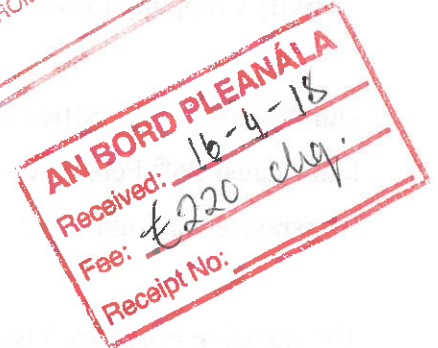


**SIMON CLEAR & ASSOCIATES  
PLANNING AND DEVELOPMENT  
CONSULTANTS**

The Secretary  
An Bord Pleanála  
64 Marlborough St  
Dublin 1



16<sup>th</sup> April 2018

**Re: Declaration by Dublin City Council in respect of the Button Factory,  
Curved Street, Dublin 2**

Dear Secretary,

On behalf of NOTTUB Ltd of No.8 Cecilia Street, Temple Bar, Dublin 2 I wish to refer the decision of Dublin City Council to declare a 'proposed development' at the Button Factory premises to An Bord Pleanála for review and determination. The Planning Authority's reference number is EXPP0055/18 and the decision was made on 20<sup>th</sup> March 2018.

My clients recently purchased a 500-year lease on the property and are effectively, freehold owners. My clients were served with the Declaration and any person issued with a declaration may, on payment of the described fee, refer the declaration for review by ABP within 4 weeks of the notification of declaration.

I enclose the Planning Authority notification of Declaration addressed to my clients. I also enclose the requisite fee in the sum of €220 (cheque).



Simon Clear B.A. Dip. T.P. MIPI  
Darran Quail B.A. MRUP MSc BLUP MIPI

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TERENURE,  
DUBLIN 6W  
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Vat No. 9803199H

## **Introduction**

This application for a Declaration was prepared and submitted in respect of our client's property without their knowledge or input, by the Temple Bar Cultural Trust Designated Activity Company (TBCT) and was submitted on 21<sup>st</sup> February 2018.

Our Clients were notified of the Request for Declaration by DCC, as owner/occupier, by letter dated 26<sup>th</sup> February 2018 and were allowed to make comments by 9<sup>th</sup> March 2018. A response was submitted to DCC by our clients on receipt of the notification.

The question posed by TBCT was *'Whether 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 "Publicans seven day Licence" in lieu of the use of the premises with a "Publicans Licence (Ordinary) Theatre" is or is not development and if it is development, whether it is exempted development.'*

Our Clients took issue with the nature of the request and of the question posed. In summary, this is a hypothetical question posed by a 3<sup>rd</sup> Party. It is our submission that the question as posed should not have been addressed by DCC as indicated in the Notification of Declaration and most definitely does not refer to a 'proposed development' as described in the said Notification.

## **Background**

The Button Factory is a 1,800m<sup>2</sup>, 5-storey mixed use modern music cultural Venue in the centre of the Temple Bar district, which hosts events and operates as a modern Rock Music museum cultural facility during the daytime, including hosting visiting groups of tourists on the trail through Dublin. It is one of the few truly cultural centres located in the Temple Bar Cultural Quarter, tracing the history of the Dublin rock industry involvement over 60 years, which has national and international tourist appeal.

Its viability was threatened and the current owners have secured funding to reinvest in the improvement of facilities throughout the building and to secure the future of the Venue. NOTTUB purchased a 500-year leasehold from the Temple Bar Cultural Trust (TBCT) in 2017, which is effectively a freehold ownership. Therefore, our clients are owners of the

property and will make proposals for its actual use. The Request for Declaration must be regarded as a 3<sup>rd</sup> Party submission in respect of the property.

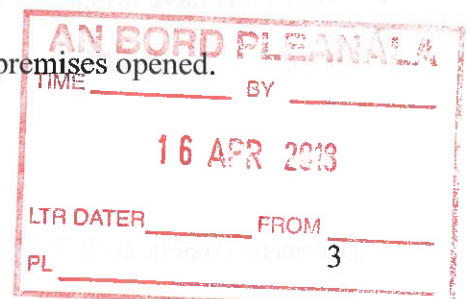
Additional to the cultural uses of Auditorium, Recording Studios, School of Music and Rock n'Roll Museum, there is a small (60m<sup>2</sup>) bar on the ground floor that has been there for 15 years, since the building first opened. This bar is referred to as "The Auditorium Bar". It is incidental and ancillary to and essential for the continued successful operation of the cultural facility.

NOTTUB operates this Bar under a "Publican's licence (ordinary) Theatre" type of licence. This licence only permits the sale of alcohol within certain time limits, i.e. starting 30 minutes before a performance and until 30 minutes after a performance. As there are regular Rock n'Roll Tours on-going through the day, this 60 sq.metre Bar stays open throughout the day, keeping the same times as a typical Public House, which premises normally have a "7 day Publican's Licence".

Last year it became apparent that if NOTTUB lost the continuous Rock n'Roll Museum tours it would *de-legitimise* the established opening hours of the ground floor bar, as the 30 minute restriction would kick-in and the existing trading times would technically then become illegal. As NOTTUB would not wish to be associated with any breach of the Licensing law, no matter how minor or common practice, it was decided to apply to change the licence in the Courts and to operate the Auditorium Bar as currently operated, with the Court's approval of a "7 day Publicans Licence" instead of the existing "Publicans Licence (Ordinary) Theatre" type of Licence.

In relation to this, NOTTUB wish to point out the following: -

- The Auditorium Bar already opens 7 days of the week and for the same hours of the "7 day Publican's licence" as it is;
- There would be no physical change to the existing bar;
- The licensed use would be just maintaining and regularising its existing use, not intensifying it;
- The Auditorium Bar has operated responsibly since the premises opened.



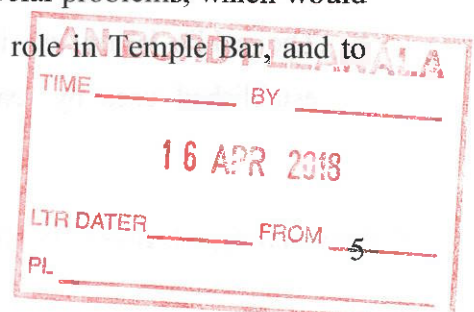
Counsel Opinion was requested on this and Michael O'Donnell BL confirmed the proposed change of Licence to this part of the building (i.e. The Auditorium Bar), would not require Planning Permission (copy of opinion enclosed). This information was shared with TBCT prior to the request for declaration. TBCT commissioned Doyle Kent Planning Consultants to prepare the question and explanation provided to DCC.

### **Planning Grounds for Declaration**

Doyle Kent submitted to the Planning Authority that: -

- They 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)*;
- 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 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'";
- NOTTUB have otherwise not provided any reason for seeking a seven day licence;

- It appears that the intention is to sell alcohol to the public in the relatively unconstrained fashion permitted under a seven day license 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 license is very different;
- The operation of the premises under a seven day publican's license 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;
- 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;
- 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 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.29 S. 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.

➤ 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;

➤ The Planning and Development Regulations, 2001, as amended, make a clear distinction between a public house and a theatre/concert hall;

➤ There is no provision for exempted development status for any change from one of these uses to the other;

➤ 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;

➤ 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;
- d) 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.

### **Planning Officer's Report**

The Planning Officer acknowledges that there are no structural changes associated with the proposal and that the proposal does not constitute 'development' by reason of works arising.

The Planning Officer states that "the proposed licence change makes the public house use separate to, or independent of, the theatre use" and "forms a public bar in the premises." In relation to this the Planning Officer concludes that the addition of the new use to the premises constitutes a change of use which is deemed as a material change as it alters the functioning of the premises in a substantive way.

The Planning Officer believes that there is 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."

The Planning Officer continues to state that the "a 7 day Publican's Licence is not an incidental use to a theatre" and that an additional use would result.

### **Precedents**

#### **PL 29S.RL2879**

The Board considered a publican's licence in a Guest House restaurant would constitute development requiring permission. The Inspector's Report included the following considerations: -

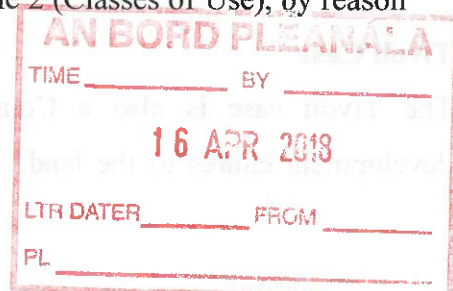
- The proposed licence change makes the public house use separate to, or independent of, the restaurant and B&B uses;



- There is no public house use established in this premises;
- There is a B&B (guest house) and a restaurant;
- The addition of a new use to the premises constitutes a change of use. This change is a “material” change of use as it alters the functioning of the premises in a substantive way;
- It introduces a wholly different client or patron base;
- It forms a public bar at the front of the premises in the existing reception area and the link area with the restaurant;
- 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, likely impacts on neighbouring residential amenity, social behaviour, etc.;
- Thus, the proposal constitutes “development”;
- The relevant provisions relating to a change of use under the Planning and Development Regulations, 2001 are Article 10 and Part 4 of Schedule 2;
- Article 10(2) of the Planning and Development Regulations, 2001 deals with uses that are incidental to the permitted use;
- The proposed use associated with a new publican’s on-licence in this instance would not be an incidental use to the main use as a B&B and restaurant.

It can be seen that there are significant differences between this decision and the subject referral, principally because of scale and established activity. In the subject context, the use of the Auditorium Bar exists as an incidental use. It is not a separate use in planning terms. The availability of a 7-day publican’s licence would not alter the pattern, nature or intensity of trading, such as to have a material effect in planning terms.

The Auditorium Bar was a permitted element and has been fitted out and operated as a bar since the premises opened. It is incidental and ancillary to the primary use and is not a separate use. It is a type of incidental use covered by Article 10 (2)(a) of the Planning and Development Regulations 2001, as amended. It is not excluded from the permission merely by reason of its being specified in Part 4 of Schedule 2 (Classes of Use), by reason of its being specified as a separate use.



There is no potential for the conversion of the Button Factory into a 'super-pub' by reference to the existing planning permission and to do so would not be facilitated merely by the possession of a 7 day Publicans Licence for the Auditorium Bar, which will continue to exist as an incidental use.

### **5 Aston Quay**

Dublin City Council has previously declared that the type of licence held in a bar area is not development constituting a material change of use. It was noted that the premises currently had the benefit of a Publican's Theatre License and the owner now wished to change this to a full 7 day Publicans License, which, in itself is not a planning matter and only relates to the type of Excise License attached to the property. It was the applicant's contention that the development was in fact not development and therefore, exempted from the requirements to obtain planning permission. The proposed use will remain as a bar and licensed premises. The only change related to the change in the type of Publican's License, which it was submitted, was in itself not a planning matter. Notwithstanding, the applicant required from the Planning Authority confirmation that this was indeed the case, hence the Section 5 reference.

Therefore, the Planning Authority appears to have been inconsistent in the application of the exemption. Where there is a bar, the type of licence is irrelevant. Declaring the use of the Button Factory with a Publicans 7 day Licence as exempt would render the Planning Authority's position consistent.

### **Carrickhall Case**

It is noted that the Carrickhall case is precisely the type of outcome that would arise if a publican's licence was abused to give rise to a material change of use of the overall Button Factory premises by intensification. This was a prosecution case arising from the Enforcement powers available under the Planning Acts. The relevant powers are available under Part VIII of the Act (see detailed explanation below IEHC 396 2004).

### **Tivoli Case**

The Tivoli case is also a Court case. While licensing applies to the individual, development enures to the land. The planning enforcement process is operated by the

Courts, which decide on unauthorised development, as to whether it has occurred and what the appropriate penalties for unauthorised development are, if it has occurred. Fundamentally, in the planning enforcement process the development must already have occurred before there is judgement and that is a matter solely for the Courts.

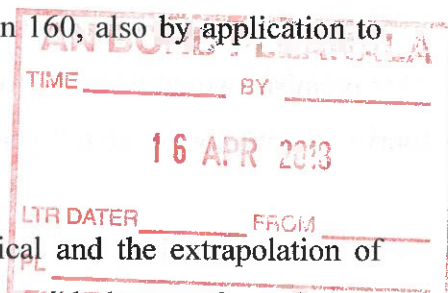
It is inappropriate to speculate about how unauthorised development may occur because of the postulated potential for an otherwise law-abiding entity to set out wilfully on a course of unauthorised development. If there is concern as to the likelihood of unauthorised development then this is dealt with via Section 160, also by application to the Courts.

### Grounds of Opposition

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’.

The judgement of the High Court in the matter of Michael McDowell & Niamh Brennan v Roscommon County Council (2004 IEHC 396), in which Mr Justice Finnegan determined that the Planning Authority is not entitled to adjudicate on an issue in respect of a particular section of the Act (in that case Part III), when there are wide powers conferred under Part VIII of the Act of 2000 in the event of an unauthorised material change of use having taken place. In short the provisions made under different Parts of the Act may not be operated for an improper use – it is not permissible to use a statutory power conferred for a particular purpose for some other purpose.

This Declaration application is to be assessed under Part 1, Section 5 of the Act. The hypothetical extrapolation contained in the TBCT submission relates to anticipated material change of use requiring planning permission (Part III) and unauthorised development, which, if it occurred, would be regulated under the provisions of Part VIII of the Act. The determination and resolution of unauthorised development by way of material change of use (by intensification or other means) is a matter reserved to the Courts alone.



Therefore, all of the speculation as to what could ensue must be dismissed by An Bord Pleanála.

The Auditorium Bar, which represents approximately 3% of the total floor area of The Button Factory, is incidental to and ancillary to the use of the premises. It was included as a bar in the planning permission and has operated since the opening of the premises and is not excluded from the permitted use.

Therefore, to continue its existing established use does not require planning permission. This premises would continue to operate as a Theatre/Museum and Cultural Facility as a tourist attraction with the full publicans licence in its ancillary Auditorium Bar.

Other theatres with bars and 7-day licences, such as the Olympia Theatre, Vicar Street or the Stella Cinema, operate responsibly and are recognised as Theatres in land use terms. The subsequent introduction of the Full Bar Licence instead of a Theatre Licence did not change the use of the premises.

The Auditorium Bar is incidental to and ancillary to the permitted use of the premises. It is not a separate land use. The granting of a 7-day licence is made by a Court to authorised development operating within the provisions of a planning permission (unless an established premises) and is subject to review annually in the Court. The issues addressed particularly relate to the planning compliance context and the suitability of the operator.

The use of the premises consistent with the permitted established use and under the provisions of a 7-day publican's licence does not constitute development by way of material change of use or intensification of use, if operated to the same degree as already established.

Serving refreshments and alcohol to customers attending the Rock Museum, or to customers not attending the Rock Museum, or as tourists on a cultural trail, whether in a guided tour or not, does not materially alter the use of the premises to constitute a material change of use.

Possession of a Publican's licence to allow the sale of intoxicating liquor for consumption on the premises to which the licence attaches, does not per se give rise to a material change of use or an intensification of use. It is how the licence is used that can give rise to a material change of use or an intensification of use. The owners have declared their intention to operate as permitted and any unauthorised material change of use or intensification of use (with detectable effects) is amenable only to the Courts.

Therefore, the possession of a 7-day publican's licence in this instance does not materially change the use of the premises in the planning context. If there is unauthorised development from a planning perspective by the operation of the licence, there are powers of enforcement under Part 8 of the Planning Act 2000, which can lead to prosecution in the Courts.

Such prosecution can lead to loss of renewal in the licensing court and the use of a Publican's Licence would require careful operation of the facilities ancillary to and for the improvement of the amenities of the Rock Museum.

### **Conclusion**

This is a 3<sup>rd</sup> Party request for declaration under Section 5 of the Planning Act. The declaration misrepresents what the property owners wish to do with the premises, as responsible stakeholders operating a cultural venue. The implication of the action in bringing this Section 5 into effect can have significant commercial effects for the current stakeholders in the property and the future viability of the cultural venue.

The possession of a Publicans Licence relating to the percentage of the premises occupied 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.

It is requested that this submission be taken into account and that the decision of the planning authority is not upheld.

Yours sincerely,  
Simon Clear.



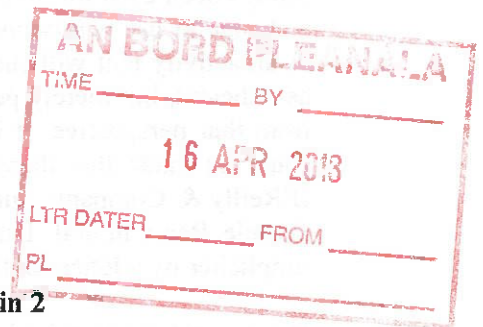


20th December 2017

Martin E. Marren & Co.,  
Solicitors  
10 Northumberland Road,  
Ballsbridge,  
Dublin 4.  
DX: 58

### Opinion

**Re: The Button Factory, Curved Street, Temple Bar, Dublin 2**



Querist holds the property known as The Button Factory under a lease from Temple Bar Cultural Trust Limited. The property currently is used as a theatre and is entitled to sell alcohol under a theatre licence, but it now wishes to apply for a seven-day ordinary publican's licence and I am asked to advise as to whether such a licence would give rise to any planning issues, for the purposes of the Planning and Development Act 2000 and the Planning Development Regulations 2001.

I have been furnished with a letter dated 14 December 2007 from Patrick F. O'Reilly & Company Solicitors for Temple Bar Cultural Trust Limited, who referred to the lease under which Querist holds the property and which refers to Temple Bar Cultural Trust Limited having concerns that the application for a seven day ordinary publican's licence would amount to a change of use for the purposes of the Planning and Development Act 2000 and may require planning permission. The letter goes on to refer to possible alterations that might be required to comply with the Intoxicating Liquor Acts and the suggestion is that this also may require planning permission, although this is not expressly stated.

It is appropriate that I deal with each of these issues in turn, having regard to section 2 of the Planning and Development Act 2000, which defines use and works as being in two separate categories and that works will not amount to a material change of use, having regard to the definition of use in section 2.

The first issue raised in the letter of 14 November 2017 refers to a change of use of the theatre by virtue of obtaining a seven-day ordinary publican's licence, but this is misconceived on two grounds.

A change of use is not development for the purposes of the Planning and Development Acts. The change of use must be material for planning purposes and development is defined in section 3 of the Planning and Development Act in the context of use as requiring that there be "a material change of use". Material for the purposes of a change of use, must be material in planning terms. It must be demonstrated in order for there to be a material change of use, that the new use is materially different, either being a different category or class of use, or having some very significant impact in planning terms on the area relevant to the previous use.

I am instructed that there will be no change of use, much less a material change of use, in the particular circumstances of what is proposed. The premises will continue to

be used as a theatre and therefore falls within the same category of use as it has always been used for. In those circumstances therefore, the assertion that there will be a change of use is misconceived and what is being sought here is not a change of use or an activity that will change the use of the premises which will continue to remain as a theatre, but merely permission under the Licensing Acts to authorise the activity from that perspective. It is difficult to see in those circumstances how an assertion could be made that there is a change of use, and while the Solicitors, Patrick F. O'Reilly & Company, quite properly do not make such an assertion and refer to the Temple Bar Cultural Trust having a concern, any such concern can be assuaged simpliciter by a letter confirming that the existing use is to continue.

The second issue raised is one relating to the second limb of the definition of development, namely works, in a concern that works may be required, which of themselves would require planning permission. Before I deal with this, as I must, my clear instructions are that no such works are proposed. The definition of works, as defined in section 2 and 3 of the Planning and Development Act, gives a very broad definition of works and the definition includes any act of construction, excavation, alteration, demolition, extension, repair or renewal. There is no doubt that the definition of works is all embracing and it would be difficult to carry out any alteration of a premises without such alterations falling within the definition of works.

However this is resolved by the exemptions contained in section 4 of the Planning and Development Act and in particular, section 4(1)(h) of the Planning and Development Act 2000. Section 4(1)(h) provides that works which are internal to the property are afforded a complete exemption, as the provisions of section 4 and in particular section 4(1)(h) are without limitation and qualification. The specific exemptions contained in section 4 are very different than the exemptions contained in the Planning and Development Regulations 2001, which are limited not just within the particular exemptions themselves, but also by article 9 of the Planning and Development Regulations 2001, but none of this complexity applies to the exemption in section 4(1)(h). 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.

### **Conclusion**

Having considered the letter from Patrick F. O'Reilly & Company, Solicitors on behalf of the Temple Bar Trust, in my opinion, there are no planning implications arising from the application for a seven-day ordinary publican's licence, as this is a matter to be considered under a separate statutory code, namely the licensing law. There is no suggestion that the existing premises or any part of it is unauthorised. In light of the nature of the use that is proposed, which will continue to be a theatre but with the facility to serve alcohol without such service being connected to a "performance", it is my considered opinion that this cannot amount to a change of use, much less a material change of use, for the purposes of the Planning and Development Act 2000.

Nothing further occurs.

**Michael O'Donnell BL**





Brendan Kearns <brendan@soundtraining.com>

**EXPP Section 5 for The Button Factory (Former Temple bar Music Centre), Curved Street North/Temple Lane South, Temple Bar, Dublin 2.**

Joe Ryan <joseph.ryan@dublincity.ie>  
To: "Brendan@soundtraining.com" <Brendan@soundtraining.com>

Wed, Mar 28, 2018 at 9:13 AM

Hi Brendan,

I have been asked to forward you this decision and report for the Section 5 application. Please see attached.

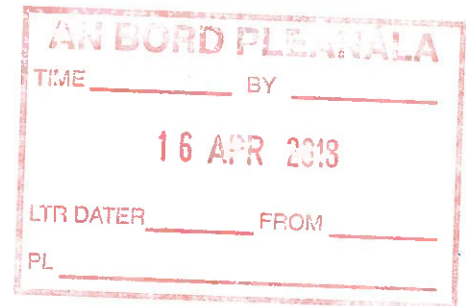
Regards,

Joe Ryan  
Planning Registry

-----Original Message-----  
From: Scan To Me  
Sent: 28 March 2018 09:09  
To: Joe Ryan  
Subject: Message from "R-041"

This E-mail was sent from "R-041" (MP C4504).

Scan Date: 03.28.2018 09:11:35 (+0200)  
Queries to: [ScanToMe@dublincity.ie](mailto:ScanToMe@dublincity.ie)



Smaoinigh ar an timpeallacht sula ndéanann tú an ríomhphost seo a phriontáil. Please consider the Environment before printing this mail.

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Comhairle Cathrach  
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Dublin City Council

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

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

21-Mar-2018

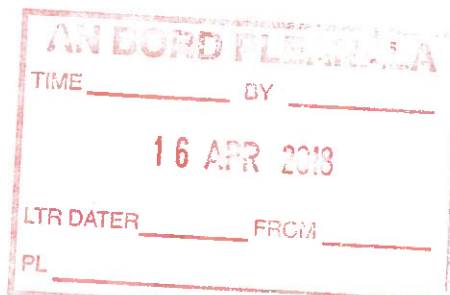
Doyle Kent Planning Partnership Ltd  
71, Carysfort Avenue  
Blackrock  
Co. Dublin

Application Number 0055/18  
Application Type Section 5  
Registration Date 21-Feb-2018  
Decision Date 20-Mar-2018  
Decision Order Number P1806

Location The Button Factory (Former Temple bar Music Centre), Curved Street North/Temple Lane South, Temple Bar, Dublin 2.

Proposal EXPP: PROTECTED STRUCTURE: 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.

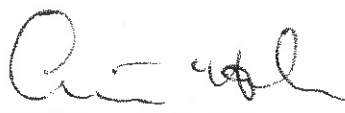
Applicant Details Temple Bar Cultural Trust



### 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 20-Mar-2018 decided to issue a Declaration that the proposed development is NOT EXEMPT from the requirement to obtain planning permission under Section 32 of the Planning & Development Act 2000-2013.

Signed on behalf of Dublin City Council

  
For Assistant Chief Executive

Note: Any person issued with a declaration on development and exempted development, may on payment of the prescribed fee, refer a declaration for review by An Bord Pleanála within four weeks of the date of the issuing of the declaration.

Ceannoifig, Oifigí na Cathrach, An Ché Adhmaid, Bhaile Átha Cliath 8, Éire  
Head Office, Civic Offices, Wood Quay, Dublin 8, Ireland

NOT1section5(Refuse Exemption)

T. 01 222 2222 W. www.dublincity.ie



(3) Paraly)

AN BORD PLEANNALA	
TIME _____	BY _____
16 APR 2018	
LTR DATER _____	FROM _____
PL _____	

**EXPP:** 0055/18  
**Section 5 received on:** 21/2/18  
**Applicant:** Temple Bar Cultural Trust Designated Activity Company  
**Address:** The Button Factory, Curved Street

**Proposed Development:**

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) Theatres is or is not development and if it is development, whether it is exempted development."

**Zoning:**

In the 2016 – 2022 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."

Part of the site is located within a Conservation Area and comprises of a protected structure.

**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,

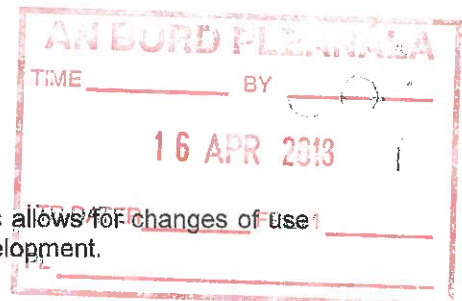
(ii) the storage of caravans or tents, or,

(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."

Section 4 of the Planning and Development Act refers to 'Exempted Development' and Subsection (1) sets out categories of development for the purposes of this Act.





Schedule 2, Part 4 of the Planning and Development Regulations allows for changes of use within any one of the classes of use specified to be exempted development.

**Planning History:**

**2050/18:** Planning permission refused for retention of 2 no. digital illuminated signs (1.55 sq.m each) located at first floor balcony level above the entrance to the Temple Bar Music Centre on the south elevation fronting Curved Street. Part of Temple Bar Music Centre includes No. 11 Temple Lane South, a Protected Structure.

The main reason for refusal was:

*"The proposed digital illuminated signs, which are affixed to a first floor balcony are considered to be contrary to section 16.24.3 of the Dublin City Development Plan, 2016–2022, adversely impact on the visual amenity of the building itself and set an undesirable precedent for similar type advertisements and signage. The proposed signage is also considered to seriously injure the amenity of adjoining properties in the vicinity and would, therefore, be contrary to the proper planning and sustainable development of the area."*

**E0048/16:** Enforcement file opened in relation to Erection of digital signs & use of basement as museum

**EXPP0180/17:** Exemption certificate refused for the proposed signs

**1661/92:** Planning permission granted for 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 facade to no. 10/10A including minor changes to elevation.

**Report:**

The question in this Section 5 application is whether or not 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."

**Submission from the Applicant:**

This Section 5 application was made by Temple Bar Cultural Trust Designated Activity Company (TBCT DAC). The applicant outlined in a cover letter that the Button Factory is used for music/entertainment events. There are also other facilities within the building including a recording studio, offices, basement level rehearsal areas, Rock 'N Roll museum and auditorium bar.

In licensing terms the premises is subject to a Publican's Licence (Ordinary) Theatre. According to the Revenue website ([www.revenue.ie](http://www.revenue.ie)) the definition of this licence is as follows:

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

The owners of the Button Factory are applying for a 7 day ordinary licence which 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 10.30am to 11.30pm





<b>AN BORD PLEANALA</b>	
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<b>16 APR 2018</b>	
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- Friday and Saturday 10.30 am to 12.30 am
- Sunday 12.30 pm to 11pm.

The Applicant considers that the proposal in relation to licensing the Button Factory will lead to a significantly intensified and materially different use of the premises because it allows for the sale of alcohol independent of a performance. It is argued by the Applicant that this change would lead to a material change of use.

**Submission from the owner:**

The owners of the Button Factory submitted a letter stating that the premise has a stated area of 1,800 sq. metres. There is a small bar (60sq. metres) on the ground floor called the Crowbar. It is stated that this bar is ancillary to the existing cultural facility. The owner outlined that as there are regular Rock n' Roll tours on-going throughout the day, this 60sq. metre bar stays open throughout the day keeping the same times as a public house which has a normal 7 day Publican's Licence. The owner of the premises states that there is no change of use as the premises will continue to be used as a theatre and that the Crowbar is ancillary to this use. They consider that the question in this section 5 application should be re-worded to read:

"Whether the use of the Auditorium Bar within the Button Factory having a 7 day publicans licence instead of the existing "publicans licence (ordinary) theatre" type of licence is or is not development."

The owners of the Button Factory submitted an opinion from Michael O'Donnell, Barrister of Law stating that the proposed change in licensing does not amount to a change of use, much less a material change of use.

**Relevant Section 5 decisions by An Bord Pleanala:**

Under Section 5 application (29S.RL2879) An Bord Pleanala decided that the use of 15 Upper Stephen Street, Dublin 2 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 constitutes a material change of use and is, therefore, development and is not exempted development.

In this section 5 the Bord concluded that:

*"(a) an additional use, that being a public house, is introduced for part of the premises arising from a publican's on-licence in lieu of a special restaurant licence, which is not an incidental use to the main use as a guest house and restaurant;*

*(b) the public house use is materially different from the established guest house and restaurant 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, 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.*

*Now therefore the Board, in exercise of the powers conferred on it by section 5 of the Planning and Development Act 2000, has decided that the use of the premises as a guest house and restaurant with a publican's on-licence in lieu of the use of the premises as a guest house and restaurant with a special restaurant licence constitutes a material change of use and is, therefore, development and is not exempted development."*

The decision of this section 5 is considered relevant for this application.

**Assessment:**

There are no structural changes associated with the proposal. Thus, the proposal does not constitute "development" by reason of works arising.

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 a specified time, which is 30 minutes before the commencement of the performance and ceases 30 minutes after the performance ends. The serving of alcohol 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 in 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.

It is noted that the owners of the Button Factory state that the Crowbar is currently operating similar hours to a normal public house because there are regular Rock n' Roll tours on-going throughout the day and therefore there will be no difference in trading patterns. However the owner also notes in their cover letter that if the Rock nRoll museum tours ceased it would delegitimise the established opening hours of the ground floor bar.

Article 10(2) of the Planning and Development Regulations, 2001 is noted. However it is considered that a 7 day Publican's Licence is not an incidental use to a theatre, an additional use would result.

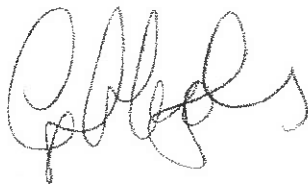
In relation to Part 4 of Schedule 2, this allows for changes of use within any one of the classes of use to be exempted development. There is no provision for exemption for change of use from a theatre to a public house under the exempted development provisions of the Planning and Development Regulations.

Thus, it can only be concluded that the effect of the proposed change of licence, introducing an additional use which is a material change of use for which there is no exemption under the Regulations, constitutes development that is not exempted development.

**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 considers that the use of the premises (in whole or in part) with a publican's "seven day licence" in lieu of the use of the premises with a Publican's Licence (Ordinary) Theatre is a material change which constitutes development that is not exempted development.

  
Audrey Taylor  
Executive Planner



20/03/18

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TIME _____	BY _____
16 APR 2018	
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Comhairle Cathrach  
Bhaile Átha Cliath  
Dublin City Council

Planning and Property Development Department,  
Dublin City Council, Block 4, Floor 0, Civic Offices, Wood Quay, Dublin 8

An Roinn Pleanála & Forbairt Maoiné; Comhairle Cathrach Bhaile Átha Cliath  
Bloc 4, Urlár 0, Oifigí na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8

T: (01) 222 2149 / F: (01) 222 2675

Paraic Dunning  
NOTTUB Ltd,  
8 Cecilia Street,  
Temple Bar,  
Dublin 2.  
D02 RW82

26<sup>th</sup> February 2018

Application No.	EXPP 0055/18
Applicant	Temple Bar Cultural Trust Designated Activity Company
Registration Date	21 <sup>st</sup> February 2018
Location	The Button Factory, Curved Street, Temple Bar, Dublin 2

**Re: 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.**

Dear Mr. Dunning

Please be advised that an application for a Declaration under Section 5 of the Planning and Development Act 2000 (as amended) was submitted to the planning authority by **Temple Bar Cultural Trust Designated Activity Company** on 21<sup>st</sup> February 2018.

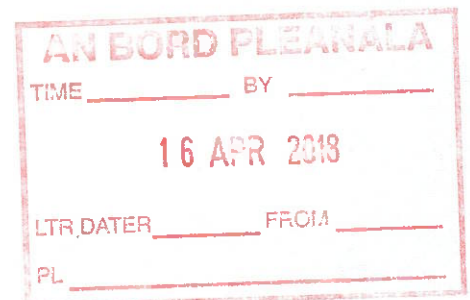
It is noted that you may have an interest in the subject site to which this application relates. The planning authority would like to provide you as the owner/occupier of the site, the opportunity to submit views or comments on the application.

Any comments or views you may wish to submit shall be submitted by close of business on **9<sup>th</sup> March 2018**.

Should you require any clarity on this matter please do not hesitate to contact me at the number above.

Yours sincerely

Joe Ryan  
For Executive Manager





# EXPP APPLICATION

EXPP APPLICATION NO: 0055/18

Location Address: THE BUTTON FACTORY (FORMER TEMPLE  
BAR MUSIC CENTRE)  
CUMM'D STREET NORTH / TEMPLE LANE SOUTH  
TEMPLE BAR, DUBLIN 2

Area: D P. FALLON

Date Received: 21-2-18

Date Due: 20-3-18

Applicant's Legal Interest in Site: LONG LEASE (500 YEARS)

Protected Structure:  RPS No.: 8029

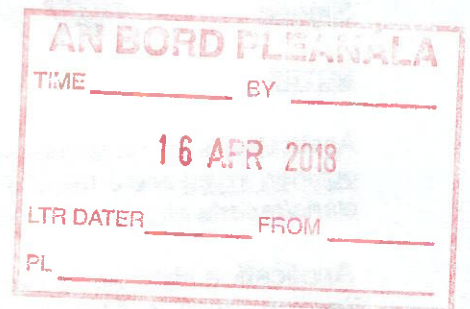
Planning History: 2050/18, 4225/17, 0180/17, 1840/06

Enforcement History: E1016/97, E0262/13  
E0048/16

Updated in Access:

Updated in Post Book:

Updated in APAS:







DECLARATION ON DEVELOPMENT & EXEMPTED DEVELOPMENT



SECTION 5 APPLICATION FORM



NAME OF APPLICANT: Temple Bar Cultural Trust Designated Activity Company (TBCT DAC)

ADDRESS OF APPLICANT: [REDACTED]

EMAIL ADDRESS: [REDACTED]

TELEPHONE NO. Day: \_\_\_\_\_ Mobile: \_\_\_\_\_

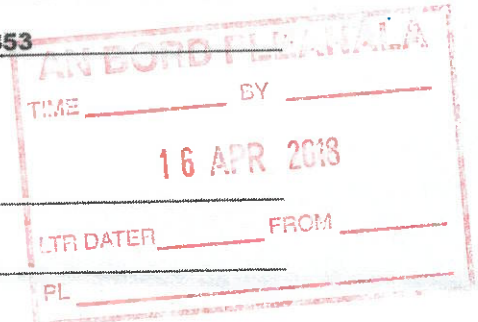
NAME OF AGENT AND AGENT'S ADDRESS: Doyle Kent Planning Partnership Ltd

71 Carysfort Avenue, Blackrock, Co. Dublin

TELEPHONE NO. Day: \_\_\_\_\_ Mobile: 085 739 4853

ADDRESS FOR CORRESPONDENCE (if different from above)

71 Carysfort Avenue, Blackrock, Co. Dublin



LOCATION OF SUBJECT SITE: Curved Street North and Temple Lane South

Is this a Protected Structure or within the curtilage of a Protected Structure?  **Part of the premises includes No.11 Temple Lane South - Protected Structure - but we are not seeking a declaration in respect of works.**  
If yes, has a Declaration under Section 57 of the Planning & Development Act 2000 been requested or issued for the property by the Planning Authority?

**We are not aware of any declaration under Section 57**

Please provide details of works (where applicable) or proposed development. (Note: only works listed and described under this section will be assessed under this section 5 application. Use additional sheets if required.)

We wish to seek a declaration under Section 5 of the Act in respect of the following question:

**"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."**

(See letter with application for further details)



List of plans, drawings etc. submitted with this application

**OSI Map 1:1000 scale showing site location**

Please state Applicant's interest in this site: **Owner of head lease**

If applicant is not owner of site, please provide name & address of owner:

**The lessor of the property for 500 years is a registered company,  
NOTTUB Ltd, (of No.8 Cecilia Street, Temple Bar, Dublin 2, D02 RW82)  
Company Reg No. 605307**

**The directors are Messrs. Paraic Dunning and Paul Clinton**

Are you aware of any enforcement proceedings connected to this site?  
If so please supply details:

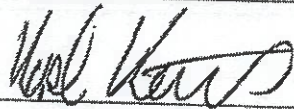
**E 0048/16 - not relevant to this application under Sec.5**

Where there previous planning application/s on this site?  
If so please supply details:



**Plan No. 1661/92: Permission for Music Centre plus ancillary**

Signed



Date

**21st February 2018**

**NOTES**

Application shall be accompanied by 2 copies of site location map with site clearly outlined in red and a fee of €80.00. Please submit 2 copies of any additional plans/reports etc. you may wish to include as part of the application.

Application shall be forwarded to: Dublin City Council, Planning Registry  
Section, Block 4, Floor 0, Civic Offices, Wood Quay, Dublin 8.  
Contact Details: Phone: 01 222 2149 Fax: 01 222 2675

<b>AN BORD PLEANALA</b>	
TIME _____	BY _____
<b>16 APR 2018</b>	
LTR DATER _____	FROM _____
PL _____	





Doyle Kent Planning Partnership Ltd  
Company Reg No 513327  
71 Carysfort Avenue  
Vat Reg. No. IE 9829282N  
Blackrock, Co. Dublin

21<sup>st</sup> February 2018

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

**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.

DIRECTORS

Jane Doyle MRUP Dip EIA (Mgmt) B Soc Sc MIPI  
Karl Kent B Arch MRBC Dip TP Dip EIA (Mgmt) FRIAI  
MIPI

PHONE

087 6263918  
085 7394853

EMAIL

info@doylekent.com www.doylekent.com

WEB





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 on 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:

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*"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'"<sup>1</sup>. However, they have otherwise not provided any reason for seeking a seven day licence.

<sup>1</sup> *Legal opinion submitted on behalf of NOTTUB to TBCT.*

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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.

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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.<sup>2</sup> This is evident in alcohol-related crime in the city centre area, as attested to by the Gardaí (Irish Times 15<sup>th</sup> 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".

<sup>2</sup> 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.

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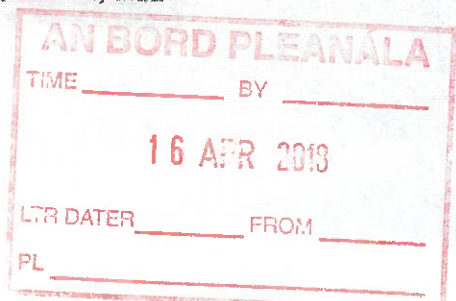
- Article 5(1): the term "*business premises*" is stated not to encompass an "*excluded premises*".
- Under Article 5(1) the term "*excluded premises*" encompasses:  
"*any premises used for purposes of a religious, educational, cultural, recreational or medical character*".  
We submit that, as a theatre 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

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<b>16 APR 2018</b>	
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Surveyed 1970  
 Revised 2016  
 Levelled 1983

# Urban PLACE Map



Scale- 1:1,000  
 Scale- 1:1,000



Scale- 1:1,000  
 Scale- 1:1,000



**Site Location Map**  
**Burton Factory**  
**Temple Bar Music Centre**  
**Curved Street/Temple Lane**  
**Dublin 2**

Plot Ref. No. 19772646\_1\_1  
 Plot Date 19-FEB-2018

ITM CENTRE PT COORDS  
 715586.734192

DESCRIPTION

MAP SHEETS

1:1000  
 3263-10

OS  
 Internet Map

Authorised OS Internet Map  
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Comhairle Cathrach  
Bhaile Átha Cliath  
Dublin City Council

Planning and Property Development Department,  
Dublin City Council, Block 4, Floor 0, Civic Offices, Wood Quay, Dublin 8

An Roinn Pleanála & Forbairt Maoine, Comhairle Cathrach Bhaile Átha Cliath  
Bloc 4, Urlár 0, Oifigí na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8

T: (01) 222 2149 / F: (01) 222 2675

Paraic Dunning  
NOTTUB Ltd,  
8 Cecilia Street,  
Temple Bar,  
Dublin 2.  
D02 RW82

12<sup>th</sup> March 2018

Application No.	EXPP 0055/18
Applicant	Temple Bar Cultural Trust Designated Activity Company
Registration Date	21 <sup>st</sup> February 2018
Location	The Button Factory, Curved Street, Temple Bar, Dublin 2

**Re: 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.**

Dear Mr. Dunning

I wish to acknowledge receipt of your correspondence dated 8<sup>th</sup> March 2018. I will forward a copy of said correspondence to the case officer dealing with this Section 5 application.

Yours sincerely

Joe Ryan  
For Executive Manager



ANEORND PL...  
TIME \_\_\_\_\_ BY \_\_\_\_\_  
16 APR 2008  
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