

The Secretary
An Bord Pleanála
64 Marlborough Street,
Dublin 1

AN BORD PLEANÁLA
DG- 018095-19
ABP- _____
06 AUG 2019 L.C
Fee: € 220 Type: Chg
Time: 17:18 By: Hand

2 August 2019

Re: Referral under Section 5(3)(a) of the Planning and Development Act 2000, (as amended) regarding Internal Alterations to the Licensed Premises at 52 & 53 North Main Street, Cork.

Dear Sir/Madam,

We act on behalf of the Black Dog Bar and Nightclub Ltd. of 52/53 North Main Street, Cork and submit on their behalf this referral for a request for a Declaration under Section 5 of the Planning and Development Act 2000, as amended (herein referred to as "the Act").

Section 5(3)(a) of the Act states:

Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2)

A request for a Section 5 Declaration together with the appropriate fee was issued to Cork City Council on the 7th June 2019. In a letter dated 10th June 2019, Cork City Council returned the request along with a cover letter requiring resubmission with the Council's Section 5 Declaration form. The request was resubmitted together with the requested form and appropriate fee on 13th June 2019. The question on which the declaration was sought is whether the alterations to the internal layout of the permitted licensed premises at 52 & 53 North Main Street Cork, which are shown on the drawings attached as Appendix 1, are, or are not, development and are, or are not, exempted development.

A decision was issued by Cork City Council on 15th July 2019, 5 no. days after the 4-week deadline (i.e. 10th July) for decision as set out in Section (2)(a).

This declaration states:

With reference to your request for a section 5 Declaration at the above named property, I wish to advise as follows:

Having regard to –

- *Sections 2, 3 and 4 of the Planning and Development Act 2000 (as amended), and*
- *Articles 6 and 9 of the Planning and Development Regulations 2001 (as amended)*

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McCutcheon Halley is a limited partnership registered under the Limited Partnerships Act, 1907, registration no. LP512. Registered in Ireland No. 326490. Registered office: 6 Joyce House, Barrack Square, Ballincollig, Co. Cork. Directors: Brian McCutcheon, BA(Econ) DipIP DipGIS MIP1 (Chairman), Tom Halley, BA(Mod), MRUP BSc ARCH(Hons) Cert. Civil Eng. MIP1.

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*It is considered that the service kitchen located in the existing beer garden of no. 53 North Main Street currently operating as a public house and late night bar, **Is Development and Not Exempted Development.***

The Board will note that the subject of the Section 5 Declaration issued by the Council (*i.e. the service kitchen located in the existing beer garden of no. 53 North Main Street currently operating as a public house and late night bar*) differs from the subject for which the declaration was sought (*i.e. the alterations to the internal layout of the permitted licensed premises at 52 & 53 North Main Street Cork*).

Given this decision, as well as the content of the planner's report, we do not consider that adequate attention or deliberation was given to the original request put forward by our client. Therefore, in accordance with the provisions of Section 5(3)(a), we now refer the question for decision by An Bord Pleanála.

Request for Section 5 Declaration to Cork City Council

The basis on which the request for a Section 5 Declaration was made to Cork City Council is summarised as follows:

- The alterations made to the internal layout of the permitted licensed premises, permitted under planning applications ref. 12/35314 and 13/35544, are considered to be 'development', however they are 'exempted development' as they fall within the scope of Section 4(1)(h) of the Planning and Development Acts 2000, as amended (herein referred to as the Planning Act).
- The subject development, comprising no. 52 and 53 North Main Street, has 2 no. relevant planning permissions granted by Cork City Council under planning application ref. 12/35314 and 13/35544¹. Previous to these applications, no. 52 (*i.e. The Vicarstown Inn*) was an established licensed premises with a dance license (not a late-bar), and no. 53 (*i.e. BDSM – Black Dog Saloon & Mezcalaria*) was a vacant retail unit. The effect of these permissions was to effectively create a single planning unit with the relevant license now benefitting the 2 no. properties.

The response of the Planning Authority has not adequately considered the valid points made in our original submission, and as mentioned above, the decision does not follow on from an assessment of the points made given that the 'question' answered in their declaration differs from that originally posed to them.

Further Relevant Points

While the specific question asked in the request to the City Council made reference to the use of the building, we consider that a rebuttal to the points made in the Planners Report is required as same are unfounded.

The existing use was permitted by Cork City Council under planning application ref. 12/35314 which permitted the change of use of the ground floor from retail to a licensed cafe/restaurant use, the widening of the front entry doors and the removal of the rear flat roof and installation of a new preparation kitchen within No. 53 and associated site works. The effect of this permission was to combine no.52 and 53 into a single planning unit and licensed premises, as clearly stated in the development description and indicated in the planning documents and drawings. Following the granting of permission, No. 52 and 53 are licensed under the same license by the courts, with the court sanctioning the opening hours. The premises complies with its extension of licencing hours as granted by the courts (note no condition governing opening hours is attached the relevant planning permissions). The fact that the café restaurant is described as "licensed" in the permission indicates

¹ The original request sent to Cork City Council referred to planning application ref. 13/35534 however this was a typographical error and should refer to 13/35544. Note, City Councils report uses the correct planning application reference.

that it would be operated in accordance with whatever licence was granted. The current use of the premises is in accordance with the relevant licence.

The assertion made in the Planner's Report that the use permitted under planning application ref.12/35314 was never implemented and the current and operational use is as a public house and late-night bar is unfounded, and no factual evidence is given to support same. Planning permissions sought for the site have always indicated that the use would be as a licensed café/restaurant and the planning permission afforded to the site permitted this licensed use. There is no condition which restricts opening hours therefore the premises runs per the licensing hours. This is common practice for all similar licensed premises.

We consider that the internal alterations are exempted development under Section 4(1)(h) of the Planning and Development Act 2000, as amended, as per the reasons set out in the original request to Cork City Council. Section 4(1)(h) states that the following shall be exempted development for the purposes of the 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 neighbouring structures [emphasis added].*

The Planners Report focuses only on one aspect of the provisions of Section 4(1)(h), namely whether the works are considered to be internal or not where it is stated:

"I consider the proposed service kitchen to be located in an external area (the existing beer garden), notwithstanding the slight overhanging roof. The additional service kitchen involves an extension to the existing floor area of the public house by constructing it externally in the current rear yard of no. 53, the proposal is not considered to come under the terms of 4(1)(h)."

We do not consider this assessment to be correct in the first instance due to the discernible omission of facts. The fully enclosed beer garden area was once internal prior to the removal of the roof permitted under the 2012 application. This space has always been indicated as usable floorspace within the past planning permissions; within the defined planning unit; and part of the permitted license use for eating and drinking. We consider that this area clearly identifies the interior of the structure as defined in Section 4(1)(h). There has not been an extension to the premises as the alterations referred to in this statement are provided within the existing floorspace with part of the beer garden used for serving drinks now used for serving pizza, tacos and tapas.

Furthermore, the service kitchen referred to in the Planner's Report comprises a counter with certain kitchen apparatus positioned behind same, located under an existing lean-to roof overhang which is existing, as is evident in the historic photographs contained in the Planner's Report. The counter is not enclosed by walls, glazing or panels. Therefore, to insinuate that this represents an extension of the floor space is incorrect - it is clearly located within same.

While we consider that the works only affect the interior of the planning unit, the Board is minded to agree with the Council's interpretation that the counter/service kitchen is located in an external area, it must be noted that this kitchen area does not materially affect the appearance of the structure so as to render the appearance inconsistent with the character of the structure, which is allowable under Section 4(1)(h) and therefore exempted development. We reiterate that the only change is the addition of a counter and some kitchen equipment. No demolition works or construction of an enclosure have been provided.

We consider that the alterations which are subject of this statement are exempted development under Section 4(1)(h) of the Planning and Development Act 2000, as amended. Reference made in the Planner's Report to

AN BORD PLEANALA
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Article 9(1)(a)(vii) are not relevant in this instance as it only relates to exemptions being sought under the Planning and Development Regulations 2001, as amended, and not under the Act. Section 4(1)(h) is considered to be a different and entirely separate matter.

Notwithstanding this, the assessment of Article 9(1)(a)(vii) in the Planner's Report infers that the use of the no.53 is unauthorised which we have already established is not the case. Reference is made to class 14 stating that there are specifically different listings for the change of use from a public house to use as a shop; and from the use of a restaurant to use as a shop, however no reference is made to change from licensed restaurant to licensed bar. The difference between a licensed bar and a licensed café/restaurant would be reflected in the terms of the relevant license. Contrary to the opinion outlined in the Planners Report, the terms of planning application ref. 12/35314 were implemented as BDSM has been operating as a licensed café/restaurant within the terms of its license since the foundation of the business.

With respect to the operation of the business and the respective food offer, the Planners Report is incorrect in its ascertain that the building has been "...used solely as a public house and late night bar since with the exception of offering pizza ancillary to its public house and late night bar use for a short period of 7/8 months whereby they closed down that and began preparing pizzas at another premises off site and brought it to the business premises "BDSM" in question." BDSM is not a late-night bar. It is a licensed café/restaurant premises with a dance license. It has always had a year-round food offering and not at certain times of the year as is insinuated by Cork City Council. Pizzas have been offered on site since the opening of the business and more recently the food offer has been expanded to flat breads, tapas and tacos. These are available 7 days a week. BBQ's or 'Cook Outs' as they are advertised, also take place each Sunday during the summer months and have done for many years. This is well documented on the BDSM social media pages. Due to the popularity of the food offer, our client centralised the production of the pizza dough and sauce to another one of his business located on Commarket Street. Food is still prepared and cooked on site. We consider that Cork City Council have been selective in their assessment of the facts and are penalising our client because of changing consumer trends and efforts to run the business more efficiently and cost effectively.

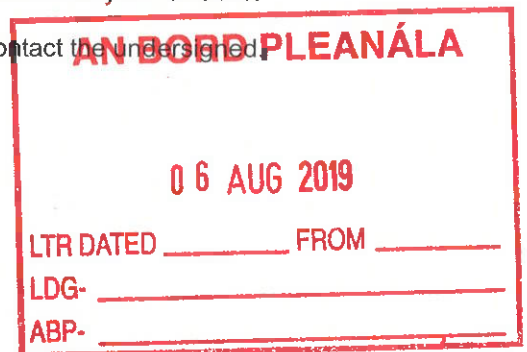
We ask that the Board considers this referral on its merits, noting the content of the original submission made to the City Council (attached) as well as the valid points made above. We enclose a copy of the request that was submitted to Cork City Council on our client's behalf as well as the statutory fee of €220.

Should you require any further information please do not hesitate to contact the undersigned.

Yours Sincerely,



Orla O'Sullivan
McCutcheon Halley Planning Consultants



Enc.

Copy of Section 5 Declaration from Cork City Council

Copy of Section 5 Declaration Request by McCutcheon Halley originally sent to Cork City Council



Comhairle Cathrach Chorcaí Cork City Council

Halla na Cathrach, Corcaigh - City Hall, Cork - T12 T997

Brian McCutcheon
6 Joyce House
Barrack Square
Ballincollig
Cork

15/07/19

RE **Section 5 Declaration R520/19 52/53 North Main Street**

Dear Sir/Madam,

With reference to your request for a section 5 Declaration at the above named property, I wish to advise as follows:

having regard to —

- Sections 2, 3 and 4 of the Planning and Development Act 2000 (as amended), and
- Articles 6, and 9 of the Planning and Development Regulations 2001 (as amended),

It is considered that proposed service kitchen located in the existing beer garden of No. 53 North Main Street currently operating as a public house and late night bar, **Is Development** and is **Not Exempted Development**.

Yours Faithfully,

Paul Hartnett

Assistant Staff Officer

Development Management Section

Community, Culture and Placemaking Directorate

Cork City Council

McCutcheon Halley	
LIBRATED	FROM _____
Received	_____
Date: 1	ABP 2019
Project: 2994	
Action: client's drive	

AN BORD PLEANÁLA
06 AUG 2019



We are Cork.

COMHAIRLE CATHRACH CHORCAÍ

CORK CITY COUNCIL

Strategic Planning & Economic Development Directorate,
Cork City Council, City Hall, Anglesea Street, Cork.

R-Phost/E-Mail planning@corkcity.ie

Fón/Tel: 021-4924564/4321

Líonra/Web: www.corkcity.ie

SECTION 5 DECLARATION APPLICATION FORM
under Section 5 of the Planning & Development Acts 2000 (as amended)

1. POSTAL ADDRESS OF LAND OR STRUCTURE FOR WHICH DECLARATION IS SOUGHT

52 & 53 North Main Street, Cork

2. QUESTION/ DECLARATION DETAILS

PLEASE STATE THE SPECIFIC QUESTION FOR WHICH A DECLARATION IS SOUGHT:

Sample Question: Is the construction of a shed at No 1 Wall St, Cork development and if so, is it exempted development?

Note: only works listed and described under this section will be assessed under the section 5 declaration.

Whether the alterations to the internal layout of the permitted licensed premises at 52 & 53 North Main Street Cork, are, or are not, development and are, or are not, exempted development. The planning status of the signage on the front elevation of No. 53 North Main Street is outside the scope of this request.

ADDITIONAL DETAILS REGARDING QUESTION/ WORKS/ DEVELOPMENT:

(Use additional sheets if required).

AN BORD PLEANÁLA
06 AUG 2019
LTR DATED _____ FROM _____
LDG- _____
ABP- _____

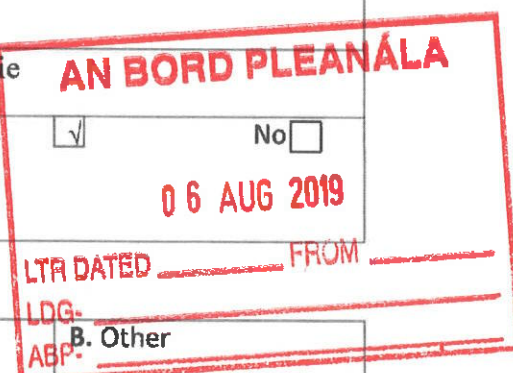
3. APPLICATION DETAILS

Answer the following if applicable. Note: Floor areas are measured from the inside of the external walls and should be indicated in square meters (sq. M)

(a) Floor area of existing/proposed structure/s	470 sqm
(b) If a domestic extension, have any previous extensions/structures been erected at this location after 1 st October, 1964, (including those for which planning permission has been obtained)?	Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, please provide floor areas. (sq m) _____
(c) If concerning a change of use of land and / or building(s), please state the following:	
Existing/ previous use (please circle)	Proposed/existing use (please circle)

4. APPLICANT/ CONTACT DETAILS

Name of applicant (principal, not agent):	Black Dog Bar and Nightclub Ltd.	
Applicants Address	c/o McCutcheon Halley Planning Consultants, 6 Joyce House, Barrack square, Ballincollig, Co. Cork	
Person/Agent acting on behalf of the Applicant (if any):	Name:	Brian McCutcheon
	Address:	McCutcheon Halley Planning Consultants, 6 Joyce House, Barrack square, Ballincollig, Cork.
	Telephone:	021 4208710
	Fax:	N/A
	E-mail address:	info@mhplanning.ie
Should all correspondence be sent to the above address? <small>(Please note that if the answer is 'No', all correspondence will be sent to the Applicant's address)</small>	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>



5. LEGAL INTEREST

Please tick appropriate box to show applicant's legal interest in the land or structure	A. Owner <input checked="" type="checkbox"/>
Where legal interest is 'Other', please state your interest in the land/structure in question	
If you are not the legal owner, please state the name and address of the owner if available	

I / We confirm that the information contained in the application is true and accurate:

Signature: Blain McCathen

Date: 13/06/2019

ADVISORY NOTES:

The application must be accompanied by the required fee of €80

The application should be accompanied by a site location map which is based on the Ordnance Survey map for the area, is a scale not less than 1:1000 and it shall clearly identify the site in question.

Sufficient information should be submitted to enable the Planning Authority to make a decision. If applicable, any plans submitted should be to scale and based on an accurate survey of the lands/structure in question.

The application should be sent to the following address:

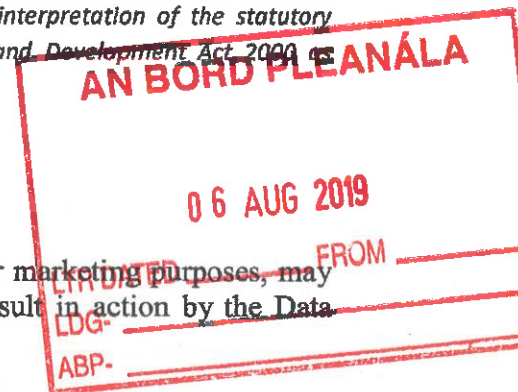
The Development Management Section, Strategic Planning & Economic Development
Directorate, Cork City Council, City Hall, Anglesea Street, Cork.

- The Planning Authority may require further information to be submitted to enable the authority to issue the declaration.
- The Planning Authority may request other person(s) other than the applicant to submit information on the question which has arisen and on which the declaration is sought.
- Any person issued with a declaration may on payment to An Bord Pleanála refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.
- In the event that no declaration is issued by the Planning Authority, any person who made a request may on payment to the Board of such a fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued by the Planning Authority.

The application form and advisory notes are non-statutory documents prepared by Cork City Council for the purpose of advising as to the type information is normally required to enable the Planning Authority to issue a declaration under Section 5. This document does not purport to be a legal interpretation of the statutory legislation nor does it state to be a legal requirement under the Planning and Development Act 2000 as amended, or Planning and Development Regulations 2001 as amended.

DATA PROTECTION

The use of the personal details of planning applicants, including for marketing purposes, may be unlawful under the Data Protection Act 1988-2003 and may result in action by the Data Protection Commissioner against the sender, including prosecution



The Secretary
Planning Department
Cork City Council
City Hall
Cork

07 June 2019

Re: Internal Alterations to the Licensed Premises at 52 & 53 North Main Street, Cork

Dear Sir/Madam,

We act for Black Dog Bar and Nightclub Ltd. and submit on their behalf this request for a Declaration under Section 5 of the Planning and Development Acts, 2000 – 2018¹. We enclose the required fee of €80.00.

The question on which the Declaration is sought is whether the alterations to the internal layout of the permitted licensed premises at 52 & 53 North Main Street Cork, which are shown on the drawings attached as Appendix 1, are, or are not, development and are, or are not, exempted development. The planning status of the signage on the front elevation of No. 53 North Main Street is outside the scope of this request.

1. Exempted Status of the Works

The alterations which were carried out to the internal layout of the permitted licenced premises fall within the definition of 'development' as they involved 'works' to remove, relocate or replace some of the partitions, furnishings and fittings shown on the layouts permitted under Planning Register Ref Nos. 12/35314 and 13/35534. However, these works are also 'exempted development' as they fall within the scope of Section 4(1)(h) of the Planning Acts which provides an exemption for:

"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 works were required to improve the internal layout of the premises so that it can compete with the other licensed premises in the area. The alterations also reflect the fact that, since the grant of permission for the Cork Heritage Brewery at Cornmarket (Planning Register Ref. No. 13/35664), the applicants have been able to centralise the food preparation for their licenced premises in this area. As a result, the food preparation areas which were shown on the layouts permitted under 12/35314 and 13/35534 have been replaced with a

¹ Hereafter referred to as "the Planning Acts"

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LDG- _____
ABP- _____

service kitchen located to the rear of the premises. These changes will allow a wider range of food to be served on the premises.

As the alteration works were confined to the interior of the premises, they do not affect the external appearance of the structure and are therefore exempt under Section 4(1)(h) of the Planning Acts.

2. Planning Status of the Current Use of the Premises

The planning unit comprises the combined areas of 52 and 53 North Main Street and was established by the permissions granted by Cork City Council under Planning Register Ref Nos. 12/35314 and 13/35534. Prior to the grant of permission under 12/35314, the site comprised of two separate planning units: No. 52 North Main Street was an established licenced premises with a dance license and No. 53 was a vacant retail unit.

2.1 Planning Register Ref No. 12/35314

The effect of the permission granted under 12/35314 was to allow 52 and 53 North Main Street to be linked together through a common outdoor seating area and for the combined area to be used as a single, licensed premises which included an ancillary use as a licensed café/restaurant. While the application form and the cover letter submitted under 12/35314 referred to the proposed hours of operation of the café, this information was provided to clarify the ancillary nature of the licensed café use which was envisaged at that point in time.

No condition was attached to the permission which regulated the mix of uses; the location of any café use within the overall licensed premises; or the hours of operation of any part of the licenced premises. Since the grant of permission under 12/35314, the entire planning unit has been governed by a single licence under the Licencing Acts. As a result, the internal layout and use of the premises is regulated by the terms of the licence which is issued annually by the Court having due regard to the planning status and established use of the property and the way the premises has been managed during the preceding period.

Condition 1 of the decision to permit under 12/35314 stated that:

"The Development shall be carried out in accordance with the drawings and specifications submitted to the Planning Authority on 27/06/12 except where altered or amended by conditions in this permission.

Reason: To enable the Planning Authority to check the proposed development when completed"

The use of the term "drawings and specifications" rather than "plans and particulars" means that the condition refers to the dimensions and materials of the permitted works and not to any non-technical information submitted in regard to the intended operation and use of the premises. Furthermore, the reason given for Condition 1 confirms that the purpose was to allow the Planning Authority to check compliance with the terms of the permission at the point in time when the works had been completed and before the use had commenced. The condition does not regulate the use of the premises after the permitted works have been completed.

The nature and extent of the permitted use as a licenced premises was confirmed when the decision to permit under 12/35314 was appealed by a third party under ABP Case No. PL 25 241086. The appeal, which was submitted by Noonan Linehan Carroll Coffey Solicitors, highlighted the fact that:

"No 52 North Main Street is a public house, and the proposed development will be an extension to that licensed premises. It is clear from the planning application that the proposed development will require the premises at 53 North Main Street to be licensed for the sale of alcohol".

On 11/10/2012, the City Council's responded to the grounds of the third-party appeal by stating that:

"the Planning Authority has no further comments to make on this matter".

This implies that the Planning Authority agreed with the appellant's assessment of the nature and extent of the permitted use as a licensed premises and did not consider that the issues raised in the appeal required any amendment to the conditions attached to the decision to permit.

2.2 Planning Register Ref No. 13/35534

The permission granted under 13/35534 also applies to the entire planning unit. Although the development description refers to elevational changes to Nos 52 and 53 North Main Street and the installation of a flue, the ground floor plan which was submitted and approved showed a number of changes to the internal layout of 52 and 53 as compared to the permission granted under 12/35314.

No issues were raised in regard to these internal alterations in the planning reports or the planning conditions. This indicates that the changes to the internal layout were:

- (a) not considered to be of any planning consequence, and/or
- (b) were deemed to be exempt under Section 4(1)(h).

In our opinion this conclusion also applies to the alterations shown in Appendix 1 which are the subject of this request. These represent relatively minor further changes to the ground floor plan which is deemed to have been approved under 13/35534.

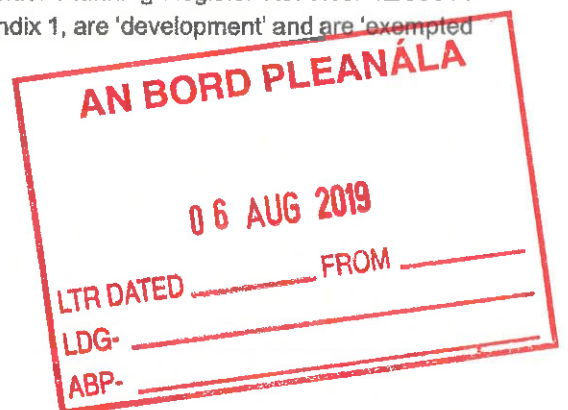
3. Request

As noted in the first part of this submission, our clients were entitled under Section 4(1)(h) of the Planning Acts to carry out exempted alterations to the interior of the premises as soon as the permitted works had been completed in accordance with Condition 1. As this exemption is provided under the Planning Acts rather than the Planning and Development Regulations, 2001 (as amended), it is not subject to the restrictions in Articles 9 or 10 of the Regulations. As a result, the conditions attached to the planning permissions cannot be used to restrict our clients' right to use the exemption available under Section 4(1)(h) to carry out further alterations and improvements to the internal layout and use of the licenced premises.

We therefore request the Planning Authority to issue a Declaration under Section 5 of the Planning Acts confirming that the alterations to the internal layouts permitted under Planning Register Ref Nos. 12/35314 and 13/35534, which are shown on the drawings attached as Appendix 1, are 'development' and are 'exempted development' under Section 4(1)(h) of the Planning Acts.

Yours sincerely,

Brian McCutcheon
McCutcheon Halley



Appendix 1: Drawings showing the alterations to the permitted floor plans

- 1.1 Site Location Map @ 1:1,000
- 1.2 Site Location Map @ 1:500
- 1.3 Ground Floor Plan @ 1:100

