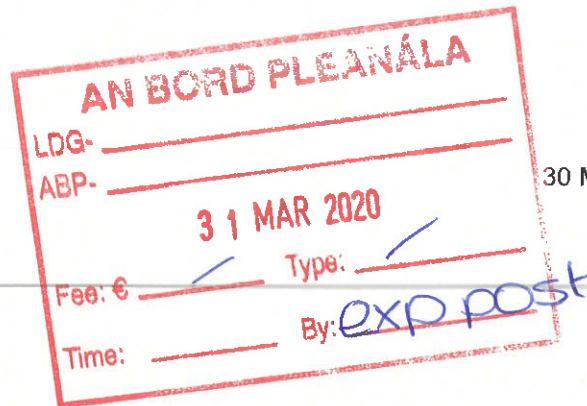


The Secretary  
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30 March 2020

Re: **ABP-306780-20. Section 5(4) Referral on whether replacement signage is or is not development and is or is not exempted development and whether the current use as a licensed café/restaurant is or is not a material change of use from TP 12/35314 and TP 13/35544.PA Ref. No. R/566/20**

Dear Sir/Madam,

## 1. Introduction

We act for Black Dog Bar and Nightclub Ltd. of 52/53 North Main Street, Cork and respond on their behalf to the notice issued by the Board on 4<sup>th</sup> March 2020 under Section 129 of the Planning and Development Act 2000 (as amended)<sup>1</sup>. This notice invites submissions or observations in regard to the Referral which was made by the Planning Authority on 15<sup>th</sup> March 2020.

The premises is one of a group of 15 heritage food and beverage venues in Cork City which include Arthur Maynes, The Bodega, Crane Lane, Mutton Lane, The Oval and Sin é. We ask the Board to note that the name of the company should not be taken as descriptive of the operation of the licensed premises at 52 and 53 North Main Street as the company was set up in 2010 to handle property transactions within the group.

Section 5(4) of the Planning Act states that:

*(4) **Notwithstanding subsection (1)**, a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.*

The Planning Authority acknowledges that on 25<sup>th</sup> February 2020 McCutcheon Halley submitted a request under Section 5(1) of the Planning Act for a Declaration in regard to the same questions. However no declaration was issued by the Planning Authority on 23<sup>rd</sup> March 2020 as required by Section 5(2)(a) and no notice was issued on 16<sup>th</sup> March 2020 as required by Section (2)(ba)(ii).

<sup>1</sup> Hereafter referred to as the Planning Act

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In Section 1.0 of the submission, the Planning Authority states that

*"this referral is being made to expedite circumstances related to with Enforcement Court Proceeding at Cork District Court associated with an Enforcement Notice detailed on the Pubic Planning Register as follows (E7464)"*

Reference is also made in the introduction to the Referral to an enforcement notice issued under E8067. This is in regard to works which have already been addressed by the Board under ABP-305107-19. These works are not relevant to the current referral as:

- (a) The works are outside the scope of the questions on which the referral is made;
- (b) Our client intends to comply Enforcement Notice E8067 following agreement with the City Fire Department who requested that some of the works be retained in the interests of fire safety.

## 2. Extent of the Referral Site

The Planning Authority acknowledges that the referral relates to a planning unit which is comprised of Nos 52 and 53 North Main Street. This is an important point as the size of the planning unit, the complexity of the planning history and the variety of the uses carried out within the planning unit are important aspects in the consideration of:

- (a) The materiality of the change of use; and
- (b) The effect of the amended signage on the appearance of the facade and on the character of the North Main Street Architectural Conservation Area (ACA) as a whole.

## 3. Background and Relevant Planning History

The Planning Authority considers that the "relevant planning history" commenced with the service of Enforcement Notice E77464 on 6<sup>th</sup> June 2019. This ignores the history of the consultation held from June 2013 to June 2015 with Dominic O Briain Senior Executive Planner on the implementation of the permissions granted under TP 12/35314 and 13/35544. In our opinion the relevant planning history includes:

### Planning Register TP 12/35314.

Following withdrawal of a third-party appeal, permission was granted in January 2013 on the combined sites of 52 and 53 North Main Street for a development which comprised of:

- (a) change of use of the ground floor from retail to licensed café/restaurant;
- (b) elevational changes to the facades of 52 and 53;
- (c) a new preparation kitchen to the rear of 53.

### Planning Register TP13/35544

While the permission granted under TP 12/35314 was being implemented an application was submitted under TP13/35544 for permission for further changes to the front elevation, signage and vent flue position. This was granted on 17<sup>th</sup> May 2013

The property comprising No. 52 and No. 53 was licensed by the District Court as a single premises in June 2013 and opened as a pub with an ancillary licensed café/restaurant which offered a range of food and beverages including bakery produce and teas and coffees as well as alcoholic drinks.

While the permission granted under TP13/35544 was being implemented the kitchen area within No. 53 was enlarged to provide food preparation capacity for The Bodega Bar in Cornmarket as well as The Vicarstown Inn in No. 53. There were significant benefits from the economic and food hygiene viewpoints in centralising food preparation on one of three food and beverage sites which were operating under a single management company. However it was subsequently decided to relocate some of the food preparation for these sites to the Rising Sons brewery pub which was developed by our clients associated company at Cornmarket under TP 13/33522.

#### Planning Register 17/37500

During the period from June 2013 to June 2015 no issues were raised by the Planning Authority in regard to the use of 52 and 53 North Main Street. Concerns were raised that the marquee signage on the front elevation of No. 53 exceeded the dimensions permitted under TP13/35544. Our client acknowledged that retention was required and when this was refused under TP 17/37500 the marquee sign was modified to comply with the dimensions permitted under TP13/35544.

We understood from our discussions with the Planning Authority that their primary concern was that the unauthorised marquee sign covered the original signboard which should remain visible and be restored to use as signage. Our client therefore installed the name of the premises "BDSM" in thin neon tubing within the original signboard.

When Enforcement Notice E7674 was issued on 6<sup>th</sup> June 2020 our client assumed that the reference to the "unauthorised sign on front elevation" indicated that the Planning Authority was seeking to enforce the signage permitted under TP 12/35314 and had overlooked the amended signage permitted under TP 13/35544. We therefore set out in the Section 5 request of 25<sup>th</sup> February 2020 a detailed argument that the marquee sign complied with the amendments permitted under TP 13/35544.

Our clients were only made aware of the Planning Authority's concerns in regard to the use of the original signboard for a small neon sign when the matter was raised in the District Court. Furthermore, it is only now that the Board has sought comments on the Planning Authority's referral under Section 5(4) that we have learned the rationale for the enforcement action in regard to the use of the signboard. These issues are addressed in Section 5 of this response.

#### 4. Review of the Board's Decision under ABP-305107-19

The Board's Direction on ABP-305107-19 noted in regard to the use of the premises:

*"that the current use of No. 53 North Main Street presents as a public house whose permitted use is as a licensed café/restaurant and for which no planning permission appears to exist for use as a public house either independently or associated with the public house use at No. 52 North Main Street."* (emphasis added).

The Board did not make any direction in relation to use and indicated that the nature of a licensed café/restaurant was a question of the balance between the food and beverage and the way that the use was **presented to** customers. In order to address the Planning Authority's concerns, my client has offered to regulate the use of the premises for food and beverage to put beyond doubt that it complies with its use permission.

The design of the premises is similar to other licensed restaurants such as 777 in Dublin and the style relates to the type of food served. Design always evolves to enhance the customer experience.

As a general point the fact that no specific planning permission exists for a particular use does not mean that it is an unauthorised use as it may be a non-material change from another established or permitted use.

## 5. The Planning Authority's Position in regard to the Signage

The Section 5(4) referral has been made in regard to three separate signage elements:

1. The marquee or 'billboard' sign, which we maintain is substantially compliant with the permission granted under TP 13/35544;
2. The red neon sign on the original signboard which we maintain is exempt as it is a direct replacement for the larger sign for Mac's Meat Market which previously occupied this space;
3. The lettering to the upper windows which are shown on image 1 of the Section 5(4) referral and has since been removed.

The Planning Authority refers to Section 82 of the Planning Act which specifies that signage could only be considered to be exempt within an Architectural Conservation Area (ACA) if it would not materially affect the character of the ACA. It therefore concludes that:

*"Having regard to the above, and discussions internally with the City Council's Conservation Officer the Council submits that the signage to the front elevation materially affects the character of the North Main Street ACA and is not exempted development".*

In our opinion the Planning Authority has not provided adequate justification for the conclusions reached for the following reasons:

- (a) It is not clear which of the three signage elements are considered to be unauthorised;
- (b) No written report is provided to substantiate the views attributed to the Conservation Officer; and
- (c) No reasons or considerations are given to justify the conclusion that the signage would affect the character of the ACA **to a material extent**.

The position adopted by the Planning Authority fails to make any reference to the following statement of character for the North Main Street ACA which is set out in Volume 3 of the Cork City Plan

*"Along North and South Main Streets the buildings are mostly narrow-fronted with long plots and with a laneway running between each pair of buildings. Many of the laneways are now incorporated into buildings as hallways or private accesses. Building heights are mainly between 3 and 4 storeys, with commercial premises on the ground floors. **Buildings on the secondary streets are similar, but with a mix of commercial premises and domestic houses.** Because of the narrow-frontages, **many businesses in North and South Main Street and the larger side streets extend across a number of buildings and plots.***

*External finishes are mainly painted plaster over brick and rubble stone walls, timber sliding sash windows, stone slated pitched roofs with cast-iron rainwater goods. **A number of larger scale buildings are located at the northern end of North Main Street which provide city-wide leisure and shopping facilities in modern complexes.** There are a number of institutional buildings within the area. Notable examples include the mid-20th century Franciscan and Augustinian Churches, the Catholic Young Men's Society Hall, and the 18th century former Church of Ireland Parish Church, St. Peter's (Cork Vision Centre) which is set-back from the street front, behind cast-iron railings.*

***The area continues to suffer from the continuing decline of its traditional economic and social role despite the uplift generated by the 1994 Historic Centre Action Plan. That initiative needs***

*to be followed up with a sustained effort on the part of the City Council, local residents, business people, property owners and the general community who use the area.*

*The lack of integration with the modern commercial city district to the east is improving by way of planned upgrades to Cornmarket Street and by the coming on stream of the key retail opportunity site on the Old Guy's site. The demand for ground floor retail space is growing but needs to be supported to ensure continued commercial vibrancy of the area. While narrow building frontages and the small-scale of buildings make some modern uses difficult to accommodate the overall identity of the area needs to be strengthened so that the area's archaeological and architectural richness can be actively maintained."*

This statement of character highlights the need to encourage commercial vibrancy along North Main Street and confirms that the conversion of a vacant retail store to a licensed café/restaurant with appropriate signage is entirely consistent with the objectives of the North Main Street Area. The Board will note that there is a wide variety of shop fronts and signage along the street and there is no specific type of signage which could be considered to represent the distinctive character of this ACA. There is, therefore no basis for the Planning Authority's conclusion that the use of a small neon sign on the signboard of an established shopfront would have any effect on the frontage of No. 53; or on the overall character of the ACA.

In our opinion it is not appropriate for the Planning Authority to base its conclusions on undocumented internal discussions with the Conservation Officer. The Board and our client are entitled to know the reasons and considerations on which the conclusion was reached by the Planning Authority that there would be a *material* effect on the character of the ACA. There is also an onus on the Conservation Officer to clarify what form of signage would be compatible with the commercial vibrancy of the ACA.

## 6. The Materiality of the Change of Use

Our conclusion that the alleged change of use is not material is explained in detail in the Section 5(1) Request which was submitted on the 25<sup>th</sup> February 2020 and is attached to the Section 5(4) Referral. The Planning Authority has failed to give any response to the points we made and relies instead on the following quotation from the Inspector's Report on ABP-305107-19

### *The Nature and Extent of the Existing Development*

*The Vicarstown Bar is a public house. The Black Dog Saloon & Mezcaleria presents itself as a public house. With the exception of the small enclosed 'Service Kitchen' adjoining the outdoor area, there is no kitchen facility and no associated food preparation area. At the time of my site inspection, there was no evidence of any cooking taking place in this premises. No. 53 Main Street presents itself as an entirely separate commercial unit from the Vicarstown Bar. There is no café or restaurant in formal presentation at No. 53.*

In our opinion the Planning Authority has overlooked a number of important points in regard to this quotation from the Inspector's Report:

- (a) The Inspector was reporting on the situation he found at the time of his inspection on 15<sup>th</sup> October 2019. This cannot be considered to be an accurate representation of the use of the premises throughout a typical week as the balance between food and beverage sales within a licensed premises varies over time;

- (b) The Inspector noted that, apart from the service kitchen, he found no kitchen facility no associated food preparation area and no evidence of any cooking taking place in this premises. However the use of a licensed café/restaurant is primarily a question of where the food is consumed rather than prepared. As we pointed out in Section 2 above, at the time of Inspector's visit, some of the food preparation for 52 and 53 North Main Street had recently been transferred to the Rising Sons Brewery at Cornmarket. There is still quite an amount of food preparation done within No. 53 North Main Street, but this could not be ascertained by the Inspector during his inspection which was conducted outside of opening hours. The mere fact that some of the food consumed is no longer being prepared on the same premises does not mean that the use as a licensed café/restaurant has ceased.
- (c) The Inspector's statement that there was no café or restaurant *in formal presentation* at the time of his visit does not in itself support the Planning Authority's allegation in Enforcement Notice E7464 that there was a change of use to a "late night music bar". There is no evidence in regard to use of No. 53 as a late-night music bar in the Inspector's report and none has been offered in the Planning Authority's referral. Our client is willing to submit financial statements to the Board to demonstrate that the revenue generated within No. 53 North Main Street is almost exclusively before the hours when there is a special exemption. This part of the premises does not have the size or scale to be a late bar in the manner alleged by the Planning Authority.
- (d) The Referral has overlooked an important difference between the conclusions reached in the Inspector's Report and the Board Direction. The Inspector recommended that the Board should conclude:

*NOW THEREFORE the Board, in exercise of the powers conferred on it by section 5 of the 2000 Act, has decided that the primary use of No. 53 North Main Street, Cork as a public house and the alterations in the form of a Service Kitchen to the layout of the permitted licensed premises at 52/53 North Main Street, Cork constitute development and development that is not exempted Development.*

The Board declined to follow this advice and concluded instead:

*NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that: (a) the alterations in the form of staircase provision and other minor alterations are development and are exempted development, and (b) the alterations in the form of a 'Service Kitchen' to the layout of the permitted licensed premises are development and are not exempted development, all at numbers 52/53 North Main Street, Cork.*

The Board did not reach any conclusion in regard to the primary use of No. 53 and also deleted the Inspectors statement that No 52 and 53 were two separate planning units.

- (e) We acknowledge that the Board's order had regard *inter alia* to:

*"the planning history of numbers 52 and 53 North Main Street, with particular reference to planning permissions, planning register reference numbers TP12/35314 and TP13/35544, and noting that the current use of number 53 North Main Street presents as a public house whose permitted use is as a licensed café/restaurant and for which no planning permission appears to exist for use as a public house either independently or associated with the public house use at number 52 North Main Street"*

In our opinion the fact that the premises *presented as* a public house at the time of the Inspector's visit does not mean that it is being primarily and continuously *used for* that purpose. We would also argue that, while there may be no permission to use No. 53 as a public house, no such permission is

required to continue the current use of that premises as part of the established mix of pub, café and restaurant uses within the larger planning unit of 52 and 53 North Main Street.

The Planning Authority has effectively avoided addressing the materiality of the change of use by:

- (a) relying entirely on the Inspector's Report on ABP-305107-19,
- (b) declining to comment on the case made in Section 2 of our Section 5(1) Request of 25<sup>th</sup> February 2020; and
- (c) failing to provide any direct evidence of the current use of the premises.

In order to determine whether the current use of No. 53 is or is not exempted development, the Board must first establish that it is 'development' in the sense that any change from the permitted use of Nos 52 and 53 is 'material'. Without repeating the case we have already made in the Section 5(1) request we would like to emphasise the following mitigating factors which support the argument that any change between the permitted and the current use is not material:

Most licensed premises provide a mix of food, beverage and entertainment. The relative importance of these constituent uses will depend on customer demand and will determine how the overall use is presented.

The permissions granted under TP 12/35314 and TP 13/35544 applied to a planning unit which included Nos 52 and 53 North Main Street and a mix of uses which comprised the primary use as an established late-night bar with an ancillary use as a licensed café/restaurant.

No conditions were imposed regulating the balance of the mix between the bar and café/restaurant uses, and no issues were raised during the first two years of operation. In so far as there has been any change in the balance between the primary and ancillary uses over the past 7 years this is due to:

- (a) a general change in the way food preparation is handled in food and beverage outlets throughout the City Centre; and
- (b) specific problems with on-street drug dealing in North Main Street which discourage café/restaurant customers during the daytime.

It is reasonable to expect that a planning permission, which has no conditions restricting use, would allow the commercial operator to respond to changes in the market environment, while maintaining the primacy of the primary use.

#### 7. Alleged Expiry of the Permission Granted under TP 12/35314

At the end of page 6 of the referral the Planning Authority makes the remarkable statement that the use permitted under TP 12/35314 was not implemented and that the permission expired in 2017.

In the first place, as we pointed out in Section 2 of this response, the permission granted under TP 12/35314 was implemented during the period between the grant of permission in January 2013 and the issue of a licence by the District Court in June 2013. The licence would not have been issued unless the Court was satisfied that the development had been carried out in substantial compliance with the permission granted under TP/12/35314.

Secondly, no issues in regard to compliance with the permitted use were raised by the Planning Authority during the period between June 2013 and June 2015 when discussions were held with the Planning Officer in regard to compliance with the permitted signage.

Thirdly the permission granted under TP 12/35314 included internal and external works as well as the change of use. The Board's decision under ABP-305107-19 implicitly confirmed that the permitted works were carried out as the materiality of the further alterations were assessed in that specific context.

Finally, the Enforcement Notice issue under E7464 is in regard to "unauthorised use as a late-night music bar in contravention of T.P.12/35314". There is no legal basis for a Planning Authority to take enforcement action in regard to non-compliance with a permission which it now considers to have expired without being implemented.

## 8. Conclusion

The Planning Authority has declined to issue a Declaration during the statutory time limit under Section 5(2) and has chosen to refer the question to the Board under Section 5(4). As a result, the issues which we raised in our request for the Declaration on 25<sup>th</sup> February 2020 have not been addressed.

The Planning Authority's referral does not accurately reflect the planning history of the site and is based on the erroneous assumption that the permission granted under 12/35314 expired before it was implemented.

The arguments relating to the signage rely on the location of the site within an Architectural Conservation Area (ACA) but fail to have regard the statement of character for the North Main Street ACA. They also rely on the verbal comment of the Conservation Officer without providing any written report.

The arguments relating to the use of the premises rely on an Inspector's report which, in turn, is based on a single inspection carried out on a Tuesday in October 2019 outside opening hours. It also overlooks the fact that the Board made significant amendments to the Inspector's conclusions relating to key aspects of this referral. The report of the Inspector's site visit in October 2019 does not accurately reflect the current use of the site or the way our client intends to present the licensed café/restaurant use in the future.

In our opinion there is a remarkable lack of consistency in the Planning Authority's approach to this case. The inconsistency applies to the contrasting views of the various planning officers who assessed compliance over the past 7 years and the way this site has been treated in comparison with competing licensed premises offering a similar mix of pub, restaurant and entertainment uses.

We ask the Board to take a reasonable and practical approach and to acknowledge that, where permission has been granted for a licensed premises without any restrictive conditions relating to use or opening hours, the operator should be allowed reasonable flexibility to adjust the food and beverage offer in line with consumer demand and within the terms of the licence issued by the District Court.

Yours sincerely,

*Brian McCutcheon*

Brian McCutcheon  
McCutcheon Halley

