the Local Government (Planning & Development) Act 1963. If anything, the judgment 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.

33. Turning to the second argument outlined above, the intentions of a particular occupier are not determinative in planning terms. This issue was addressed by the High Court judgment in *In re Tivoli Cinema Ltd.* [1992] 1 412. This case concerned an application for a seven day publicans licence in respect of premises used as a theatre. One of the issues in the case was whether the grant of a licence would necessitate an application for planning permission. The High Court held that the planning code and the licensing code are separate and distinct codes of law; and the fact that the area to be licensed might exceed that authorised for use as a bar by the planning permission does not prevent the licence from being granted for the greater area. The absence of planning permission could not therefore be relied upon as a ground of objection to the initial licence application. For present purpose, however, it is relevant that the High Court judge went on to note that a use of any part of the premises other than the original bar for supplying and/or consuming intoxicating liquor would involve an *unauthorised use* of such other part of the premises which could be restrained under the planning code; and might then be used as a ground of objection to renewal of the licence if such wrongful use were to be allowed by the applicant.

34. The judge ultimately concluded that the premises were not suitable for licensing. In this regard, the judge again referred indirectly to the planning status of the premises. See page 421 of the reported judgment.

38. This saver only applies where the second use is and remains "ordinarily incidental" to the principal use. For the reasons discussed above, 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, i.e. there is no longer a link between performances and the sale of alcohol. The use is no longer incidental.

CONCLUSION

39. The central factual predicate for the section 5 referral is not in dispute. The Owner/Occupier intends to apply for a change of liquor licence. The question for An Bord Pleanála is whether this proposed change constitutes a material change in use such as to require planning permission. This question falls squarely within the jurisdiction conferred on the Board under section 5 of the PDA 2000, as described in the case law cited at page 3 and 4 above.

40. 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. The legal consequence of the grant of a seven day licence would be to elevate the bar use from an incidental and ancillary use to a principal use in its own right, i.e. unconnected to the principal use. This issue is addressed in more detail in the submission prepared by Doyle Kent and, in particular, the materiality of the change in terms of, for example, impact on residential amenity is dealt with in detail. I do not propose to replicate that analysis here. Suffice it to say, from a legal viewpoint, the change in liquor licence type is capable of constituting a material change in use.

GARRETT SIMONS, S.C.

25 MAY 2018

"Broadly speaking these objections relate to the suitability of the Tivoli Theatre to be the subject-matter of an ordinary seven day publican's licence. There is no contest as to the suitability of the premises for a theatre licence with the restrictions appropriate to such a licence - see Sections 20 and 21 of the Intoxicating Liquor Act1927. What is sought by the Applicants however is a full ordinary seven day publican's licence in lieu of such licence now extinguished in relation to No. 7 Dean Street.

The bar on the mezzanine floor of the Tivoli Theatre is only 810 square feet in area and capable of accommodating no more than 170 to 180 people. There is approximately another 8,000 square feet excluding stairs, etc., where drink might be consumed by up to 800 people if this licence is granted and planning permission for such extended use were obtained. Mr. Byrne is undoubtedly a committed theatre enthusiast and not interested in running a mere public-house but Mr. Byrne may not always be the person in charge of these premises. He himself indicated a desire to use the premises during the day time for business conferences and lunches and other like functions but even if so used how can intoxicating liquor be consumed other than in the small bar area without contravening the planning code? A theatre licence would not allow the use of the bar at all except during theatrical performances and for half an hour before and half an hour after such performances but the ordinary seven day publican's licence would allow the sale of drink throughout the whole of the day and during the same hours as any public-house."

35. Of course, the intoxicating liquor licensing legislation has been amended since the date of this judgment; in particular, by the Intoxicating Liquor Act 2008. For 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. As such, the change is material in planning terms.

36. This is confirmed by a consideration of the Use Classes under Part 4 of the Second Schedule of Planning and Development Regulations 2001. A "public house" falls in a different class than a "theatre" or a "concert hall". This indicates that they are regarded as materially different in planning terms.

37. The Owner/Occupier's reliance on Article 10(2)(a) is misplaced. This article provides as follows.

"A use which is <u>ordinarily incidental</u> 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."

Our Ref: ABP-301491-18

PA Reg Ref: E0055/18

Your Ref:

An Bord Pleanála

AN BORD PLEANÁLA
TIME _____ BY _____
28 MAY 2018
LTR DATER _____ FROM _____
PL _____

Temple Bar Cultural Trust
c/o Doyle Kent Planning Partnership Ltd
71 Carysfort Avenue
Blackrock
Co. Dublin

Date: 30 April 2018

Re: 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.
The Button Factory (former Temple bar Music Centre) urved Street North/Temple Lane South, Temple Bar, Dublin 2. Protected Structure

Dear Sir / Madam

Enclosed is a copy of a referral under the Planning and Development Acts 2000 to 2017.

In accordance with section 129 of the Planning and Development Act 2000 (as amended) you may make submissions or observations in writing to the Board in relation to the referral within a period of 4 weeks beginning on the date of this letter.

Any submissions or observations received by the Board outside of that period shall not be considered and where none have been validly received, the Board may determine the referral without further notice to you.

Please quote the above referral number in any further correspondence.

Yours faithfully,

Yvonne McCormack
Administrative Assistant
Direct Line: 01-8737155

Encls.
BPRL05

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