



SECTION 5 REFERRAL TO AN BORD PLEANÁLA FOLLOWING DUBLIN CITY COUNCIL'S DECISION TO REFUSE AN EXEMPTION CERTIFICATE FOR DCC REG. REF. 0139/23 IN RELATION TO WHETHER THE HOSTING OF OCCASIONAL WINE TASTING EVENTS (WITH FINGER FOOD) AS AN ANCILLARY EVENT AT A RETAIL STORE ON A ONCE-PER-MONTH BASIS AT THE LENNOX STREET GROCER, 38 LENNOX STREET, PORTOBELLO, DUBLIN 8, D08 R5P0 IS CONSIDERED DEVELOPMENT AND IF SO DOES IT CONSTITUTE EXEMPTED DEVELOPMENT UNDER THE PROVISIONS OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND THE PLANNING AND DEVELOPMENT REGULATIONS 2001 (AS AMENDED)?

Prepared for:

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AN BORD PLEANÁLA	
LDG- <u>064320-23</u>	
ABP- _____	
14 JUN 2023	
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The Secretary
An Bord Pleanála
61-64 Marlborough Street
Dublin 1
D01 V902

Wednesday, 14 June 2023
[By hand.]

Dear Sir / Madam

RE: SECTION 5 REFERRAL TO AN BORD PLEANÁLA FOLLOWING DUBLIN CITY COUNCIL'S DECISION TO REFUSE AN EXEMPTION CERTIFICATE FOR DCC REG. REF. 0139/23 IN RELATION TO WHETHER THE HOSTING OF OCCASIONAL WINE TASTING EVENTS (WITH FINGER FOOD) AS AN ANCILLARY EVENT AT A RETAIL STORE ON A ONCE-PER-MONTH BASIS AT THE LENNOX STREET GROCER, 38 LENNOX STREET, PORTOBELLO, DUBLIN 8, D08 R5P0 IS CONSIDERED DEVELOPMENT AND IF SO DOES IT CONSTITUTE EXEMPTED DEVELOPMENT UNDER THE PROVISIONS OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND THE PLANNING AND DEVELOPMENT REGULATIONS 2001 (AS AMENDED)?

1.0 INTRODUCTION

1.1 Overview of this Referral to An Bord Pleanála

La Gourmande Limited¹ has retained Tom Phillips + Associates² to request that An Bord Pleanála reviews Dublin City Council's *Notification of Declaration on Development and Exempted Development*, dated 18 May 2023 in respect of Reg. Ref. 0139/23 (enclosed in Appendix A) under Section 5 (3) (a) of the *Planning and Development Acts 2000* (as amended).

This Declaration seeks to establish under Section 5 whether the holding of occasional wine tasting (with finger food) as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the *Acts* and the *Planning and Development Regulations, 2001* (as amended) (hereafter referred to as the *Regulations*).

We enclose a cheque made payable to An Bord Pleanála in the sum of €220.

It is of importance to note that only six of these events have occurred since the establishment of the Lennox Street Grocer in November 2020. This amounts to one event every five months (approximately). In submitting our Section 5 Referral we took a 'worst case scenario' approach (i.e. that events would be hosted monthly) which is significantly more intensive than that which what has occurred on site. The occasional activity is still very much ancillary to its use as a shop.

In a Hearing before the District Court, on the day we submitted the Section 5 to DCC, Counsel representing Dublin City Council deemed that this Section 5 Referral did not sufficiently address the enforcement matter at issue. Subsequently, this required our submission of a second Section

5 Referral three days later. That too was refused and will be subject to an Appeal to An Board Pleanála submitted on or before its deadline next week. (Reg. Ref. 0149/23.)

We seek confirmation from An Bord Pleanála (through the issuing of a *Declaration* under Section 5 of the *Planning and Development Acts 2000* (as amended)) that the components and ancillary elements detailed in this *Section 5 Referral* is or is not development or is or is not exempted development.

The questions to be determined in respect of the subject elements may be described as follows:

"Whether the holding of occasional wine tasting (with finger food) as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?"

1.2 Summary of the Subject Site

Figure 1.1 illustrates the ground floor plan of the premises. The Architects' Office (annotated and to the left) has since reverted to a retail shop to the front as conditioned by the previous Application (Reg. Ref. 4115/99).

(As illustrated in Figures 2.6 to 2.11 below the retail element is small, with the area utilised the display of wine smaller still.)

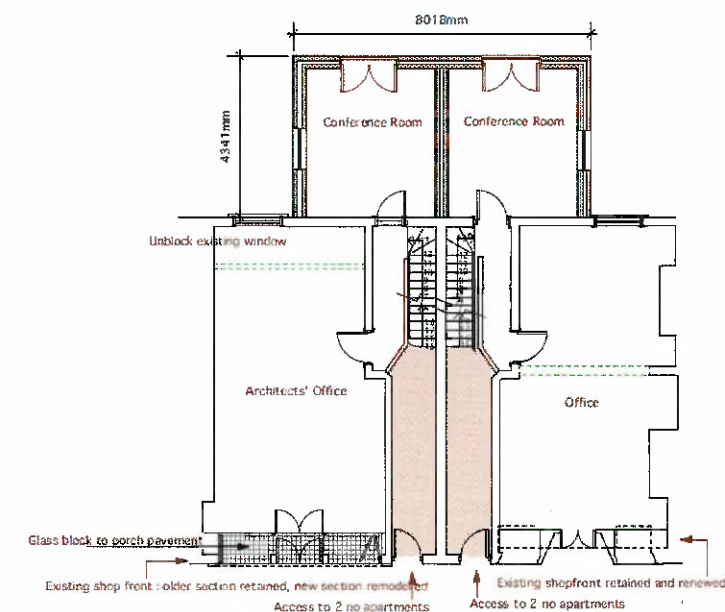


Figure 1.1: An excerpt of Dwg. No. PP02 – Ground, first and second floor plans submitted as part of a previous Application for the site (Reg. Ref. 4115/99). (Source: Paul Arnold Architects, 1999.)

The subject shop is now on the bottom left "quarter."

¹ Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8, D08 R5P0.

² No. 80 Harcourt Street, Dublin 2, D02 F449.

1.3 Site location

The Lennox Street Grocer is located at No. 38 Lennox Street, Portobello, Dublin 8, D08 R5P0.

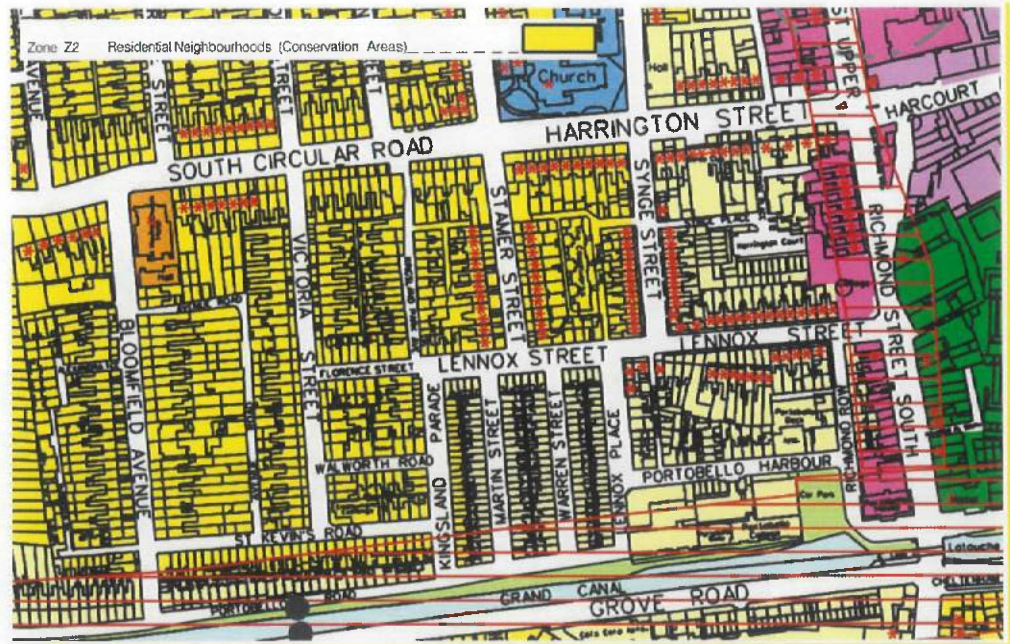


Figure 1.2: Location of Subject Site in the context of Development Plan Zoning Map. (Source: Dublin City Development Plan 2022-2028, Volume 3, Mapset E.)

The subject site is zoned 'Objective Z2 – Residential Neighbourhoods (Conservation Areas)', but is not a protected structure.

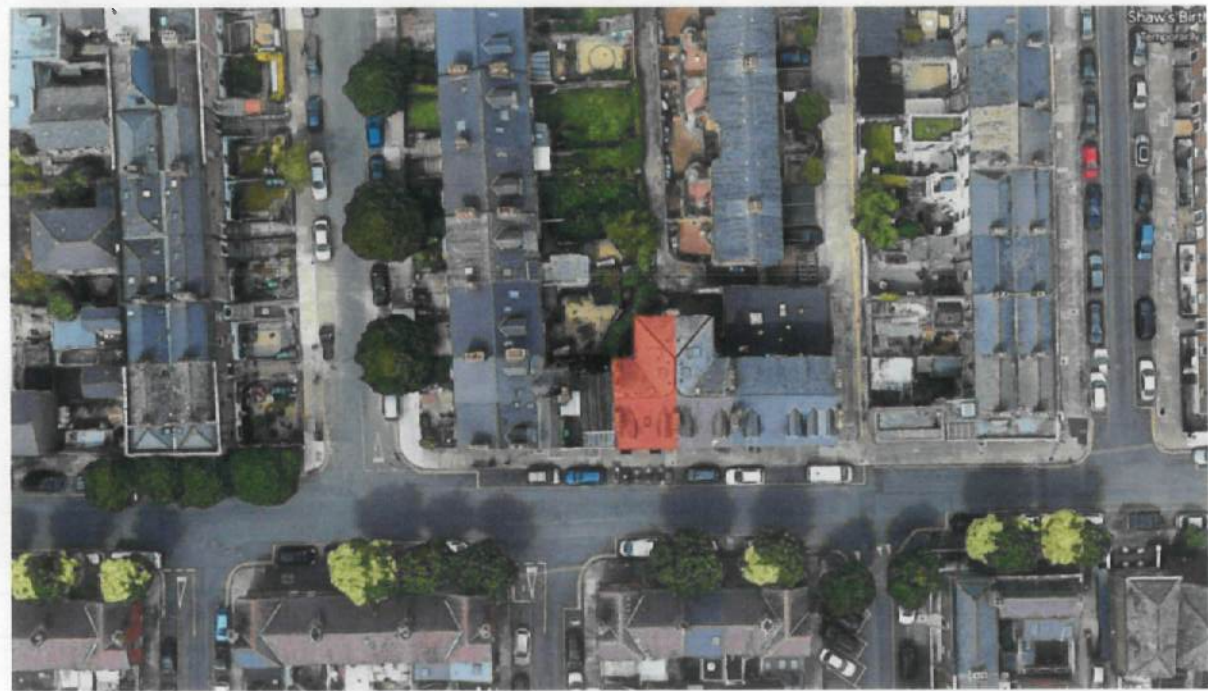


Figure 1.3: Location – Approx. location of The Lennox Street Grocer shown on Lennox Street, Dublin 8. (Source: Google Earth Pro, annotated by TPA, December 2022.)



Figure 1.4: OSI Location Map of Subject Site on Lennox Street, Dublin 8 (red). (Source: OSI Geohive Maps (Copyright Licence No. CYSL50311197), annotated by Tom Phillips + Associates, January 2023.)

2.0 BACKGROUND INFORMATION

2.1 Description of Subject Site – short commercial row of properties

The Lennox Street Grocer is situated at No. 38 Lennox Street in the vibrant and eclectic Portobello neighbourhood of Dublin 8, just a short distance from the city centre. (Figure 2.1.)

The Lennox Street Grocer is located approximately 1.5 kilometres (1 mile) south of Dublin city centre. The nearest LUAS stop to the grocer is the Harcourt stop on the Green Line, which is approximately a 10-minute walk away.

The Lennox Street Grocer is situated in between the proposed A Spine and F Spine of the BusConnects scheme. The resultant impact is high frequency public transport infrastructure 5 minutes to the west and east of the site, with numerous bus routes that stop near The Lennox Street Grocer in Portobello, Dublin 8.



Figure 2.1: Site Location Map. (Source: Myplan.ie, April 2023.)

The premises is abutted by: No. 40 Lennox Street (Wayward Hair Salon) (Figure 2.2); and No. 36 Lennox Street (Portobello Physiotherapy) (Figure 2.3).

No. 34 Lennox Street is occupied by Brindle Coffee & Wine (Figure 2.4).

As illustrated by the interior images Figures 2.6 to 2.11, the scale of wine sales in the Lennox Street Grocer in floorspace terms is ancillary to the balance of the retail unit.



Figure 2.2: Wayward Hair Salon, No. 40 Lennox Street, Dublin. (Source: TPA, April 2023.)



Figure 2.3: Portobello Physiotherapy, No. 36 Lennox Street, Dublin. (Source: TPA, April 2023.)

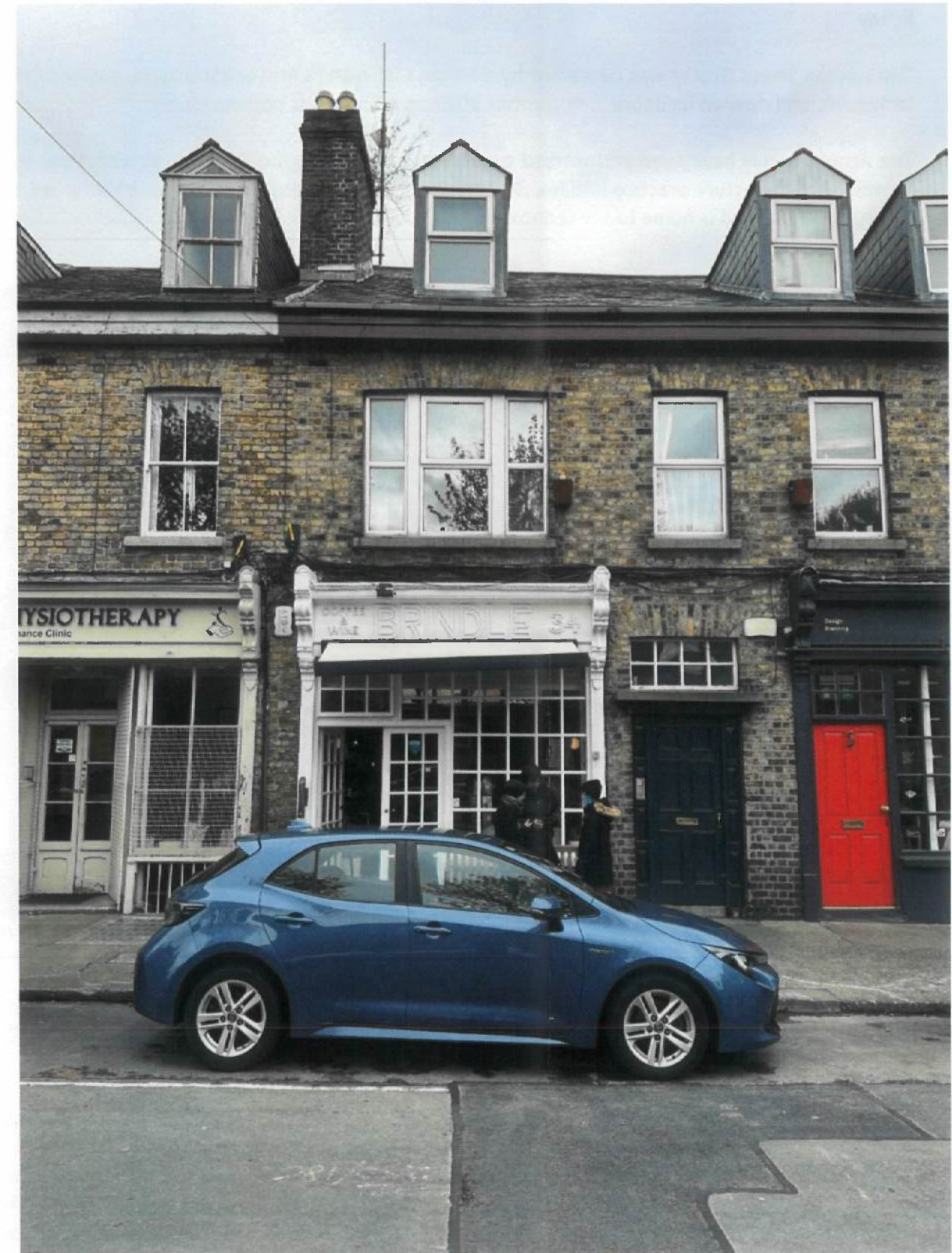


Figure 2.4: Brindle Coffee & Wine, No. 34 Lennox Street, Dublin. (Source: TPA, April 2023.)

Unlike the Lennox Street Grocer, Brindle's shopfront announces its sale of wine.

2.2 Ethos

The Lennox Street Grocer was conceived by siblings, Claire and Christopher Arnold, during Covid-19 lockdown, and opened its doors in November 2020, as a Christmas pop-up.

The Arnold family have lived and worked on Lennox Street since 1999 when patriarch Paul Arnold moved his architecture practice into No. 38 Lennox Street. The shop space has been returned to its original purpose and is home to the Lennox Street Grocer. (See the planning history below in Section 2.1.)



Figure 2.5: Christopher and Claire Arnold at Lennox Street Grocer in Portobello. (Source: Tom Honan/*The Irish Times*, November 2022.)

The Irish Times' article titled "The small local shops changing what we buy and how we eat", published in November 2022, discusses how the pandemic prompted a nationwide resurgence of local grocers offering quality Irish produce, featuring a section about the Lennox Street Grocer:

"Back in Dublin, another accidental grocer is Claire Arnold. In early 2020 she quit her job in wine sales with a plan to set up a business offering food tours, but the lockdown in March put a halt to that. Along with her brother Chris, who had been working in the restaurant industry before it shuttered, she decided to set up a small pop-up shop selling Christmas hampers from an unused space on the ground floor of their father Paul Arnold's architecture practice in Portobello.

"We opened on the 20th of November 2020, scrambling to try and do something before Christmas," she says.

They started to get to know the neighbours. "We were asking everyone who came through the doors, 'If we stay around, what can we do?' Mostly people wanted fresh produce, and lunch options." The shop stayed open past Christmas and the business grew slowly and organically, as the siblings figured out what worked and what didn't, trusting their instincts and drawing on their many years of combined experience in the food and drink industries in Ireland, France, Canada and the US.

"When I saw so many other places opening, I knew I just had to work on keeping the shop unique," says Arnold. Alongside many of the artisanal Irish brands that have become widely available in small grocers like this, the Lennox Street Grocer also offers a range of specially selected oils and vinegars, preserves, sauces, tinned fish and coffee from international suppliers, and gorgeous bunches of dried flowers from The Flower Drop in Co Offaly. A surprise hit with customers has been good pasta. "It's one of those things that might seem expensive on the shelf, but you can make such a nice restaurant quality dinner at home, relatively inexpensively," Arnold says."

Another *The Irish Times* Article on the "25 of the best places to go food shopping in south Dublin" published in November 2021, listed Lennox Street Grocer as one of the 25 No. best places:

"This small neighbourhood grocer is all about quality suppliers. Vegetables are from Beechlaw Organic, Ballymakenny and Market Gnomes, who are operating a market-garden farm using regenerative agricultural practices to produce high-quality organic vegetables. Other products stocked include Sheridans cheeses, Pastificio Mancini pasta and low-intervention wines."

Wine is an ancillary element.

As noted previously, however, the premises' Licence "authorizes sale by retail of the liquor to which the Licence extends for consumption **either on or off the premises**".

[Our emphasis. See Appendix I.]



Figure 2.6: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



Figure 2.7: Lennox Street Grocer Shop Interior with a view of the wine section. (Source: TPA, April 2023.)



Figure 2.8: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



Figure 2.9: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



Figure 2.10: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



Figure 2.11: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)

2.3 Covid-19 Exemptions – A dual context – *The Civil Law (Miscellaneous Provisions) Act 2021* extension due to be enacted 31 May 2022 and Section 28: Guidelines for Planning Authorities – Enforcement of certain planning conditions during the Coronavirus (COVID-19) outbreak

The Lennox Street Grocer first opened its doors for customers in November 2020 – the beginning of which was during a stringent set of restrictions.

2.3.1 *Civil Law (Miscellaneous Provisions) Act 2021* extension due to be enacted 31 May 2022

The Civil Law (Miscellaneous Provisions) Act 2021 sought to:

“make provision, on a temporary basis, for the sale or supply of intoxicating liquor in certain circumstances in seating areas located outside licensed premises in order to allow, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19, the businesses of licensees of such premises to operate in a manner that mitigates the spread of that disease; to provide for the application of certain enactments to those outdoor seating areas.”

Lennox Street Grocer is a shop, not a restaurant/ café. It is fully entitled to sell more.

2.3.2 Section 28: Guidelines for Planning Authorities – Enforcement of certain planning conditions during the Coronavirus (COVID-19) outbreak

By way of context the flexibility shown the restaurants/ cafés during Covid is formative.

Covid planning guidelines facilitated the following provisions under the *Planning and Development Act 2000* (as amended):

1. "Consequently, given the limited time period for which this will apply and in the interests of the common good, given the materially altered circumstances described above, and the serious danger to public health posed by the COVID19 pandemic, planning authorities may therefore, as appropriate, consider any breaches of planning condition in relation to restaurants or cafés operating a delivery or take-away service to be "of a minor nature", other than where issues arise which could seriously impact on public health and safety."

2. "Given the exceptional challenges arising from COVID-19, it is critical that support is given to restaurants and cafés to allow them to maximise opportunities to maintain a revenue stream."

"Given the current serious danger to public health and the resultant pressures placed on the restaurant and café sector, planning authorities should take an accommodating and flexible approach to conditions restricting the provision of delivery and take-away services."

3. "It is vital that deliveries of food, healthcare and other essential products can be made as quickly and safely as possible."

"The purpose of this element of guidance is to ensure a proportionate response in the context of the current civil emergency, that may be applied to certain planning restrictions on the provision of delivery or take-away services from restaurants or café, in all planning authority areas."

Neither a flexible nor accommodating approach to conditions outlined in Quote Three was taken by the Planning Authority, and that enforcement does not represent a proportionate response while the business aimed to provide a social outlet whilst ensuring the safety of its patrons and staff.



3.0 PLANNING HISTORY

3.1 Planning History relating to the Subject Site

We reviewed the site's planning history using Dublin City Council's online planning portal.

The premises has a limited, but important planning history – the only application being in 1999 (DCC Reg. Ref. 4115/99). This was an application for the change the use from shops and workshops to offices and to construct a four-storey return extension to rear.

Planning Application Reg. Ref. No.	Planning Authority Decision	Summary
4115/99	Grant Permission 03/05/2000	Permission granted for the change the use from shops and workshops to offices, to construct a four-storey return extension to rear, incorporating extensions to four apartments office extensions and toilets, and to carry out alterations to a shopfront.
0139/23	Refuse Exemption Certificate	Whether the holding of occasional wine tasting with finger food as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the <i>Planning and Development Act 2000</i> (as amended) and the <i>Planning and Development Regulations, 2001</i> (as amended)?
0149/23	Refuse Exemption Certificate	Whether the hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee is considered development and if so does it constitute exempted development under the provisions of the <i>Planning and Development Act 2000</i> (as amended) and the <i>Planning and Development Regulations, 2001</i> (as amended)?

Table 3.1: Table outlining relevant planning history relating to the subject site.

Condition No. 2 of the Planning Permission (Reg. Ref. 4115/99) requires that:

"The use of the premises at the basement and ground floor of No. 36 & No. 38 Lennox Street as offices shall cease on or before the expiration of a period of ten years from the date of this order, unless prior to the expiration of that period, permission for its retention beyond that date shall have been granted."

REASON: In the interests of preserving residential amenity in a residential conservation area."

No retention permission for development was sought.

In other words, the permitted use of the former basement/ground floor of No. 38 Lennox Street is reversion to retail/workshop as appropriate.

Appendix F sets out a Warning Letter dated 15 August 2022 under section 152 of the *Planning and Development Act 2000* (as amended) alleging a change of use from shop to restaurant.

Appendix G sets out a Warning Letter dated 28 May 2021, alleging "a change of use ... from office to retail use ... without the benefit of planning permission".

However, in our professional town planning opinion the retail use is in accordance with the terms of Reg. Ref. 4115/99.

As previously stated, It is **not** a restaurant, nor purports to be one.

Section 5.0 below sets out the Planning Definitions of "retail". It includes the sale of wine.

4.0 LOCAL PLANNING CONTEXT

4.1 Overview

This Section examines the planning and development context of the lands and outlines the key development management issues that concern the site, with specific reference to the *Dublin City Development Plan 2022-2028 (Development Plan)*.

4.2 Land Use Zoning – relevant for context only – ‘retail’ is a long-established use

The subject site is zoned ‘Objective Z2 – Residential Neighbourhoods (Conservation Areas)’ according to the *Development Plan*. The purpose of this zoning objective is:

“To protect and/or improve the amenities of residential conservation areas.”

The *Development Plan* states that:

“The principal land-use encouraged in residential conservation areas is housing but can include a limited range of other uses. In considering other uses, the guiding principle is to enhance the architectural quality of the streetscape and the area, and to protect the residential character of the area.”

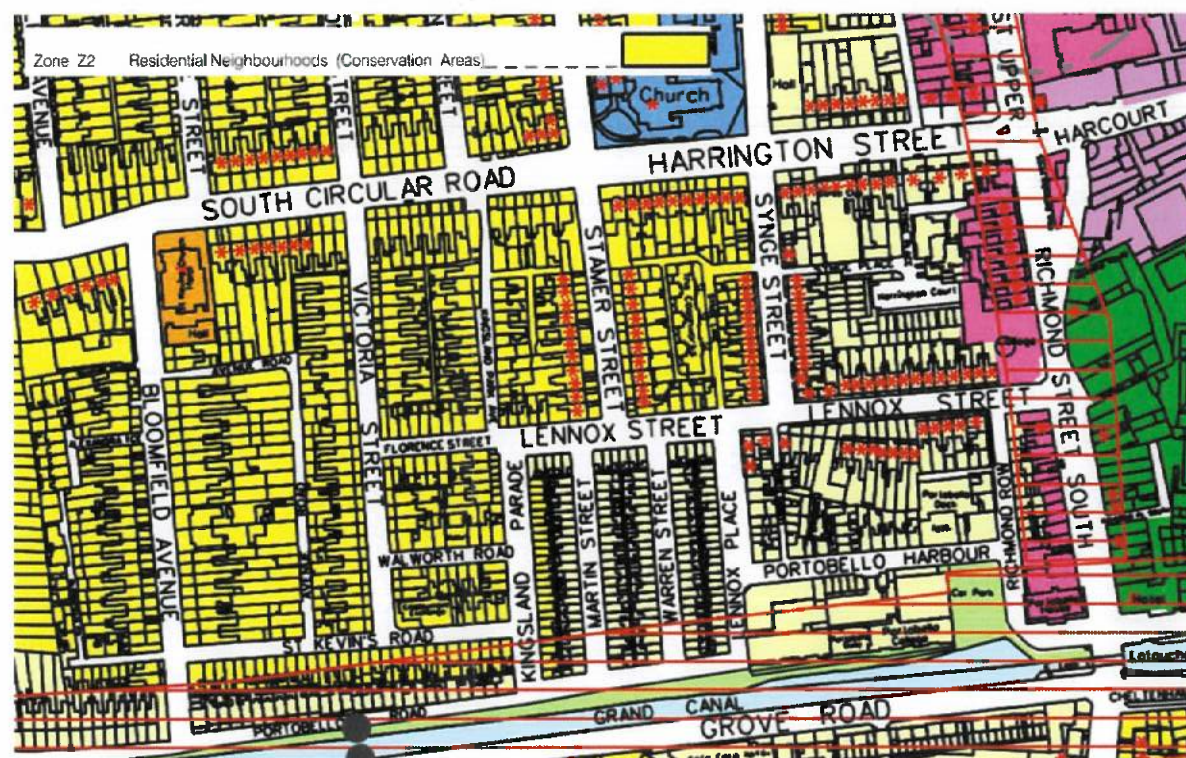


Figure 4.1: Location of Subject Site in the context of Development Plan Zoning Map. (Source: *Dublin City Development Plan 2022-2028, Volume 3, Mapset E.*)

Z2 – Permissible Uses⁴

Bed and breakfast, buildings for the health, safety and welfare of the public, childcare facility, embassy residential, guesthouse, home-based economic activity, medical and related consultants, open space, public service installation, residential.

Z2 – Open for Consideration Uses⁵

Allotments, assisted living/retirement home, beauty/ grooming services, Build to Rent residential, **café/tearoom**, civic and amenity/ recycling centre, community facility, craft centre/ craft shop, creative and artistic enterprises and uses, cultural/recreational building and uses, cultural, delicatessen, education, embassy office, enterprise centre, funeral home, hotel, laundromat, live-work units, office, place of public worship, primary health care centre, residential institution, **restaurant, shop (local)**, sports facility and recreational uses, student accommodation, veterinary surgery.

[Our emphasis.]

4.3 Policies Relating to Restaurant and Café Use – in our professional town planning opinion the Planning Unit is retail, not restaurant/café

Notwithstanding that the planning unit is retail, from an economic and enterprise perspective, the *Development Plan* recognises the growing demand and economic wealth creation opportunities involved in the provision of restaurant uses within city centre areas.

Section 6.5.6 of the *Development Plan* states that:

“Dublin has an open, international, competitive and diversified economy. It is a major hub for leading IT and financial services companies as well as for research and development activities. It is also a major tourism, leisure and culture destination and has a vibrant restaurant, food, distillery and craft sector.”

“The services sector (e.g., entertainment, restaurants, cultural and other services etc.) has been a major wealth and employment generator for Dublin and plays a pivotal role in determining the performance of the economy.”

In this regard, it is policy of the Council to:

“CU7: To support existing, and encourage the growth of, emerging cultural clusters and hubs within the city, which bring together cultural activities interlinked with supporting uses (such as restaurants, retail, galleries and venues) to create vibrant, defined cultural quarters and communities within the city that give a variety of cultural experiences to all.”

“CCUV30: To promote and facilitate the provision of cafés / restaurants in the city and support their role in making the city more attractive for residents, workers, and visitors and in creating employment.”



*"CCUV36: To support uses that would result in the diversification of the **evening and nighttime economy** where there is little impact on the amenity of adjoining or adjacent residential uses through noise disturbance and where there are no negative cumulative impacts in terms of other night-time economy uses in the area."*

[Our emphasis.]

The *Development Plan* recognises the importance of restaurant uses in the wealth and employment generation within the city. Therefore, in line with the council policies, the provision of the proposed restaurant/café is likely to generate a number of jobs and increase wealth within the city while making the region attractive for workers, visitors and residents.

4.4 No sensitive specific objectives apply to the site

We confirm that there are no sensitive 'specific objectives' that apply to the site, such as an Architectural Conservation Area, Protected Structures, NIAH Monuments etc., and the site is zoned Z2 'Residential Neighbourhoods' where the strategy is *"to protect and/or improve the amenities of residential conservation areas."*

4.5 The Question for the Purpose of Assessment

Having regard to the above, for the purposes of assessment, the question to be determined in respect of the elements at the subject site may be described as follows:

"Whether the holding of occasional wine tasting (with finger food) as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?"

5.0 THE LEGISLATIVE CONTEXT

5.1 Words and Definitions

The District Court Summons (Appendix A) states *inter alia* that:

“event or promotions, shall not take place on the premises namely The Lennox Street Grocer, 38 Lennox Street, Dublin 8, whereby food and alcoholic beverage is consumed by patrons on the premises in exchange for a fee”.

In light of the references, we consider it appropriate to outline the planning definitions of the following:

1. “Retail”
2. “Events”
3. “Promotions.”

5.1.1 Retail facilitates the sale of wine

In one An Bord Pleanála case (Reg. Ref. RL.29N.r13037), the Inspector’s Report (see Appendix I) states:

“Section 2 (1) of the Planning and Development Act, 2000, states as follows:-

“In this Act, except where the context otherwise requires – ‘development’ has the meaning assigned to it by Section 3 ...”

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

“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.”

Article 5(1) of the Planning and Development Regulations states that a “business premises” means –

(a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons,

(b) a hotel or public house,

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

Article 5(1) of the Regulations was amended by S.I. No. 364 of 2005 by substituting the following definition for the definition of ‘shop’ – ‘shop’ means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public-

(a) for the retail sale of goods,

(b) as a post office,

(c) for the sale of tickets or as a travel agency,

(d) for the sales of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and “wine” is defined as any intoxicating liquor which may be sold under a wine retailer’s off-licence (within the meaning of the Finance (1909-1910 Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,

(e) for hairdressing,

(f) for the display of goods for sale,

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

(h) as a launderette or dry cleaners,

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

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which Class 2 or 3 of Part 4 of Schedule 2 applies’.”

[Our emphasis.]

As noted by Mr Arnold, the premises had four wine tasting sessions in 2022. Mr Arnold notes it has had six since it opened. That equals to just one every five months.

In our professional town planning opinion based on interpretation, the sale of wine is ancillary.



5.1.2 Events

The *Planning and Development Act 2000* (as amended) defines “events” as follows:

“229.—In this Part—

“event” means—

(a) a public performance which takes place wholly or mainly in the open air or in a structure with no roof or a partial, temporary or retractable roof, a tent or similar temporary structure and which is comprised of music, dancing, displays of public entertainment or any activity of a like kind, and

(b) any other event as prescribed by the Minister under section 241”

Therefore the occasional holding of wine tasting is not an “event” from a town planning perspective.

6.0 THE BASIS FOR THIS SECTION 5 REFERRAL

Section 1.1 sets out the question at the heart of this Referral:

“Whether the holding of occasional wine tasting (with finger food) as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?”

We are advised that our Client, thus far, has hosted six wine tasting sessions since the establishment of the Lennox Street Grocer in late 2021 – roughly **three/four per annum**. We argue such infrequency is clearly ancillary.

Therefore, in our professional town planning opinion, we argue that the provision of ‘Wine Tasting’ events by Our Client (as described) constitutes exempted development.

In order for a change in use to comprise a ‘*material change in use*’, there are two principal conditions to be satisfied. Firstly, there must be an actual change in use (the change, rather than the use, being the act of development); and secondly the change must be ‘material’.

In our professional town planning opinion we submit that the provision of monthly wine tastings ancillary to the sale of wine in the retail unit at the Lennox Street Grocer does not constitute development. No “change of use” has occurred, nor is any such use “material”.

7.0 DCC REASONS FOR REFUSAL OF EXEMPTION CERTIFICATE

7.1 Primary Reason for Refusal

The DCC *Planner's Report* (refer to Appendix A) dated 18 May 2023 states that:

*"A material change of use is any change that **substantially affects neighbours or the environment**. What constitutes a material change of use depends on individual circumstances."*

[Our emphasis.]

The DCC Planner determined that:

*"The Planning Authority considered that this does constitute a material change of use, as the introduction of wine tasting with food, on the premises, has the **potential** to cause **additional noise and general disturbance** to the neighbouring properties for this reason the use is considered a material change of use in this shop unit, which would require planning permission."*

[Our emphasis.]

As noted by Mr Arnold, the premises had four wine tasting sessions in 2022. Mr Arnold notes it has had six since it opened. That equals to just one every five months.

In our professional town planning opinion, due to the infrequency of the 'wine tasting with food' events and the uncertainty surrounding the impact (i.e it has potential but not a definite impact), it cannot have a 'substantial affect' in the neighbours or the environment and therefore does not constitute a material change of use.

Put simply, every development has the "potential to cause additional noise and general disturbance to the neighbouring properties." Such a potential does not constitute a change of use of a small shop to host such inoccasional events.



8.0 DOCUMENTS SUBMITTED AS PART OF THIS REFERRAL

Request for Declaration fee

- A cheque in the amount of **€220.00** as per the appeal fee made payable to An Bord Pleanála.

The fee amount is as follows:

Category of Fee	Amount
Appeal to An Bord Pleanála	€220.00

Section 5 Referral Appeal

- A copy of this *Section 5 Referral appeal*, prepared by Tom Phillips + Associates, dated Wednesday, 14 June 2023.
- A copy of the Section 5 Referral, prepared by Tom Phillips + Associates submitted to Dublin City Council, dated Monday, 24 April 2023

Maps

- A copy of Site Location Map (location clearly outlined in red).

Decision Notice

- A copy of Dublin City Council's Decision to Declare Development and Not Exempted Development, dated 18 May 2023

9.0 CONCLUSION

This Referral for Declaration under Section 5 of the *Planning and Development Acts 2000*, as amended, defines the nature of the use at The Lennox Street Grocer. This is in response to the Enforcement Notice from the Planning Authority regarding this alleged 'material change of use' and District Court Summons dated 8 March 2023.

In conclusion, we submit that the use at the Lennox Street Grocer is exempted development.

We trust that you find this Referral in order and we look forward to a positive determination of this from An Bord Pleanála.

Please do not hesitate to contact the undersigned should you require any further information or clarification on the Referral.

Yours faithfully

Tom Phillips
Managing Director
Tom Phillips + Associates

Encl.

Appendix A - K



APPENDIX A: A COPY OF DCC'S DECLARATION OF DEVELOPMENT AND NOT EXEMPTED DEVELOPMENT

An Roinn Pleanála & Forbairt Maoin, Bloc 4, Uirlár 3, Oifigi na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8.

Planning & Property Development Department, Block 4, Floor 3, Dublin City Council, Civic Offices, Wood Quay, Dublin 8.

T: (01) 222 2288

E: planning@dublincity.ie

22-May-2023

Tom Phillips,
Tom Phillips & Associates
80 Harcourt Street
Dublin 2, D02 F449

Application Number 0139/23
Application Type Section 5
Registration Date 25-Apr-2023
Decision Date 18-May-2023
Decision Order Number P3221
Location Lennox Street Grocer, 38, Lennox Street, Portobello, Dublin 8
Proposal EXPP: Whether the holding of occasional wine tasting with finger food as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?

Applicant Details La Gourmande

- If you have any queries regarding this Decision, please contact the email shown above

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.

NOTIFICATION OF DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

In pursuance of its functions under the Planning & Development Act 2000 (as amended), Dublin City Council has by order dated 18-May-2023 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 (as amended) for the following reason:

Recommendation

Whereas a question has arisen as to:

Whether the holding of occasional wine tasting with finger food as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?

NOT1section5(Refuse Exemption)

An Roinn Pleanála & Forbairt Maoin, Bloc 4, Uirlár 3, Oifigi na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8.

Planning & Property Development Department, Block 4, Floor 3, Dublin City Council, Civic Offices, Wood Quay, Dublin 8.

T: (01) 222 2288

E: planning@dublincity.ie

22-May-2023

Dublin City Council in considering this section 5, had regard particularly to:

- a) Sections 2, and 3 of the Planning and Development Act, 2000, as amended;
- b) Articles 5(1), 6(1), and 10(1) of the Planning and Development Regulations, 2001, as amended;
- c) Class 1 of Part 4, Schedule 2 of the Planning and Development Regulations 2001 as amended;
- d) The planning history of the site;
- e) The existing use of the retail unit
- f) The information submitted on behalf of the application/operator regarding the nature of the use of the premises.

AND WHEREAS Dublin City Development has concluded that:

- a) The use of part of the ground floor retail unit of this premises for occasional wine tasting with finger food is not ancillary to the retail use
- b) The use of the subject premises for wine tasting and finger food on an occasional basis, does not constitute use as a 'shop' as defined in Article 5(1), as amended, as the use described is more akin to a restaurant use which is expressly excluded from the definition of 'shop' under Article 5(1) of the Planning and Development Regulations 2001, as amended.
- c) The use would constitute a material change of use and would therefore constitute development within the scope of Section 3(1) of the Planning and Development Act, 2000, as amended.
- d) The change of use is not within the scope of the exemption provided in Article 10(1) of the Planning and Development Regulations 2001, as amended.

And therefore Dublin City Council, conclude that is development and is not exempted development.

Signed on behalf of Dublin City Council

For Administrative Officer

NOT1section5(Refuse Exemption)

APPENDIX B: A COPY OF DUBLIN CITY COUNCIL ORDER OF THE SENIOR EXECUTIVE TO DECLARE
DEVELOPMENT AND NOT EXEMPTED DEVELOPMENT



0139/23 P3221

DUBLIN CITY COUNCIL
ORDER OF THE SENIOR EXECUTIVE OFFICER
PLANNING & DEVELOPMENT ACTS 2000 (AS AMENDED)

Application Number 0139/23
Application Type Section 5
Registration Date 25-Apr-2023
Decision Date
Decision Order No. P3221
Location Lennox Street Grocer, 38, Lennox Street, Portobello, Dublin 8
Proposal EXPP. Whether the holding of occasional wine tasting with finger food as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?
Applicant La Gourmande

RECOMMENDATION: I hereby endorse the recommendation of the Planning Officer to declare that the above-proposed development is NOT EXEMPT from the requirement to obtain planning permission.

REASONS & CONSIDERATIONS:

Recommendation
Whereas a question has arisen as to:
Whether the holding of occasional wine tasting with finger food as an ancillary event at a retail store on a once-per-month basis is considered development and if so does it constitute exempted development under the provisions of the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?
Dublin City Council in considering this section 5, had regard particularly to:
a) Sections 2, and 3 of the Planning and Development Act, 2000, as amended;
b) Articles 5 (1), 6(1), and 10(1) of the Planning and Development Regulations, 2001, as amended;
c) Class 1 of Part 4, Schedule 2 of the Planning and Development Regulations 2001 as amended;
d) The planning history of the site;
e) The existing use of the retail unit
f) The information submitted on behalf of the application/operator regarding the nature of the use of the premises.

DEC1 Section5 (Refuse Certificate)

Page 1 of 2

0139/23 P3221

AND WHEREAS Dublin City Development has concluded that:

- a) The use of part of the ground floor retail unit of this premises for occasional wine tasting with finger food is not ancillary to the retail use
- b) The use of the subject premises for wine tasting and finger food on an occasional basis, does not constitute use as a 'shop' as defined in Article 5(1), as amended, as the use described is more akin to a restaurant use which is expressly excluded from the definition of 'shop' under Article 5(1) of the Planning and Development Regulations 2001, as amended.
- c) The use would constitute a material change of use and would therefore constitute development within the scope of Section 3(1) of the Planning and Development Act, 2000, as amended.
- d) The change of use is not within the scope of the exemption provided in Article 10(1) of the Planning and Development Regulations 2001, as amended
- And therefore Dublin City Council, conclude that is development and is not exempted development.

Signed: Mushin Gowen
For Senior Staff Officer

Date: 17/05/23

ORDER: In accordance with the above recommendation, I direct the issuing of a declaration under Section 5 of the Planning & Development Act 2000 (as amended), that the above proposed development is NOT EXEMPT from the requirement to obtain planning permission under Section 32 of the Planning & Development Acts 2000-(as amended).

Sheila Hennessy
Sheila Hennessy
Senior Executive Officer

18/5/23
Date

To whom the appropriate powers have been delegated by order of the Chief Executive, Dublin City Council dated the 12th day of May 2023

DEC1 Section5 (Refuse Certificate)

Page 2 of 2

APPENDIX C: THE DISTRICT COURT SUMMONS, DATED 8 MARCH 2023

THE DISTRICT COURT
DUBLIN METROPOLITAN DISTRICT
COURTS (No 3) Act, 1986
Section 1
SUMMONS

DUBLIN CITY COUNCIL
Prosecutor

AND
La Gourmande Limited
Accused

WHEREAS an application was made to this office on the 08/03/2023 by Michael Quinlan of Dixon Quinlan Solicitors LLP, of 8 Parnell Square, Dublin 1, on behalf of the Prosecutor for the issue of a summons to you, the above named accused, alleging the following offence:-

that at the lands at 38 Lennox Street, Portobello, Dublin 8, in the Planning District of the Prosecutor and in the District Court area aforesaid, on the 14/02/2023, and on each day thereafter until the issue of this application, you did fail within the period specified in the Enforcement Notice dated the 09/02/2023 and served on you, take the steps required for the said Notice namely:-

- Event or promotions, shall not take place on the premises namely The Lennox Grocer, 38 Lennox Street, Dublin 8, whereby food and alcoholic beverage is consumed by patrons on the premises in exchange for a fee.

This is to be complied with from the date of delivery of this notice by registered post henceforth.

in contravention of the terms of the said Notice and contrary to the Statute in the case made and provided, that is to say, Section 154 (8) of the Planning and Development Acts 2000 – 2022.

THIS IS TO NOTIFY YOU that you will be accused of the said offence at a sitting of the District Court to be held at COURT NO. 8 FOUR COURTS BUILDING, DUBLIN 7, AT 10.30 A.M., ON THE 25 APR 2023, AND TO REQUIRE YOU to appear at the said sitting to answer the said accusation.

Dated this 8th day of MARCH 2023

Glenn Cooper
Appropriate District Court Clerk

To:
La Gourmande Limited
Paul Arnold & Co
38 Lennox Street,
Dublin 8
D08 R5P0

APPENDIX D: ENFORCEMENT LETTER FROM DUBLIN CITY COUNCIL DATED FEBRUARY 2023

Comhairle Cathrach
Bhaile Átha Cliath
Dublin City Council

DUBLIN CITY COUNCIL
PLANNING AND DEVELOPMENT ACT 2000 (as amended)
ENFORCEMENT NOTICE

Pursuant to Section 154 Planning and Development Act 2000 (as amended)
(UNAUTHORISED DEVELOPMENT)

Lands at: 38 Lennox Street, Portobello, Dublin 8

Development comprising of:

The unauthorised use of 38 Lennox Street, Portobello, Dublin 8, a shop, for the sale of food and alcoholic beverage for consumption on the premises.

Take Notice that Dublin City Council being the Planning Authority for the area comprising the City of Dublin having considered in exercise of the power conferred on it by Section 154 of the Planning and Development Acts 2000 (as amended) and of every other power in that behalf it enabling,

HEREBY REQUIRES:


Events or promotions, shall not take place on the premises namely The Lennox Grocer, 38 Lennox Street, Dublin 8 whereby food and alcoholic beverage is consumed by patrons on the premises in exchange for a fee.

This notice is to be complied with from the date of delivery of this notice by registered post henceforth.

If the steps specified in this Enforcement Notice are not taken within the period specified above or within such extended period (not being more than six months) as Dublin City Council may allow, Dublin City Council may enter on the land and take such steps, including the removal, demolition or alteration of any structure and may recover any expenses reasonably incurred by them in that behalf.

You are required by Dublin City Council to refund the costs and expenses reasonably incurred by the local authority in relation to the investigation, detection and issue of this Enforcement Notice and any warning letters issued under Section 152 of the aforementioned Act, including costs incurred in respect of the remuneration and other expenses of employees, consultants and advisers and Dublin City Council may recover these costs and expenses incurred by it in that behalf.

APPENDIX E: WARNING LETTER FROM DUBLIN CITY COUNCIL DATED 22 SEPTEMBER 2022

 Comhairle Cathrach
Bhaile Átha Cliath
Dublin City Council

Feidhmiú Pleanála
An Roinn Pleanála & Forbairt Maoin
Bloc 4, Uirlár 2, Oifigi na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8

Planning Enforcement,
Planning & Property Development Department,
Block 4, Floor 2, Civic Offices
Wood Quay, Dublin 8
T. 01 222 2147 E. planningenforcement@dublincity.ie

Claire Arnold & Christian Arnold
Lennox Street Grocer,
38 Lennox Street,
Dublin 8

22nd September 2022

Re: 38, Lennox Street, Portobello, Dublin 8

Dear Sir / Madam,

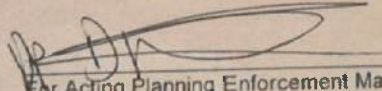
I refer to our planning enforcement file E0640/22 and the above address.

DCC Planning Enforcement has received further complaints stating that the Lennox Street Grocer is advertising Wine Tasting events to be held on the above premises, a shop.

Please be advised that this allegation is a breach of the Planning and Development Act 2000 (as amended), the premises being a shop as defined in Part 4 *Exempted Development – Classes of use* under the Planning and Development Act 2000 (as amended).

Should you wish to discuss this matter further, please contact Mr Paddy Keogh at 0870524481 or by email to paddy.keogh@dublincity.ie


Yours faithfully,


For Acting Planning Enforcement Manager

Ref: Darren Ritchie
Tel: 222 3447
Please quote file ref: E0640/22
Email: planningenforcement@dublincity.ie

Ceanntoig, Oifigi na Cathrach, An Ché Adhmaid, Bhaile Átha Cliath 8, Éire
Head Office, Civic Offices, Wood Quay, Dublin 8, Ireland
T. 01 222 2222 W. www.dublincity.ie

APPENDIX F: LETTER FROM DUBLIN CITY COUNCIL DATED 18 AUGUST 2022

 Comhairle Cathrach
Bhaile Átha Cliath
Dublin City Council

Street Furniture Unit
Block 2, Floor 4, Civic Offices, Wood Quay, Dublin 8
An Roinn Troscán Sráide,
Bloc 2, Uirlár 4, Oifigi na Cathrach, An Ché Adhmaid, Baile Átha Cliath 8
streetfurniture@dublincity.ie

DUBLIN CITY COUNCIL
ROADS ACT 1993
LOCAL GOVERNMENT ACT 2001
NOTICE
PURSUANT TO SECTION 71 OF THE ROADS ACT 1993

To: Owner / Occupier Lennox St Grocer
Address: Lennox St

Take Notice that Dublin City Council being the Road Authority for the area comprising the City of Dublin in exercise of the power conferred on it by Section 71 of the Roads Act 1993 and of every other power in that behalf, on the 18 day of 8 2022

a) removed the item(s) specified in the Schedule, which were located on a public road outside the above address, and stored the item(s) specified in the Schedule, and
b) requires you, the owner, to claim and recover the item(s) specified in the Schedule within one month of the date of the service of this notice.

To claim the item(s) specified in the Schedule, you must call to the Street Furniture Unit, Dublin City Council, Block 2 Floor 4, Civic Offices, Wood Quay, Dublin 8, between the hours of 9.00 am and 4.00pm Monday to Friday.

1) to make a declaration in writing that you are the owner of the item(s) specified in the Schedule and
2) to pay a removal and storage fee calculated as follows:-
Costs of Removal: €100.00 per item
Costs of Storage: €35.00 per week or part thereof for all items removed from any one location
3) A person claiming the item(s) specified in the Schedule on your behalf must make a declaration that he/she is authorised by the owner to claim it.

The item(s) specified in the Schedule may be recovered from U Store it Unit 7, Century Business Park, St. Margarets Rd, D11 H023, Dublin 11, between the hours of 8.00 a.m. and 4.00 p.m. (Monday to Thursday) and 8.00 a.m. to 2.00 p.m. (Friday) on presentation of this notice and receipt of payment of the removal and storage fee. Presentation of this notice and receipt of payment for the removal and storage fees must be produced when collecting the item(s)

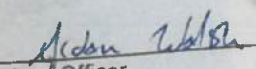
(Call 222 3802 to arrange collection) Streetfurniture@dublincity.ie
2165

In the event that you fail to claim and recover the item(s) specified in the Schedule within one month of the service of this notice, Dublin City Council may dispose of or procure the disposal of the item(s) specified in the Schedule after a period of six weeks from the date of removal.

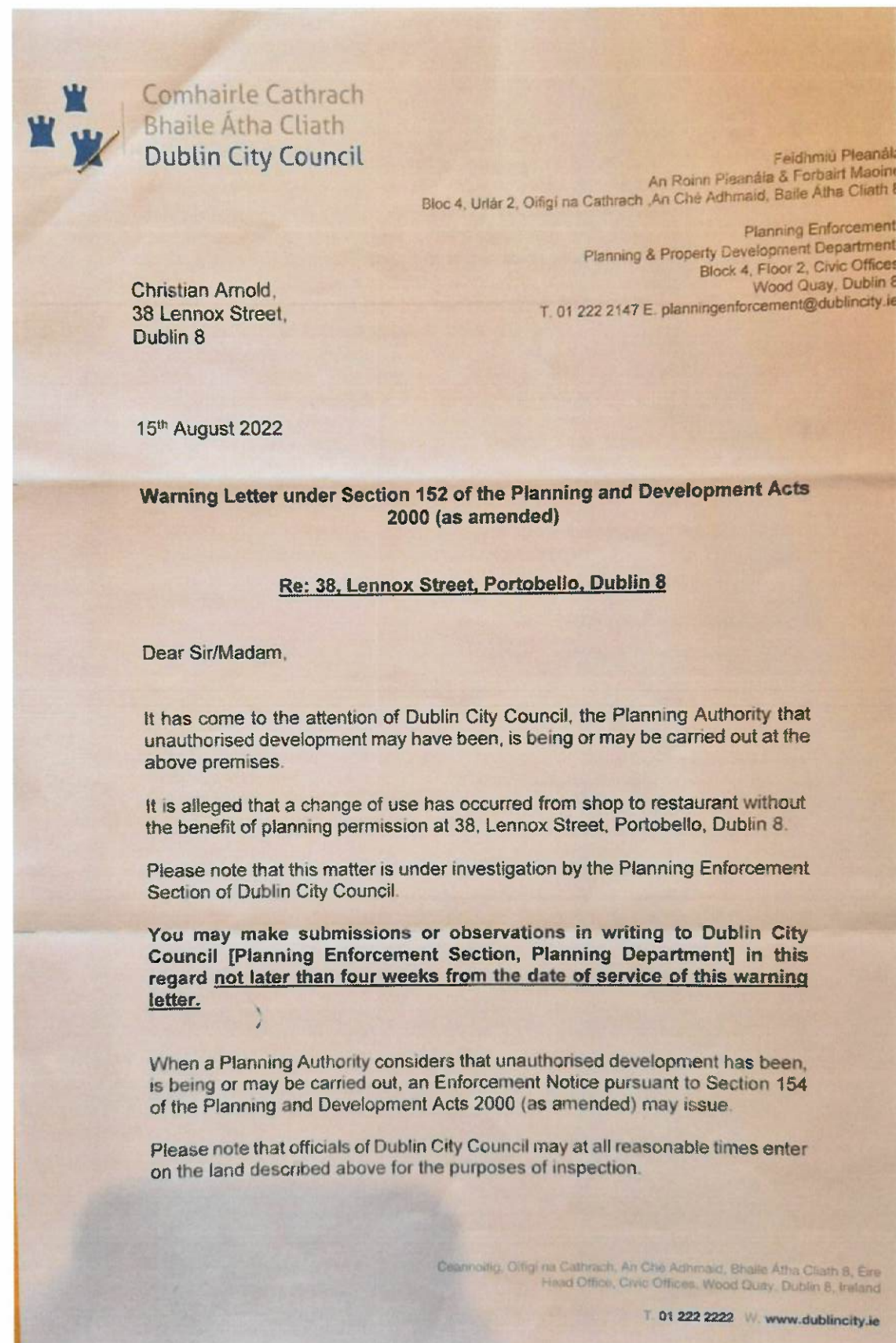
SCHEDULE

No of Items
Description: 3 Tables 2 chairs

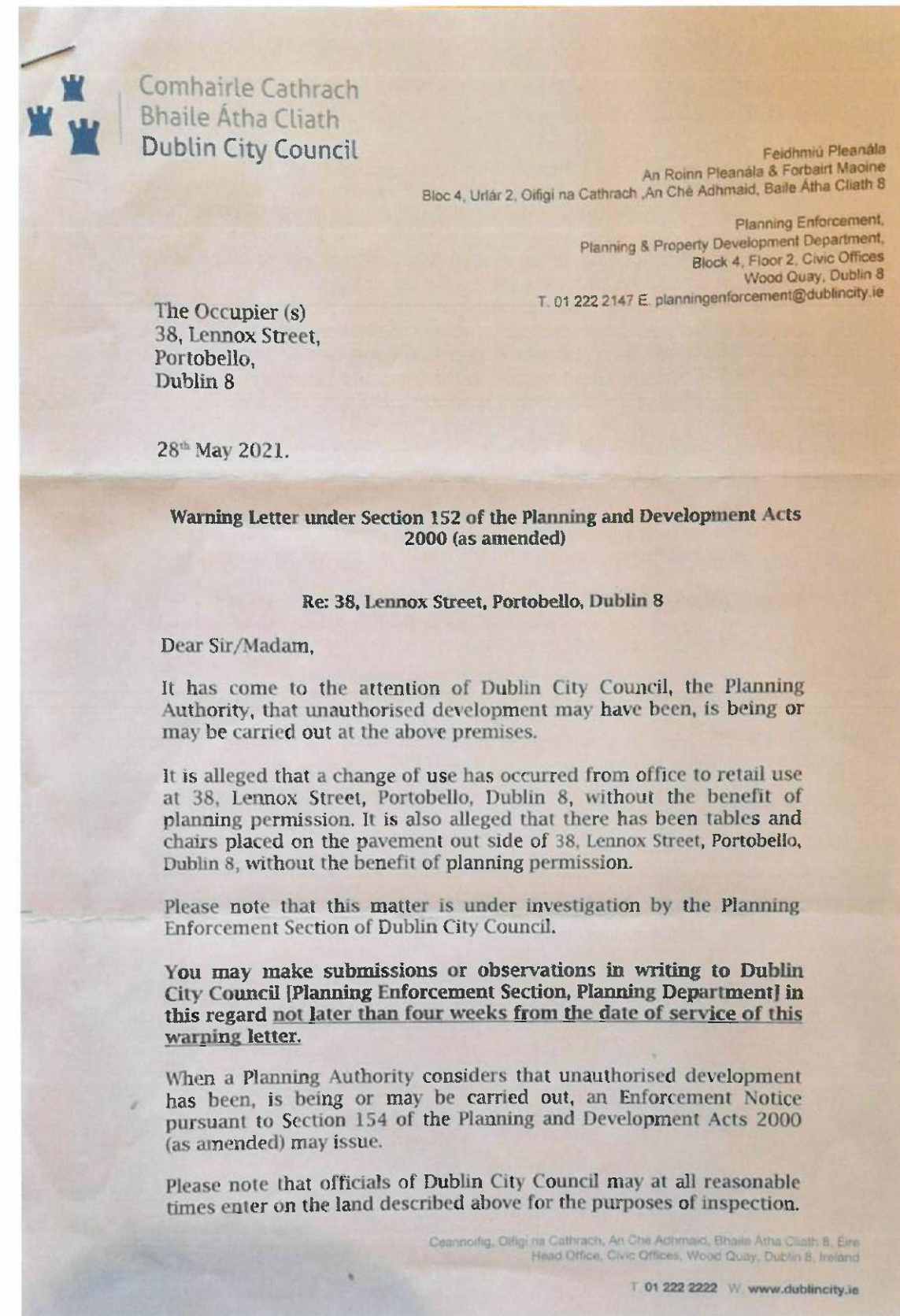
Dated this 18 day of 8 2022


Authorised Officer

APPENDIX G: WARNING LETTER FROM DUBLIN CITY COUNCIL DATED 15 AUGUST 2022



APPENDIX H: WARNING LETTER FROM DUBLIN CITY COUNCIL DATED 15 AUGUST 2022



APPENDIX I: WINE RETAILER'S ON LICENCE ISSUED BY THE REVENUE COMMISSIONERS DATED 1
OCTOBER 2022

Wine Retailer's On Licence

LA GOURMANDE
NOMINEE: CLAIRE ARNOLD
LENNOX STREET GROCER
38 LENNOX STREET
PORTOBELLO
DUBLIN 8

District Court D.M.D. Licensing Office

Garda Station Pearse Street

Excise Duty Paid € 500.00

Reference Number 1017354

Expiry Date 30/09/2023

The Revenue Commissioners hereby grant Licence to the above-named to exercise and carry on the trade or business stated in the Licence above at the premises situate as specified above, from the date hereof until and including the Expiry Date stated above, duty as above having been paid.

Issued by the Revenue Commissioners 01/10/2022

Note

- a. A retailer of wine may sell by retail, sweets as well as wine.
- b. A retailer's On Licence authorises sale by retail of the liquor to which the licence extends for consumption either On or Off the premises.
- c. "Wine" means imported wine. The term "sweets" includes made wines, mead and matheglin.
- d. This licence is confined to the products mentioned in note (c) above and does not cover the sale of any other Alcohol Liquor served alone or as an ingredient in special preparations e.g. Irish Coffee.

Revenue



APPENDIX J: NOTE FROM CONSERVATION ARCHITECT PAUL ARNOLD (RIAI GRADE 1) WHO OWNS THE PREMISES

Application to Dublin City Council for a Section 5 Declaration in respect of use at

The Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8

Contents

Pages 2 to 4 Explanatory Note

Page 5 Location Map

Page 6 Revenue On-licence Web Page

Pages 7 to 9 Photos

Section 5 Declaration Application

The Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin D08R5P0

This note is in support of an application for a Section 5 Declaration that the activities taking place at The Lennox Street Grocer (LSG) are exempted development.

1. The LSG is a grocery shop, having reverted to that use following the termination of a temporary permission for use of the premises as an architect's office. The LSG commenced business in November 2020.
2. The shop sells groceries: dry goods, vegetables, soft drinks etc, and is also licensed for the sale of wine, holding a Wine Retailer's On-licence.
3. As part of the shop activity in the promotion of its offering, occasional wine tastings are hosted: such wine tastings include up to sixteen people tasting a number of selected wines, with snacks to accompany the wine. No meal is served. In the last year such events were held four times. The scale and frequency of the tastings is indicative of the ancillary nature of the activity.
4. Wine-tasting events are commonly held by wineshops and off-licences, normally without the benefit of a Wine Retailers On-licence: we are not aware of any enforcement action having been taken against wine retailers who have hosted such wine tasting events: The conclusion must be that such events are of the nature of retailing wine, and as such are intrinsic to the shop nature of the activity, and are accordingly exempted development.

The Lennox Street Grocer may be almost unique in being fully compliant with Licensing Law in this regard, in having an On-licence rather than an Off-Licence.

5. The on-licence also allows the sale of wine for consumption on the premises on a regular basis. In this regard the distinction between a café and a shop becomes less distinct. Many grocery shops sell coffee for consumption off the premises, but often have a simple bar with stools to allow customers to rest before facing the elements: if this is seen as in the nature of a grocery shop, then properly-licensed consumption of wine, as an ancillary activity to the main grocery business, can also be understood as being compliant and exempt from further planning control.

6. Development Plan Context and Objectives

38 Lennox Street is located in a Residential Conservation Area, of particular architectural quality, with a young population who are engaged with the area, which has, among other associations, an active tidy-towns committee. The row of shops within which the Lennox Street Grocer sits

Page 2 of 9

addressing a broad pavement is a sunny social space acting as a hub for the community. Indeed, the Lennox Street Grocer has more than five thousand followers on Instagram, a tribute to the nature of the enterprise and its staff and its popularity with the people of the locality. The shop has also benefitted from national and international appreciation.

7. The locality is of a quality that the development plan seeks to emulate when addressing Key Urban Villages

‘ For the city centre to remain resilient and competitive it must attract these shoppers back to the city centre and recognise and respond to the appeal of shopping in a high quality car-free environment ‘

Investment in Key Urban Villages

In the suburbs, there are challenges relating to the traditional street, the parade of local shops or older shopping centres that are no longer strongly competitive and have now to compete with the growing presence of convenience supermarkets and on-line retailing. (DCC Development Plan 2023-2028 p. 205).

8. The type of attractive urban place that the plan seeks to create already exists in Lennox Street: it is important to nurture such places and to address the social and physical needs of its inhabitants to ensure its continuing as a vibrant urban space and community. This may mean allowing an evolution of the existing use types to reflect emerging hybrid activities, which may curiously reflect the 19th century typology of pub/grocer in a nuanced way.

9. 36 and 38 Lennox Street are examples of a successful regeneration of historic fabric, a regeneration which was unsupported by any special tax or grant in aid measures.; the works in 200 predated so many of the living over the shop schemes and such policies as QHSN7 in the current development plan:

QHSN7

Upper Floors

To resist and where the opportunity arises, to reverse the loss of residential use on upper floors and actively support proposals that retain or bring upper floors into residential use in order to revitalise the social and physical fabric of the city through measures such as the Living City Initiative.

Dublin City Council will actively engage with property owners and other stakeholders at a national level to investigate other alternative measures in addition to the Living City Initiative to expedite bringing upper floors into residential use, and will be actioned by the City Recovery Task Force and its successor.(DCC Development Plan 2023-2028 p. 134).

We are happy to engage with DCC town reviewing the totality of these mixed-use structures to ensure that they continue to contribute positively to the vitality of the area.

10. QHSN12 To encourage neighbourhood development which protects and enhances the quality of our built environment and supports public health and community wellbeing. Promote developments which:

2 *build on local character as expressed in historic activities, buildings, materials, housing types or local landscape in order to harmonise with and further develop the unique character of these places;*

11. Portobello is one of the Key Neighbourhoods identified in the Development Plan, and can be seen to be centred on the row of buildings containing the subject building:

QHSN 17

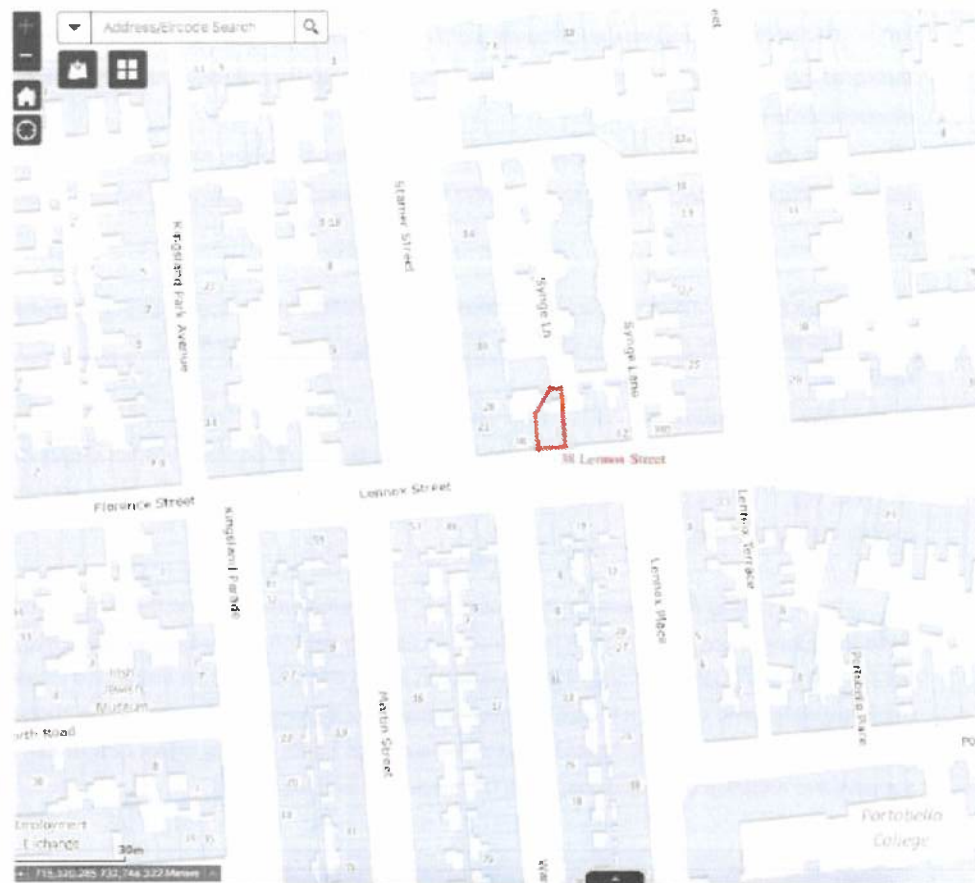
Sustainable Neighbourhoods

To promote sustainable neighbourhoods which cater to the needs of persons in all stages of their lifecycle, e.g. children, people of working age, older people, people living with dementia and people with disabilities.

12. In referencing the objectives and policies of the Development Plan in the context of this Section 5 Declaration application, it is intended to confirm the role of the Development Plan within the continuum of Legislation and Regulation within which decisions can be made and to confirm the inter-related and complex nature of ensuring that the city neighbourhoods can be sustainable. The benign, contemporary, modern nature of the activities of the Lennox Street Grocer can only support and enhance the achieving of the Development Plan objectives.

Paul Arnold, Conservation Architect Grade 1

20th April 2023



Location Map 38 Lennox Street, Portobello, Dublin 8



Wine Retailer's On Licence

1. Overview
2. First application for a Wine Retailer's On Licence
3. Renewal of a Wine Retailer's On Licence

Overview

Note:

The [waiver of Excise Duty on on-trade liquor licences](#) will not be extended to renewals in 2022.

A Wine Retailer's On Licence holder may sell fine wine, sherry and fermented liquor containing less than 23% vol. The licence is confined to premises deemed a Refreshment House.

A Refreshment House is defined as:

'all houses, rooms, shops, or buildings kept open for public refreshment, resort and entertainment at any time between the hours of 10 o'clock and 7 o'clock of the following morning not being licensed for the sale of beer, cider, wine or spirits respectively'.

Screen Grab April 20th 2023 Revenue Irish Tax and Customs Website: On-licences available to, inter alia, shops, not already licensed for the sale of alcohol.



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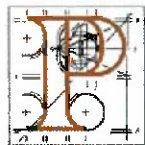
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APPENDIX K: ABP REG. REF. RL3037 INSPECTORS' REPORT



An Bord Pleanála



Inspector's Report

RL3037

Details of Reference:	Whether the ancillary retailing of wine from the amalgamated unit no's 18/19 is or is not development or is or is not exempted development.
Location:	Unit 18/19, Block C, Smithfield Market Development, Smithfield, Dublin 7
Referrer:	Tesco Ireland Limited
Owner:	Savills (Fixed Charge receiver)
Planning Authority:	Dublin City Council
Planning Authority Reference:	0083/12
Inspector:	Joanna Kelly
Date of Site Inspection:	30 th October 2012

Appendices: Key Map and Photographs



1.0 INTRODUCTION

1.1 Overview

This referral is sought by Tesco Ireland Limited, under Section 5(4) of the Act in respect of whether or not the ancillary retailing of wine from the amalgamated unit no's 18 and 19 is or is not 'development' or is or is not 'exempted development'. The Planning Authority concluded that the retailing of wine from a designated area within the amalgamated unit No. 18/19 constituted 'development' and was 'not exempted development', but the First Party, Tesco Ireland Limited is not satisfied with the outcome of this determination and thus has referred the matter to the Board for its determination.

1.2 Inspection of the Site, Site Location & Description

The subject site is located in the heart of Smithfield, along Haymarket Street. The units are currently vacant. 'Paddy Powers' bookmakers are adjoining the unit. The Smithfield Chimney is located opposite the site.

1.4 Planning History

The following history pertains to the appeal site.

File Ref. No. 29N.239124 Amalgamation and change of use of units 18 and 19 permitted by reg. ref. no. 4843/06 to provide for single retail unit, subsidiary alcohol sales and all ancillary works.

The Board issued a split decision in this instance and refused permission for proposed subsidiary sale of alcohol based on the following reason and considerations:

Having regard to the zoning objective for the area which seeks "to consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design and character and dignity" and policy RD10 of the Dublin City Development Plan 2011-2017 which seeks "to prohibit the further expansion of off-licenses and part off-licenses except in areas where a compelling case can be made" and having regard to the current provision of alcohol sales outlets within Smithfield and the surrounding area, it is considered that the proposed development would give rise to a proliferation of off-licenses uses which would be contrary to Policy RD10, would seriously injure the amenity of the civic character of the Smithfield Architectural Conservation Area and would, therefore, be contrary to the proper planning and sustainable development of the area.

2.0 DECISION BY THE PLANNING AUTHORITY

By Decision Order No. P1515, dated 18 July 2012, Dublin City Council issued a Notification of Declaration on Development and Exempted Development, pursuant to Section 5 of the Planning and Development Act, 2000, to the effect that the proposal in question was considered to be development and was not considered to constitute 'exempted development'.

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3.0 THE REFERRAL

3.1 Introduction

The Referrer made an application under Section 5 of the Planning and Development Act, 2000 to Dublin City Council for a determination to be made on the following question:-

'Is the ancillary retailing of wine from a designated area, within the amalgamated unit no. 18/19, (which forms part of the permitted retail offer, under the definition of a shop (as per the Planning and Development Regulations 2000 as amended) considered development and if so does it constitute exempted development?'

The Referrer sought a declaration from the Planning Authority in June 2012.

3.2.0 Supporting cases presented by relevant parties

3.2.1 The Referrer sets out that the substance of the request for the declaration from the Planning Authority related to two substantive issues: the first related to the definition of a "shop" and the range of goods that one would normally expect to find in such stores and the second related to the materiality or otherwise of any change of use that may occur, should the permitted "shop" proceed to sell wine.

3.2.2 It is set out that it is considered that permission is not required for the ancillary sale of wines and as such the applicant would like to refer the Declaration issued by the Planning Authority to the Board for its consideration as if permission had not been recently sought as the principle of the matter is of concern to the applicant. It is set out that it has been established in law that

"the making of a planning application for planning permission should not preclude a party from arguing thereafter that planning permission was not, as a matter of law, required (whether because the development was exempted development.)" It is set out that this was established by the Supreme Court in the case of Fingal County Council v William P Keeling & Sons Ltd.

3.2.3 The grounds of the referral are categorised as follows:

- *Whether the sale of wine within a "shop" is permissible under statutory legislation.*

The referrer outlines the definition of a shop as per the Planning and Development Regulations 2001 as amended, making specific reference to sale of wine as being permissible and not requiring a separate planning permission. Reference is also made to the Planner's report where wine was considered to be part of the retail offer of a shop unit.

- *Whether the subsidiary sale of wine is a "material" change of use and is classified as development based on the contents of the Planning and Development Regulations 2001 (as amended).*

It is set out by the Referrer that the planner's report fails to deal with the part of the request specifically:

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"Is the ancillary retailing of wine from a designated area, within the amalgamated unit no. 18/19 (which forms part of the permitted retail offer, under the definition of a shop), considered development?"

It is contended that the Planner incorrectly addressed the issue by dealing with the request as if the shop had not been granted permission and as if the request is for a declaration stating that a shop in itself is exempted development. It is contended that once the shop opens and begins trading following the grant of permission (4176/10) that it then starts to sell wine on the basis that the ancillary retailing of wine from a designated area within the permitted shop is not development. The referrer contends that the sale of wine does not constitute a material change to the shop use and would, therefore, not constitute development. It is also set out that the planner's report references Article 6 (1) and 9 (1) of the Planning and Development Regulations, 2001 to provide further evidence for the decision on the request. The Referrer set out that on this basis, if the selling of wine is considered not to be development, as it their argument, these articles do not apply as these articles rely on managing situations where development occurs. They are not considered applicable in cases where an action is not construed to be development, which is the Referrer's assessment of the case being put forward in this instance.

- *Whether the intention of Condition No. 2 was to restrict a part-off licence (p. 405, Dublin City Development Plan) as had been applied for under Reg. Ref. No. 4176/10.*

The referrer sets out that central to this referral is the wording of condition No. 2 attached to File ref. No. 4176/10. It is set out that it is clearly necessary to apply for planning permission for the ancillary sale of beers and spirits and it is this reason that drove the need for permission and which subsequently led to Condition No. 2 being applied to the grant of permission. It is set out that in the public notices "subsidiary alcohol sales" was applied for and the application was dealt with on the basis of policy RD 10 which is Dublin City Council's policy with regard to off-licences and part off-licenses. It is submitted that the annotated area represented a part off-licence and the application was assessed as such by the Planning Authority. It is set out that this may have been misunderstood in the planner's report on the basis that the annotated areas was indicated for "beers, wines and spirits" as this is best practice to group these items together when they are on display in a shop. The grouping of these items, does not in itself, lead to a need for a separate grant of permission for wine sales within a shop use. It is contended that the ancillary retailing of wine from a shop unit does not constitute development as the sale of wine from a shop is not a material change of use from that described within the Planning and Development Regulations 2001 (as amended). The referrer sets out that there is a question over the legality of a rigid interpretation of the condition.

- It is requested that the Board review the arguments regarding the attachment of Condition No. 2 as it is the Referrer's view that the condition attached to the grant of

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permission (4176/10 & Pl. 29N.239124) does not apply to all alcohol and its function was to omit that which was applied for in the application i.e. part off licence.

- In conclusion, it is requested that the Board find that no development will occur should the permitted "shop" unit sell wine subsidiary to the principal use. This conclusion is reached on the following basis:
 - The use "shop" is a distinct use under Article 5 of the Planning and Development Regulations 2001 as amended and it is normal to expect a shop to sell wine;
 - Development can only be said to have occurred where there has been a material change of use. It cannot be concluded that a material change of would occur in this instance;
 - Articles 6 and 9 of the Planning and Development Regulations 2001 as amended, refers only to exempted development. Where no development has occurred, these Articles cannot be said to be relevant and it is the Referrer's view that no development occurs in this instance;
 - The application of Condition 2 is clearly not intended to remove the sale of wine from this unit as the condition is not enforceable due to wine being a standard part of the retail offer of a shop, as established above.

4.0 PLANNING AUTHORITY'S RESPONSE TO THE REFERRAL

The Planning Authority has stated that the reasoning on which its decision on the Section 5 referral is based is set out in the Planner's report. The Planning Authority considers that the comprehensive planning report deals fully with the issues raised and justifies its decision.

5.0 LEGISLATIVE CONTEXT

5.1 I consider the following to be the statutory provisions relevant to this referral case:

Section 2 (1) of the Planning and Development Act, 2000, states as follows:-

"In this Act, except where the context otherwise requires – 'development' has the meaning assigned to it by Section 3 ..."

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

"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."

Article 5(1) of the Planning and Development Regulations states that a "business premises" means –

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(a) any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons,

(b) a hotel or public house,

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

Article 5(1) of the Regulations was amended by S.I. No. 364 of 2005 by substituting the following definition for the definition of 'shop' –

'shop' means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public-

(a) for the retail sale of goods,

(b) as a post office,

(c) for the sale of tickets or as a travel agency,

(d) for the sales of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and "wine" is defined as any intoxicating liquor which may be sold under a wine retailer's off-licence (within the meaning of the Finance (1909-1910 Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8, (my emphasis)

(e) for hairdressing,

(f) for the display of goods for sale,

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

(h) as a launderette or dry cleaners,

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

but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which Class 2 or 3 of Part 4 of Schedule 2 applies'. (my emphasis)

6.0 ASSESSMENT

6.1 The Referral Question

6.1.1 The referral question for determination in this instance is as follows:

'Is the ancillary retailing of wine from a designated area, within the amalgamated unit no. 18/19, (which forms part of the permitted retail offer, under the definition of a shop (as per the Planning and Development Regulations 2000 as amended) considered development and if so does it constitute exempted development?'

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6.1.2 The main issues to be addressed are summarised as follows:-

- Is the ancillary retailing of wine from a designated area within the amalgamated unit no. 18-19 considered development?
- If the sale of wine is considered development is it exempted development?

6.2.0 Is the ancillary retailing of wine from a designated area within the amalgamated unit considered development?

6.2.1 The permitted use on the appeal site is 'retail' as provided for under File ref. No. PL29N.239124. The definition of a "shop" as provided for in the 2005 Planning and Development Regulations clearly provides that the sale "of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and "wine" is defined as any intoxicating liquor which may be sold under a wine retailer's off-licence (within the meaning of the Finance (1909-1910 Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8, " is permissible.

6.2.2 In order to determine whether the proposal to sell "wine" is development or not, there is a need to examine whether there is a change of use? Under the planning Ref. No. PL29N.239124 the applicant sought permission to amalgamate two units (one of which involved a change of use from restaurant to retail) as a single retail unit. It is noted that the permission authorising the retail unit in question specifically refused permission for the proposed subsidiary sale of alcohol on the basis that it would give rise to a proliferation of off-licence uses which would be contrary to the policy in the Dublin City Development Plan. More importantly, Condition 2 relating to the retail use specifically set out:

The proposed development shall be amended as follows:

- The premises shall not be used for the sale of alcohol (my emphasis)
- Prior to commencement of development, a revised floor plan shall be submitted for the written agreement of the planning authority, indicating a revised use of the area proposed for the sale of alcohol in accordance with the terms of the planning permission granted therein.

Reason: In the interest of clarity, to regulate and control the development.

6.2.3 Wine is considered to fall within the definition of 'alcohol' and as such is therefore precluded from being sold within this unit. Therefore, the ancillary retailing of wine from this unit is considered to constitute development as the sale of wine would contravene Condition 2 of the permission permitting the retail use in the first instance.

6.3.0 If the sale of wine is considered development is it exempted development?

6.3.1 The definition of "shop" within the Planning and Development Regulations, 2005 provides that the sale of wine for consumption off the premise is permissible and ordinarily would not require permission i.e. would constitute exempted development. However, the condition of the parent permission, in this instance PL239124 that authorised the amalgamation of the two units and the retail use is very specific. Condition 2 clearly sets out that the premises shall not be used for the sale of alcohol. Wine is considered to be alcohol (a matter that is not disputed by the Referrer) and therefore cannot be considered to constitute exempted development as it materially contravenes the provision of

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Condition 2 which expressly precludes the sale of alcohol. The sale of wine from the unit would clearly be in breach of a condition of the parent permission representing a material change of use in the type of goods that are permitted to be sold.

6.4.0 Other

It is noted that the Referrer requests the Board to review the arguments regarding the attachment of Condition 2 as it is contended that the grant of permission does not apply to all alcohol and its function was to omit that which was applied for in the application i.e. part off-licence. It is not within the remit of this Inspector to examine what the intention may or may not have been regarding a particular condition. The Board made their determination in that instance and the matter in hand is to determine the question posed by the Referrer in this instance.

6.5.0 Conclusion

The planning unit in this instance is a 'shop' which was granted permission under planning ref. No. 4843/06. Condition 2 of that permission expressly precludes the sale of alcohol. The ancillary sale of wine, which is alcohol, would be considered to be in breach of this condition, represents a material change in the types of goods permitted to be sold from the retail unit. The ancillary sale of wine in this instance represents development and is not considered to be exempted development.

7.0 Recommendation

Having regard to the above, I recommend an Order as follows:

Whereas a question has arisen as to whether the ancillary retailing of wine from the amalgamated unit no's 18/19 is or is not development or is or is not exempted development

AND WHEREAS Tesco Ireland Ltd care of GVA planning and Regeneration Ltd, 2nd floor Seagrave House, 19-20 Earlsfort Terrace Dublin 2

Requested a declaration on the said question from Dublin City Council and the said Council issued a declaration on the 7th day of August 2012

AND WHEREAS An Bord Pleanála, in considering this referral had regard particularly to

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000 as amended,
- (b) Article 5 of the Planning and Development Regulations 2001 as amended
- (c) The submission made in connection with the referral and
- (d) The existing permission granted under PL238124 for a retail use on the site,

AND WHEREAS An Bord Pleanála has concluded that -

- (a) wine falls within the definition of alcohol
- (b) Condition 2 of the planning permission authorising the retail use specifically precludes the sale of alcohol and therefore the sale of such would materially contravene this condition

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NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the ancillary retailing of wine from the amalgamated unit 18 and 19 is development and is not exempted development.

Joanna Kelly

Inspectorate

30th October 2012

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