



# LENNOX STREET GROCER

Wednesday, 21 June 2023

Prepared for:

LA GOURMANDE LIMITED  
LENNOX STREET GROCER  
38 LENNOX STREET  
PORTOBELLO  
Dublin 8  
D08 R5P0

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**Section 5 Referral to An Bord Pleanála following Dublin City Council's Decision to Refuse an Exemption Certificate for DCC Reg. Ref. 0149/23 in relation to the hosting of events or promotions at the Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8, D08 R5P0, where food and alcoholic beverages are consumed for a fee is considered Development and if so does it constitute Exempted Development?**



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The Secretary  
An Bord Pleanála  
61-64 Marlborough Street  
Dublin 1  
D01 V902

Dear Sir / Madam

LDG- _____	ABP- _____
21 JUN 2023	
Fee: € _____	Type: _____
Time: _____	By: _____
Wednesday, 21 June 2023 [By hand.]	

RE:

**SECTION 5 REFERRAL TO AN BORD PLEANÁLA FOLLOWING DUBLIN CITY COUNCIL'S DECISION TO REFUSE AN EXEMPTION CERTIFICATE FOR DCC REG. REF. 0149/23 IN RELATION TO THE HOSTING OF EVENTS OR PROMOTIONS AT THE LENNOX STREET GROCER, 38 LENNOX STREET, PORTOBELLO, DUBLIN 8, D08 R5PO, WHERE FOOD AND ALCOHOLIC BEVERAGES ARE CONSUMED FOR A FEE IS CONSIDERED DEVELOPMENT AND IF SO DOES IT CONSTITUTE EXEMPTED DEVELOPMENT?**

**1.0 INTRODUCTION**

**1.1 Overview of this second Referral to An Bord Pleanála – how it differs from the earlier one**

La Gourmande Limited<sup>1</sup> has retained Tom Phillips + Associates<sup>2</sup> 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).

We recently submitted a Section 5 Referral to An Bord Pleanála on Wednesday 14 June 2023 (Reg. Ref. 317344-23) on a related matter.

This Declaration seeks to establish under Section 5 whether the holding of events or promotions whereby food and alcoholic beverages are consumed for a fee (as an ancillary event) is considered development and if so does it constitute exempted development under the provisions of the Acts and the *Planning and Development Regulations, 2007* (as amended) (hereafter referred to as the *Regulations*).

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

In summary, the key question is:

"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 *Planning and Development Act 2000* (as amended) and the *Planning and Development Regulations, 2007* (as amended)?"

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.

Development Act 2000 (as amended) and the *Planning and Development Regulations, 2007* (as amended)?"

It is of importance to note that only six of these events have occurred in the 32-month period 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.

**1.2 Why we are submitting a second Section 5**

In a Hearing before the District Court on 25 April 2023 (the day we submitted the previous Section 5 (Reg. Ref. 0139/23) to DCC, which is now subject to an Appeal (ABP Reg. Ref. 317344-23)), Counsel representing Dublin City Council deemed that the earlier Section 5 Referral did not sufficiently address the enforcement matter at issue. Subsequently, this necessitated our submission of a second Section 5 Referral (Reg. Ref. 0149/23) three days later. That too was refused and is the subject of this Appeal.

In other words, the Council official who attended requested that a revised Section 5 reference specifically reference the issue raised by DCC in the Enforcement Notice.

For information, the assistance of the inspector the earlier Section 5 posed the following question:

"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, 2007* (as amended)?"

We now pose a new question to reflect the Council's request of 25 April 2023:

"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 *Planning and Development Act 2000* (as amended) and the *Planning and Development Regulations, 2007* (as amended)?"

<sup>1</sup> Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8, D08 R5PO.

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

"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 Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?"

### 1.3 Summary of the Subject Site – wine retailing is ancillary to shop

Figure 1.1 illustrates the ground floor plan of the premises (the subject shop is now the bottom left "quarter"). The Architects' Office (annotated 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 for the display of wine smaller still.)

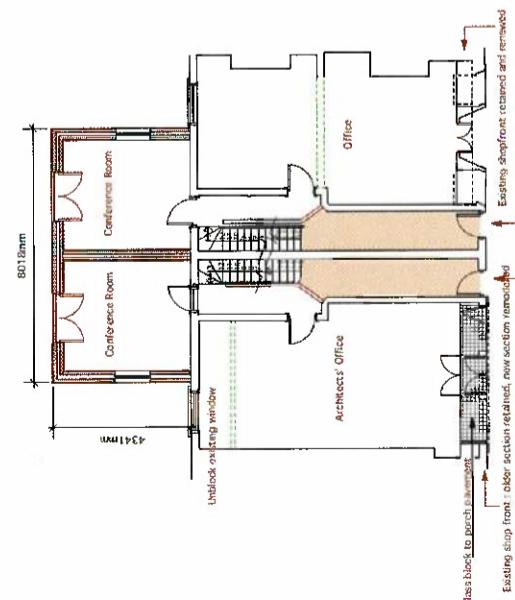


Figure 1.1: An excerpt of Dwg. No. PPO2 – Ground, first and second floor plans submitted as part of a previous Application for the site (Reg. Ref. 4115/99). (Source: Paul Arnold Architects, 1999.)

### 1.4 Site Location

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

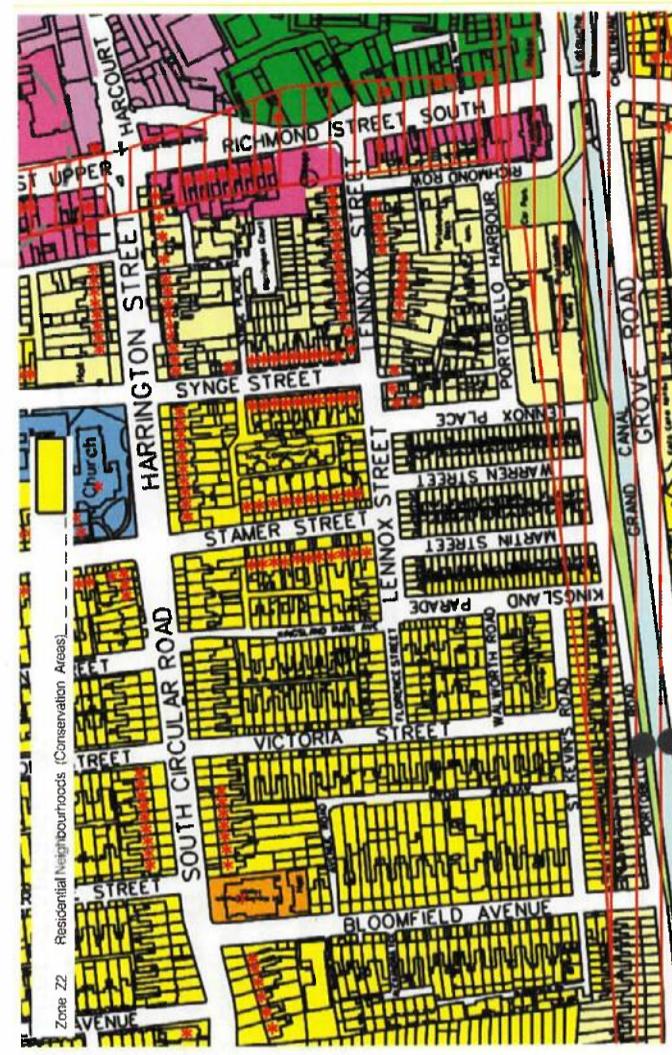


Figure 1.2: Location of Subject Site in the context of Development Plan Zoning Map. (Source: Dublin City Development Plan 2022-2028, Volume 3, Mapset E.)

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

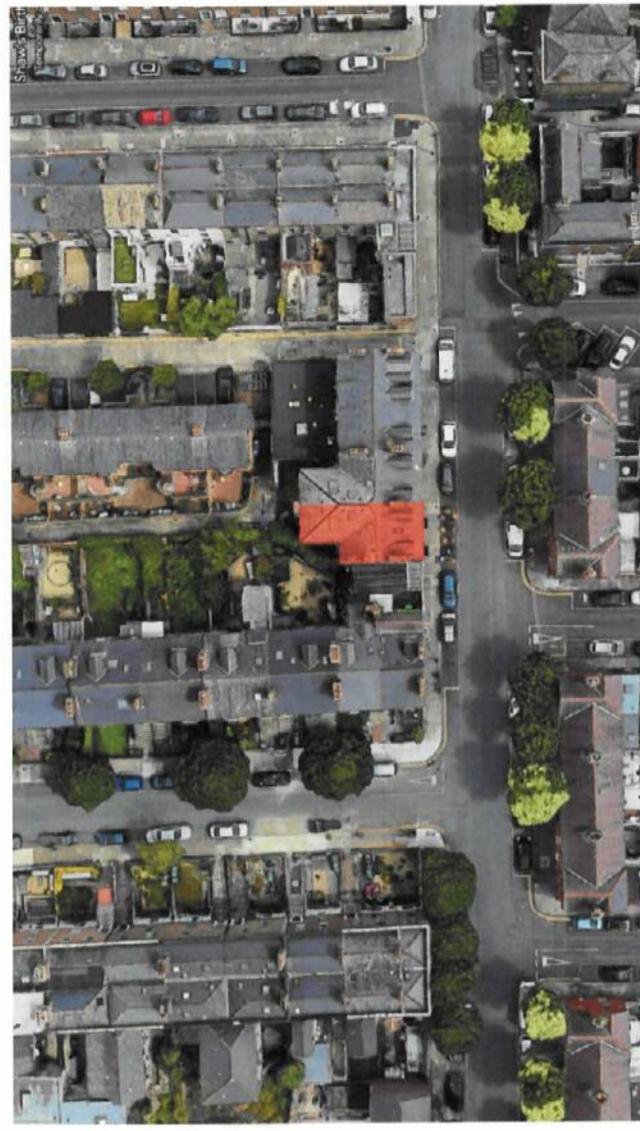


Figure 1.3: Location – Approx. location of The Lennox Street Grocer shown on Lennox Street, Dublin 8. (Source: Google Earth Pro, annotated by TPA, December 2022.)



**Figure 1.4: OSI Location Map of Subject Site on Lennox Street, Dublin 8 (red).** (Source: OSI Geohive Maps (Copyright Licence No. CYSL5031197), annotated by Tom Phillips + Associates, January 2023.)

## 2.0 BACKGROUND INFORMATION

### 2.1 Description of the 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 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<sup>3</sup> that stop near The Lennox Street Grocer in Portobello, Dublin 8.

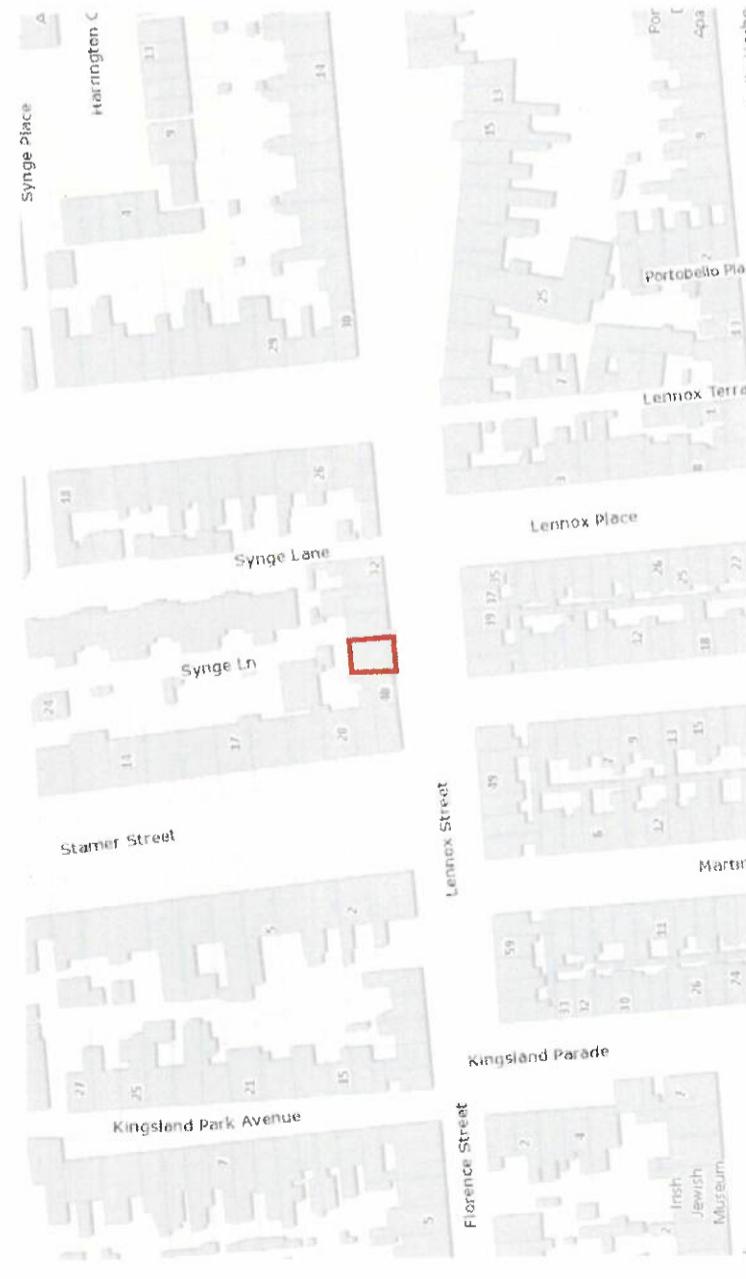


Figure 2.1: Site Location Map. (Source: MyPlan.ie, April 2023)

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 noted above and 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.)

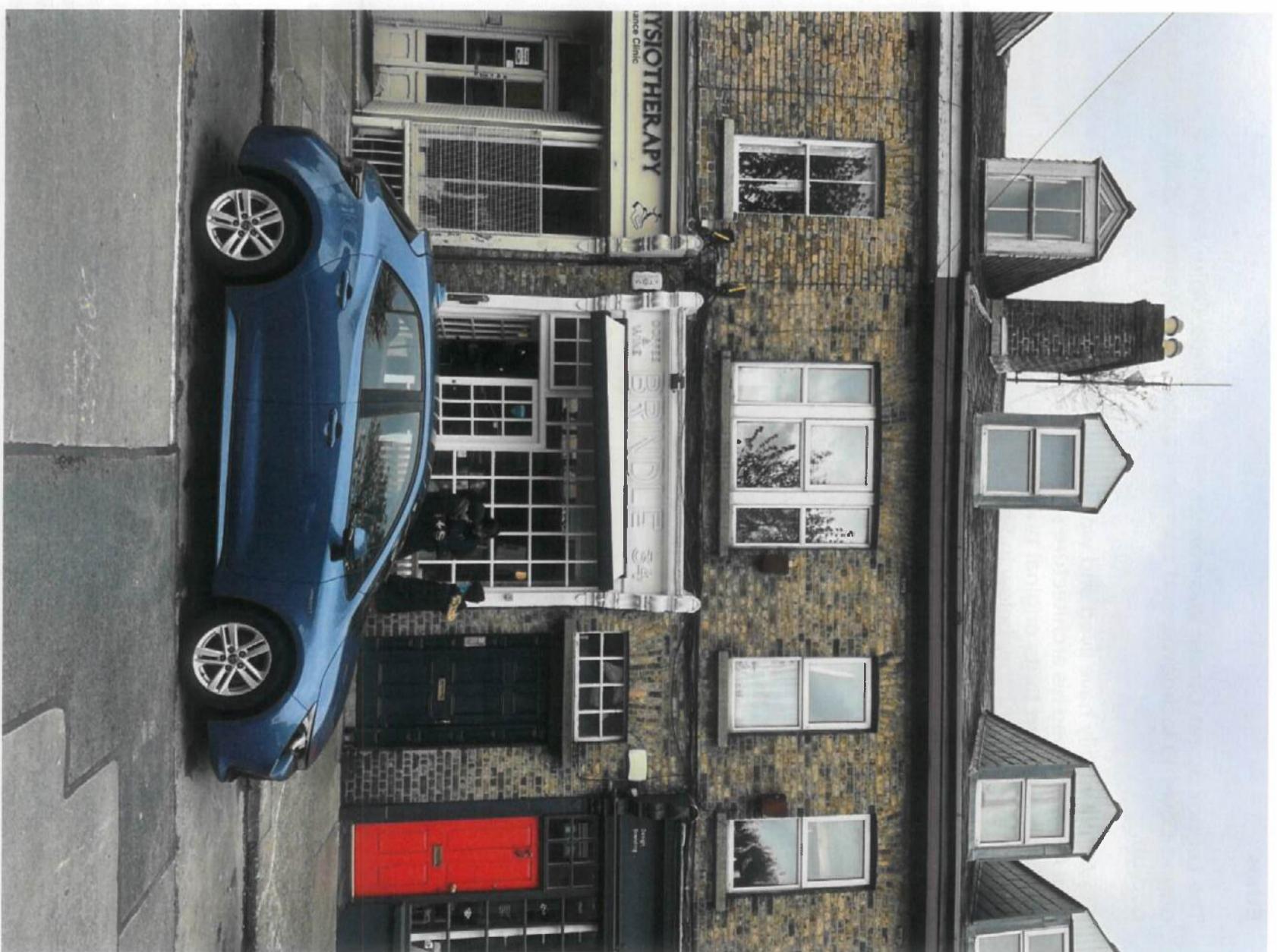


Figure 2.4: Brindle Coffee & Wine, No. 34 Lennox Street, Dublin. (Source: TPA, April 2023.)

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 Beechlawn 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.]

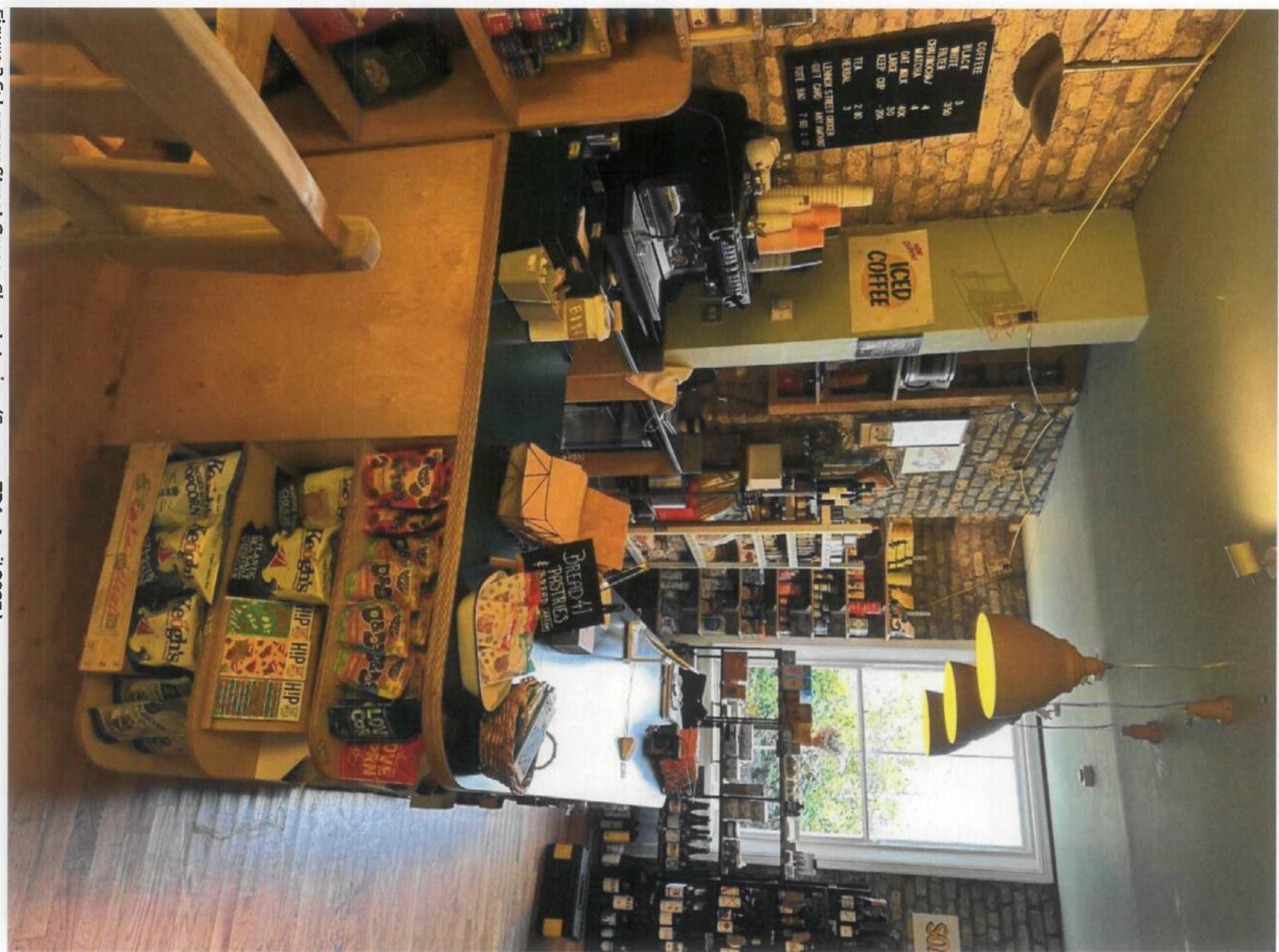


Figure 2.6: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



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

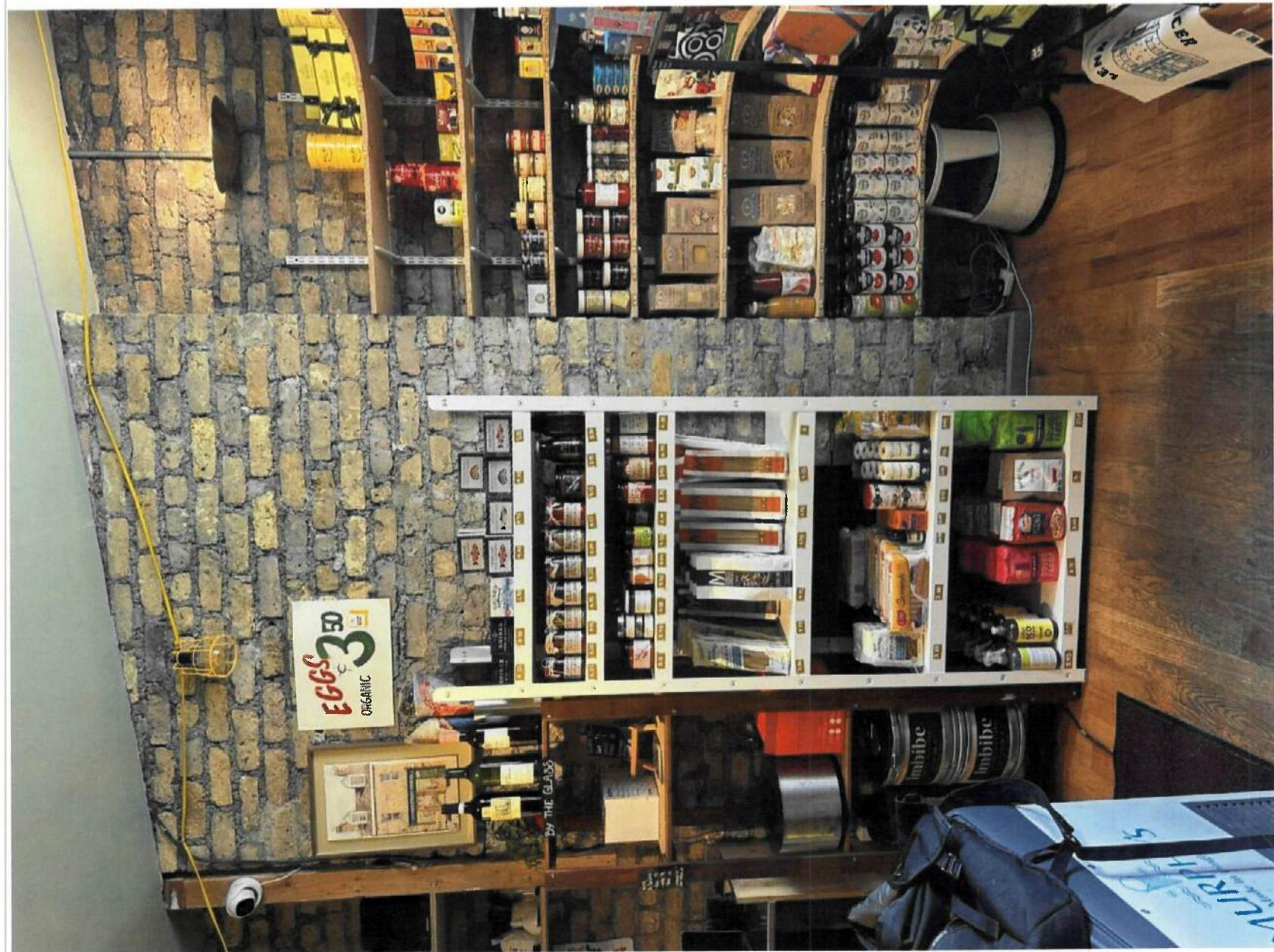


Figure 2.8: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)

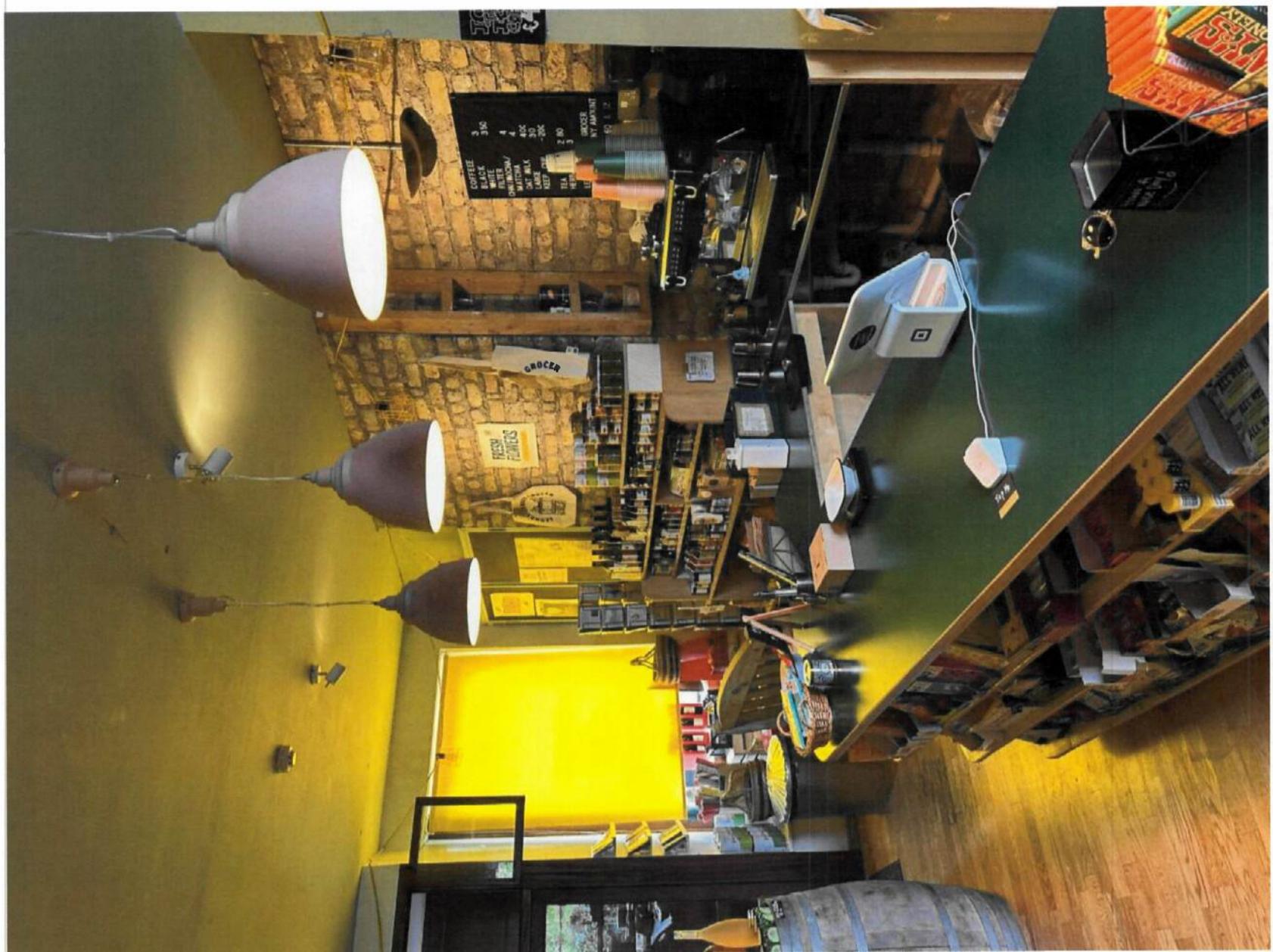
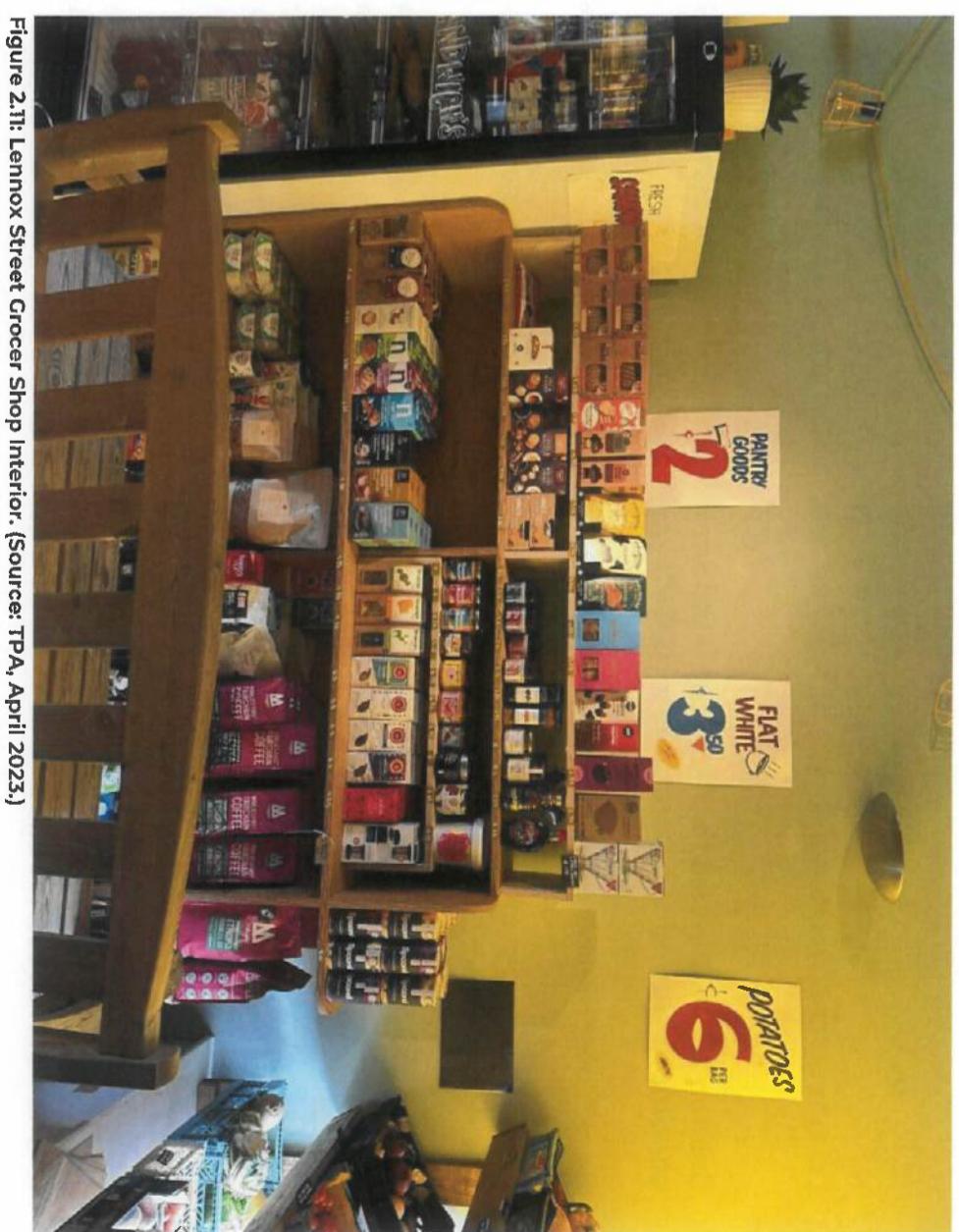
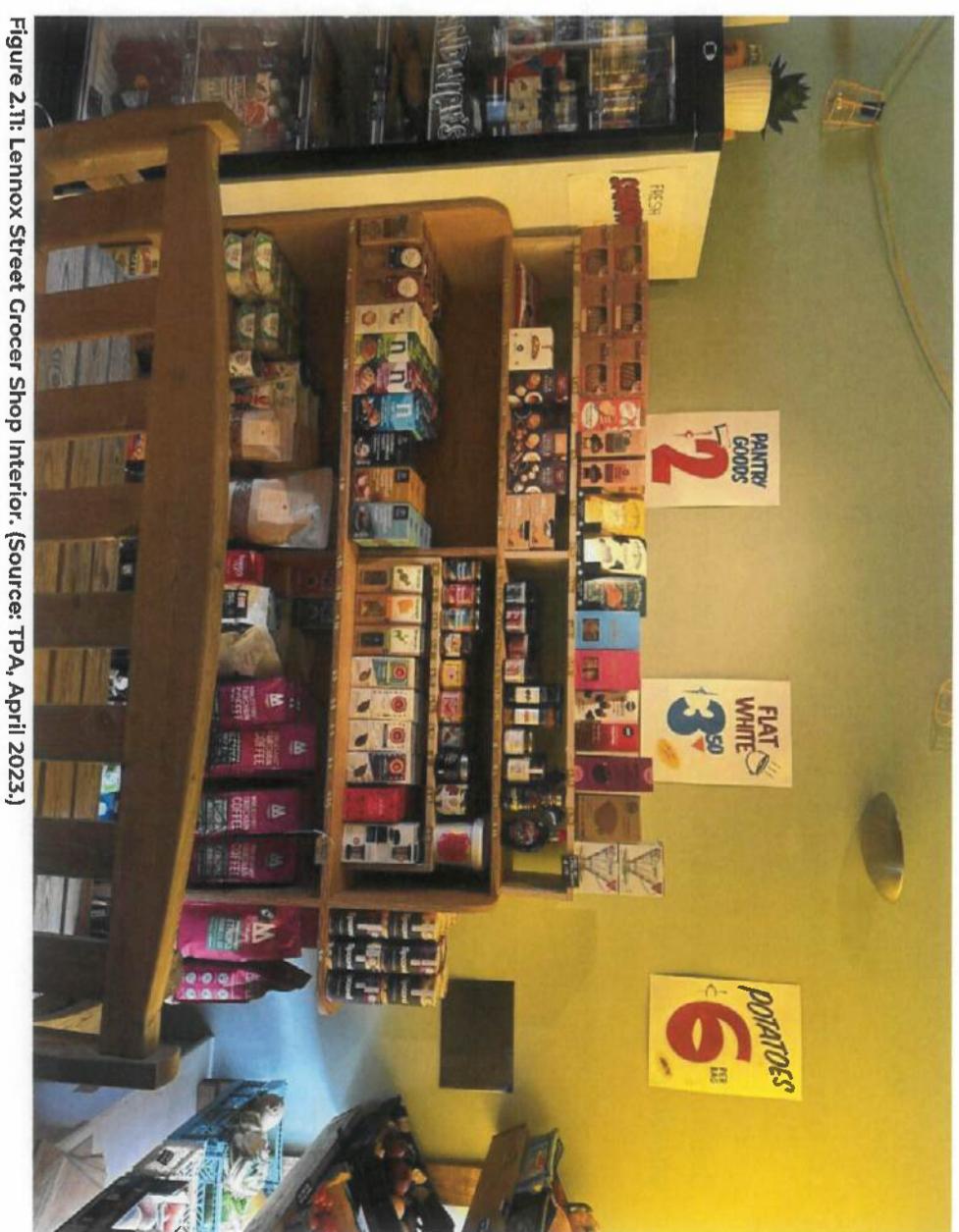
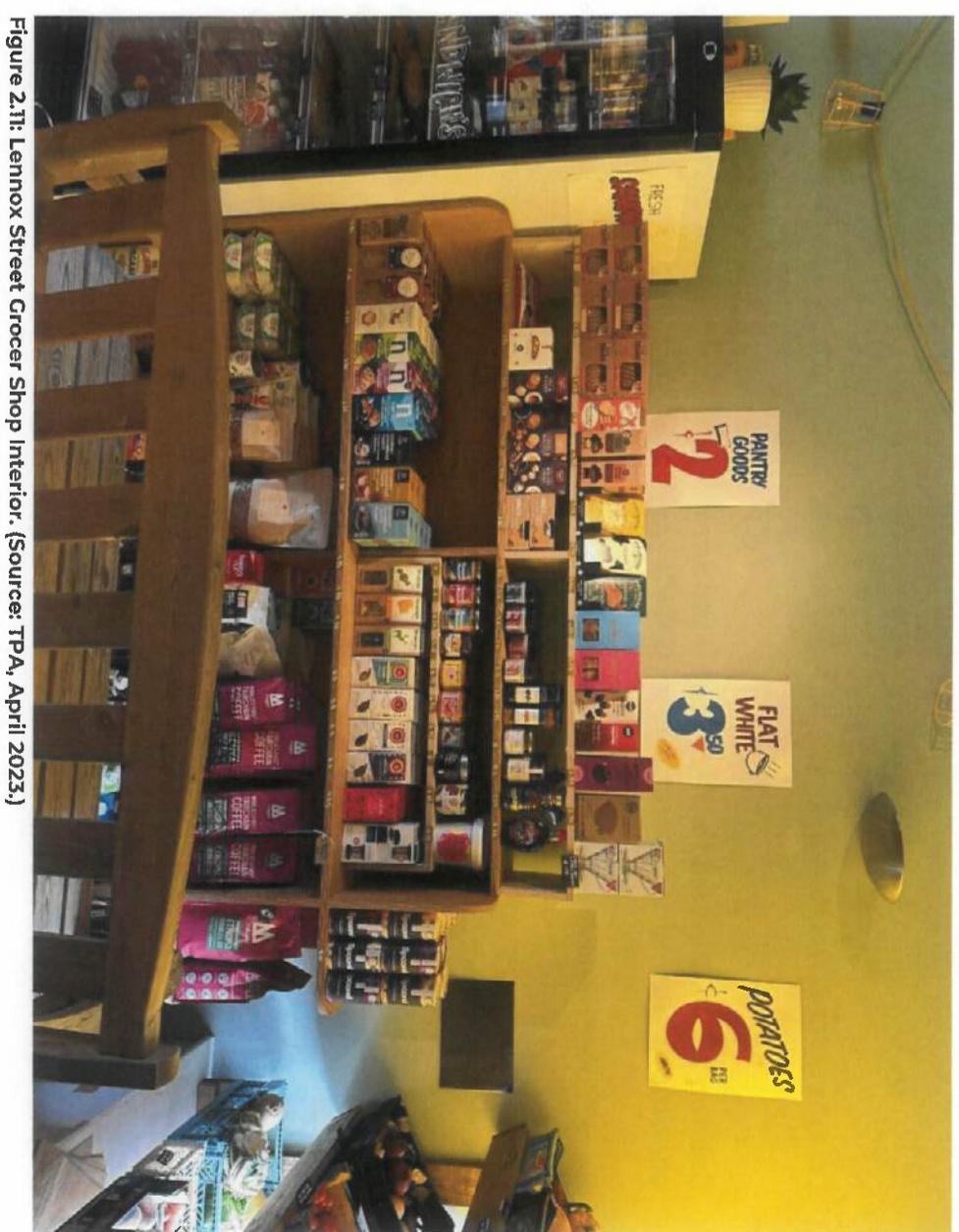
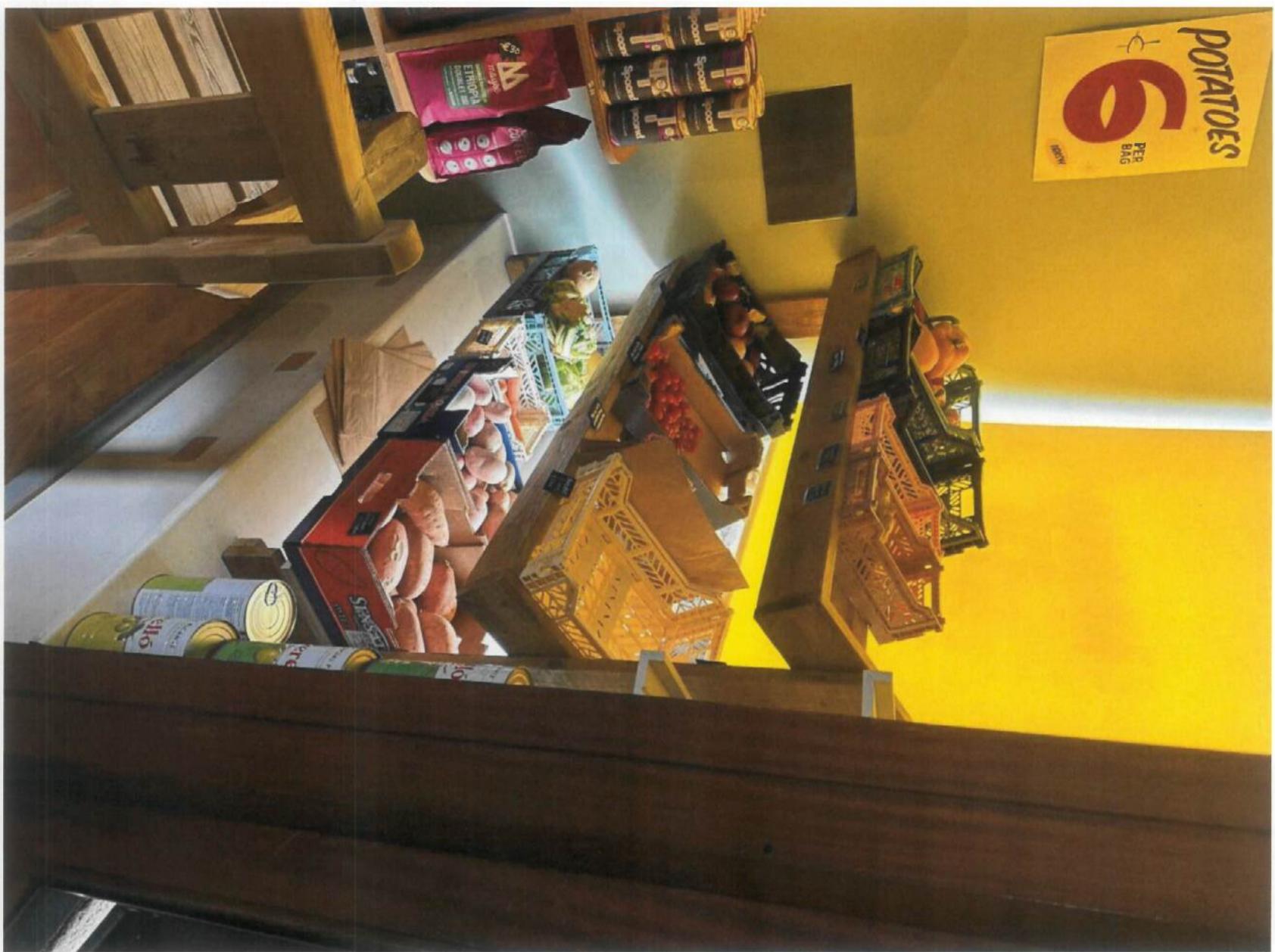


Figure 2.9: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



### 2.3 Covid-19 Exemptions – A dual context – *The Civil Law (Miscellaneous Provisions) Act 2021 extended until 30 November 2023 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 extended until 30 November 2023*

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

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

*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 wine.

### **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 the 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)?

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.

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

## 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 Uses<sup>4</sup>

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 Uses<sup>5</sup>

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 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 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 an An Bord Pleanála case (Reg. Ref. RL29N.RL3037), 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-liscence (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, and the wine tasting de minimis.**

## 5.1.2 Events – Not Applicable

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 247"

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

### 6.1 Distilling the Key Question

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

"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 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.

### 6.2 We submit that no material/actual change of use has occurred

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 16 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 hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee on the premises, has the potential to cause additional noise and general disturbance to the neighbouring properties and for this reason the use is considered a material change of use in this shop unit, which would require planning permission. The use proposed here would be more akin to a café/restaurant use, and that this would be a distinct use class and would not be ancillary to the grocer shop."*

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 social events.

Holding a book reading club in one's home or a 21<sup>st</sup> birthday party, followed by a 50<sup>th</sup> and a Leaving Cert Result's night would not change a domestic house into a restaurant/café.

If this Section 5 were taken logically it'd meant that no supermarket or off licence would host a wine tasting evening. With respect, we do not concur with the Planning Authorities Argument.

## 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, 21 June 2023.
- A copy of the Section 5 Referral, prepared by Tom Phillips + Associates submitted to Dublin City Council, dated Monday, 28 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 16 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.

The DCC Planner references the case of *Monaghan County Council vs Brogan* 1986 [I.R. 333] to support her conclusion. That case refers to an abitur and the slaughtering of cattle and is not in our opinion comparable.

The Planning Officer states:

"The applicant by hosting of events or promotions on the premises, whereby food and alcoholic beverages are consumed for a fee, would not in my opinion come under the meaning of 'shop' as set out in Article 5(1) of the Regulations, as set out above. There would be no control of this use, in terms of numbers attending or hours of operation, bar the applicant saying that they occasionally carry out these events."

Planning permission is required whenever there are 'works' to or a 'material change of use' of property. This is a matter of interpretation of the circumstances, and whether a change of use is 'material' will depend on the environment. A change of use within a particular class of development is generally deemed not to be a material change. Therefore, for example within Class 1, changing the use of a grocer shop to a hairdresser will not normally require permission, but converting a shop for example to a café/restaurant will require planning permission.

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.

The Planning Authority considered that this does constitute a material change of use, as the hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee on the premises, has the potential to cause additional noise and general disturbance to the neighbouring properties and for this reason the use is considered a material change of use in this shop unit, which would require planning permission. The use proposed here would be more akin to a café/restaurant use, and that this would be a distinct use class and would not be ancillary to the grocer shop"

Vlex (an online Law Case study search engine) synopsisises the *Monaghan vs Brogan* 1986 [I.R. 333] case as:

"Material change - Intensification of use - Permission not obtained - Unauthorised development - Slaughter of cattle - Former occasional slaughter of cattle by respondent farmer for consumption by his family and by greyhounds owned by his relative - Held that there was evidence of a significant increase in the slaughtering of cattle on the respondent's premises, and that the purpose of the increase was the provision of meat for human consumption as part of a commercial venture - Held that such slaughter was not authorised under the *Slaughter of Animals Act*, 1935 - Held that the applicant had proved a material change in the use of his premises by the respondent, and that the applicant was entitled to an order under s.27 of the Act of 1976 restraining the respondent from slaughtering cattle on his premises - ~Galway County Council v. Lackagh Rock Ltd.~ [1985] I.R. 120 considered - Local Government (Planning & Development) Act, 1963, s.3 - Local Government (Planning & Development) Act, 1976, s.27 - (1986/16 MCA - Keane J. - 26/11/86) - [1987] ILRM 564"

However, there is no need for a new planning permission to reconcile the definition of a "shop" with an on-licence.

None of the following restrictions on exempted development relate to the premises and its ancillary use:

1. "Contravention of a condition or be inconsistent with any use specified in a permission;
2. Make or widen an access;
3. Create a traffic hazard;
4. Break a building line;
5. Works under a road;
6. Interfere with the character of a landscape or a view or prospect;
7. Alter a designated site;
8. Consolidate an unauthorised structure or an unauthorised use;
9. Affect a use for which the development plan has an objective to ensure its continuance;
10. Restrict access to a natural amenity;
11. Right of way; and



12. Affect a structure located in an Architectural Conservation Area."

[Source: Irish Planning Law and Practice, Issue 27, December 2009, Bloomsbury Professional.]

In conclusion, in our professional town planning opinion

1. The premises is a shop in which wine can be sold;
2. The premises is not, nor purports to be a restaurant;
3. The operators hold a wine retailer's on-licence; and
4. Neither an actual nor a material change of use has occurred.

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: A COPY OF DCC'S PLANNER'S REPORT DATED 16 MAY 2023

Dublin City Council  
AS

16th May 2023

This is a Section 5 Reference as to 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 Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?

### Planning Assessment:

EXPP Plan No. 014923

Address: Lennox Street Grocer, 38, Lennox Street, Portobello, Dublin 8

**Development:** EXPP- 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 Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?

**Application Received:** 28/04/23

**Application Due:** 25/05/23

### Background

This is a section 5 reference as to 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 Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?

The premises is currently in retail use as Lennox Street Grocer. The shop is a high end grocer/retail, which also sells wine. Planning permission was granted under Reg. 411599 for a 'change of use from shops and workshops to offices.' Condition 2 of this permission stated that 'the use of the premises at the basement and ground floor of number 36 & 38 Lennox Street as offices shall cease on or before the expiration of a ten year period 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.'

### Zoning

The subject site is located is a Z2 zoning which is 'To protect and/or improve the amenities of residential conservation areas.'

### Site Description:

The subject site is a two storey terraced shop attached to number 36 and 40 Lennox Street. Currently this premise is being used by Lennox Street Grocer, a retail use.

### Planning History

0139123: Concurrent Section 5 application 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)?

411599: Planning permission granted for a 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.

Condition 2 of this permission notes:

2) 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.

### Enforcement History

E0640/22: Change of use from shop to restaurant

E0383/21: Change of use from office to retail

### Proposal

REPL Letter

### Legislative Context

**Planning and Development Act (as amended)**

**Section 2(1)**  
In the Act, except where the context otherwise requires:

'exempted development' has the meaning specified in section 4;

"unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making or any unauthorised structure) or the making or any unauthorised use.

"unauthorised works" means any works on, in over or under land commenced on or after 1 October 1964, being development other than -

- (a) Exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act); or
  - (b) Development which is the subject of a permission granted under part IV of the Act of 1963 or under section 34 or 37G of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.
- "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

### Section 3

Section 3 (1) of the Planning and Development Act 2000 (as amended) defines "development" as "the carrying out of any works in, on, over or under land, or the making of any material change in the use of any structure or other land".

### Part XVI

The Planning and Development Act (as amended) defines 'events' as follows:

- (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 comprises of music, dancing, displays or public entertainment or any activity of a like kind, and
- (a) any other event as prescribed by the Minister under section 241'

### Planning and Development Regulations 2001 (as amended)

#### Part 2 and Schedule 2 of the Regulations relate to Exempted Development.

Article 5(1) provides interpretations for the purposes of exempted development and defines a shop as follows:

"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 sale 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 (1908-1910) Act),
- (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

Article 6 (1) of the Regulations states the following: "Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1."

Article 10(1) provides:

Development which consists of a change of use within any one of the classes of use specified in Part 4, Schedule 2, shall be exempted development for the purposes of the Act, provided the development, if carried out, would not -

- (a) involve the carrying out of works other than works which are exempted development,
- (b) contravene a condition attached to a permission under the Act,
- (c) be inconsistent with any use specified or included in such a permission, or
- (d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

#### Part 1 of Schedule 2: Exempted Development – General.

Column 1 Description of Development Development consisting of a change of use "	Column 2 Conditions and Limitations
a) from use for the sale of hot food for consumption off the premises, or for the sale or leasing or display for sale or leasing of motor vehicles, to use as a shop.	
d) from use to which class 2 of Part 4 of this Schedule applies, to use as a shop.	

#### Part 4 of Schedule 2: Exempted Development - Classes of Use:

Class 1: Use as a shop.

Class 2: Use for the provision of

- a) financial services,
- b) professional services (other than health or medical services),
- c) any other services (including use as a betting office), where the services are provided principally to visiting members of the public

#### Whether the Change of Use Is Development

##### Section 3(1) of the Act defines development as follows:

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

The first part of the question to be examined is to whether or not a change of use has occurred and if any change of use is material, and therefore development. If any change of use is not material, no further question arises, but if on the other hand there is a material change of use then development has occurred, and the Planning Authority must determine whether it is exempted development. It is well established that 'material' in the phrase 'material change in the use in section 3(1) of the Act means 'material for planning purposes', for example the judgment of Keane J. Felix 257 in the High Court in Monaghan County Council V Brogan (1987).R 333 at page 338. Therefore, if the use would require planning permission, then it is a material change of use.

Article 5(1) of the Regulations as amended by SI No364 of 2005 provides for an interpretation of a shop for the purposes of exempted development.

A "shop" means a structure used for inter alia the retail sale of goods or the sale 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 licence (within the meaning of the Finance (1908-1910) Act, 1910) 10 Edw. 7. & 1 Geo. 5, c.8, 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, 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.

The applicant argues that the subject use is ancillary to the grocer shop. In the supporting documentation they note that as part of the shop activity, in the promotion of its offering, occasional wine tastings takes place, and can include up to 16 people tasting a number of selected wines, with snacks to accompany the wine. No meal is served. In the last year, four such events took place, which they argue this shows the ancillary nature of the activity.

Whereas the Planning Authority acknowledges that the retail shop has a licence to sell wine, it should be noted that the licensing laws in Ireland is a separate code of legislation to Planning. As this is a planning issue then the question arises as to whether this use comes under the use class as set out in Article 5 (1) of the Regulations.

Regardless of what wine licence the applicant holds, section Article 5(1) (c) specifically mentioned for the sale of sandwiches, or other food or of 'wine' off the Premises, where the sale of such food or wine is subsidiary to the main retail use.

The applicant by hosting of events or promotions on the premises, whereby food and alcoholic beverages are consumed for a fee, would not in my opinion come under the meaning of 'shop' as set out in Article 5(1) of the Regulations, as set out above. There would be no control of this use, in terms of numbers attending or hours of operation, bar the applicant saying that they occasionally carry out these events.

Planning permission is required whenever there are 'works' to or a 'material change of use' of property. This is a matter of interpretation of the circumstances, and whether a change of use is 'material' will depend on the environment. A change of use within a particular class of development is generally deemed not to be a material change. Therefore, for example within Class 1, changing the use of a grocer shop to a hairdresser will not normally require permission, but converting a shop for example to a café/restaurant will require planning permission.

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.

The Planning Authority considered that this does constitute a material change of use, as the hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee on the premises, has the potential to cause additional noise and general disturbance to the neighbouring properties and for this reason the use is considered a material change of use in this shop unit, which would require planning permission. The use proposed here would be more akin to a café/restaurant use, and that this would be a distinct use class and would not be ancillary to the grocer shop.

Having regard to the information submitted on file, I conclude that the hosting of events whereby food and alcoholic beverages for a fee, is a distinct use and would be more akin to a restaurant/café use and is not an ancillary use to the grocer shop. It therefore constitutes development.

#### **Whether the change of use is Exempted Development**

Under article 10(1) of the Regulations, development consisting of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, subject to conditions. Class 1 of Part 4 of Schedule 2 refers to "Use as a shop." The critical issue is whether or not the subject and permitted uses can both be classified as a "shop" and therefore exempted development. As discussed above, the subject use is not

considered to come within the scope of the definition of a "shop" provided in article 5(1) of the Regulations. Therefore, the exemption provided under article 10(1) does not apply in this case. I therefore conclude that the subject development is not exempted development.

#### **Conclusion**

The hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee is considered development and is not exempted development.

#### **Recommendation**

Whereas a question has arisen as to:

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

AND WHEREAS Dublin City Development has concluded that:

- (a) The use of part of the ground floor retail unit of this premises for the hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee
- (a) The use of the subject premises for hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee, 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/café use which is expressly excluded from the definition of 'shop' under Article 5(1) of the Planning and Development Regulations 2001, as amended.
- (b) 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,
- (c) 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.

DATE: 16th May 2023

**APPENDIX B:**

Alison Scott  
Executive Planner  
Eileen Buck  
Senior Executive Planner

**PLANNING**  
**25 MAY 2023**  
**DEPARTMENT**

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

Application Number	0149/23
Application Type	Section 5
Registration Date	28-Apr-2023
Decision Date	P3231
Decision Order No.	
Location	Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8
Proposal	EXPP: 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 Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)? La Gourmande
Applicant	

**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:**

Whereas a question has arisen as to:

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 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:

- Sections 2 and 3 of the Planning and Development Act, 2000, as amended;
- Articles 5 (1), 6(1), and 10(1) of the Planning and Development Regulations, 2001, as amended;
- Class 1 of Part 4, Schedule 2 of the Planning and Development Regulations, 2001 as amended;
- The planning history of the site;
- 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:

DEC1 Section5 (Refuse Certificate)

Page 1 of 2

014923 P3231

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

- a) The use of part of the ground floor retail unit of this premises for the hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee
- b) The use of the subject premises for hosting of events or promotions whereby food and alcoholic beverages are consumed for a fee 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/cafe 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: Fiona Murphy  
For Senior Staff Officer

Date: 23/03/23

**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).

25/5/23  
Date

To whom the appropriate powers have been delegated by order of the Chief Executive, Dublin City Council (Order No. CE 6393) dated the 22nd May 2023.

To:  
La Gourmande Limited  
Paul Arnold & Co  
38 Lennox Street,  
Dublin 8  
D08 RSP0

DEC1 Section5 (Refuse Certificate)

Page 2 of 2

TELEGRAM TELLED DUBLIN 01 6711000  
STOP DUE TO OVERLOAD IN  
**AN CHURCH DUBLIN THE DISTRICT COURT**  
TO: DUBLIN METROPOLITAN DISTRICT  
COURT (No 3) ACT, 1986  
DEFENDANT : DUBLIN SECTION 1  
NOTICE : DUBLIN SUMMONS 123  
PROSECUTOR: DUBLIN CITY COUNCIL, DUBLIN 1  
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 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

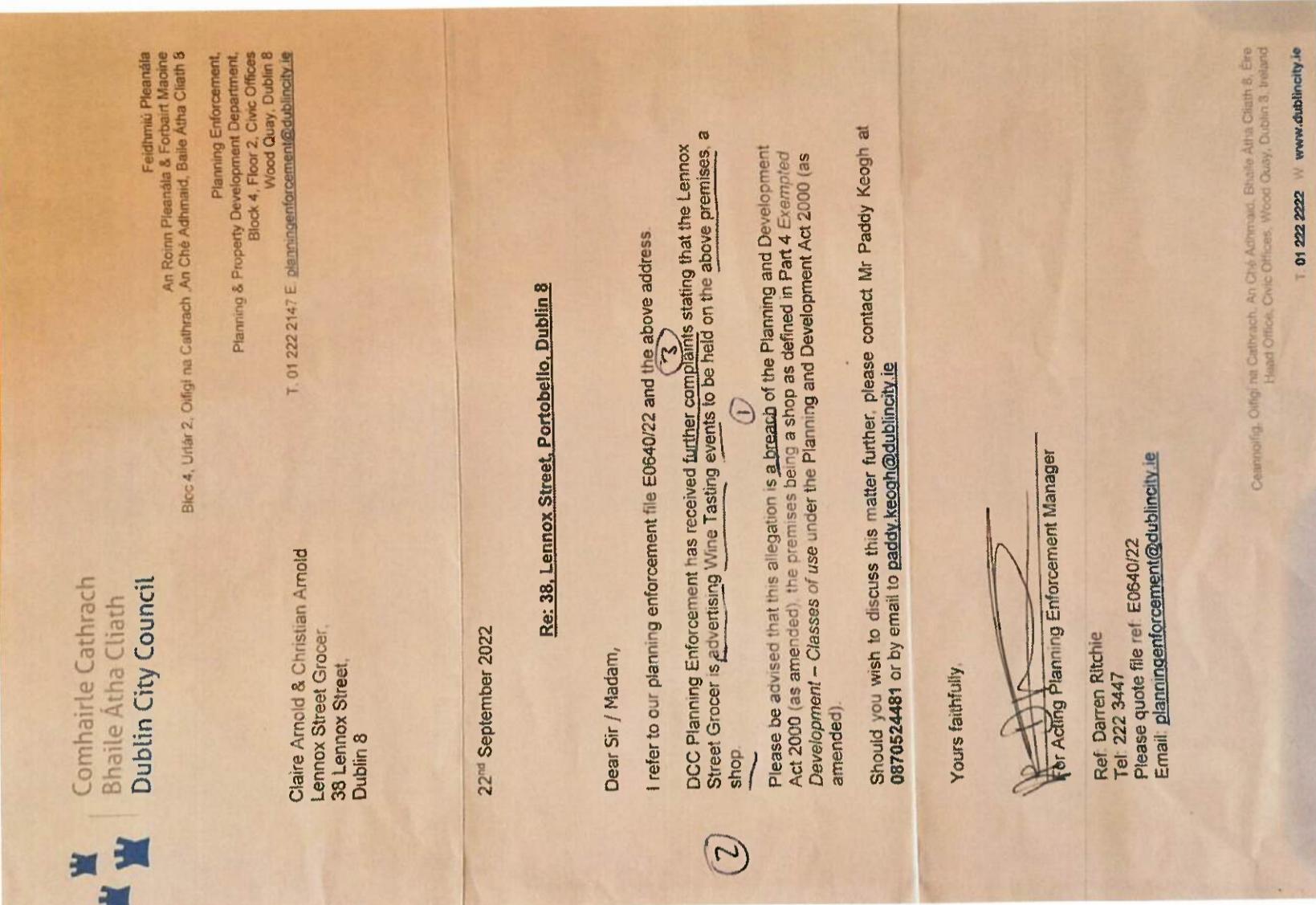
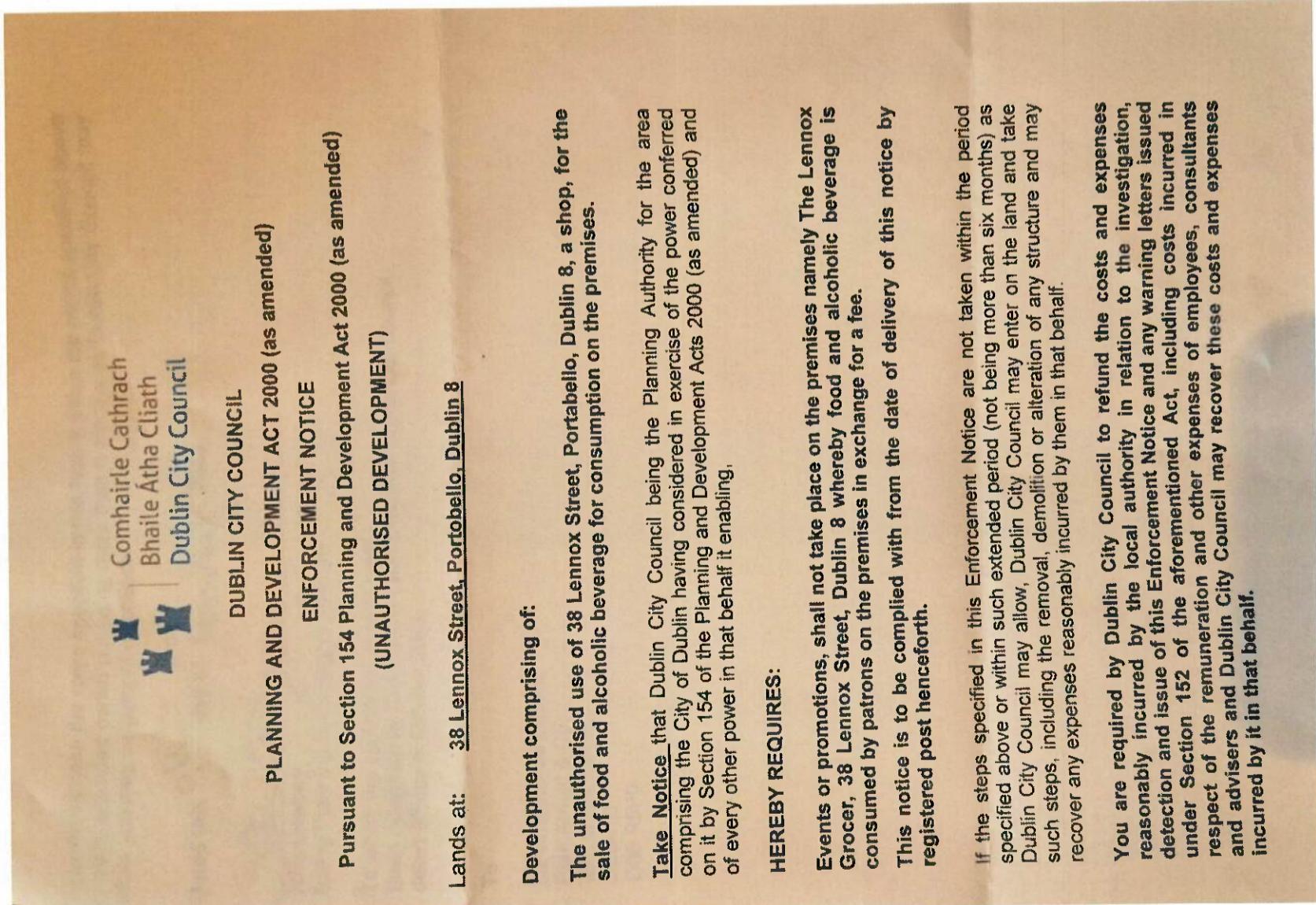
said accusation.

Dated this 8<sup>TH</sup> day of MARCH 2023  
Appropriate District Court Clerk

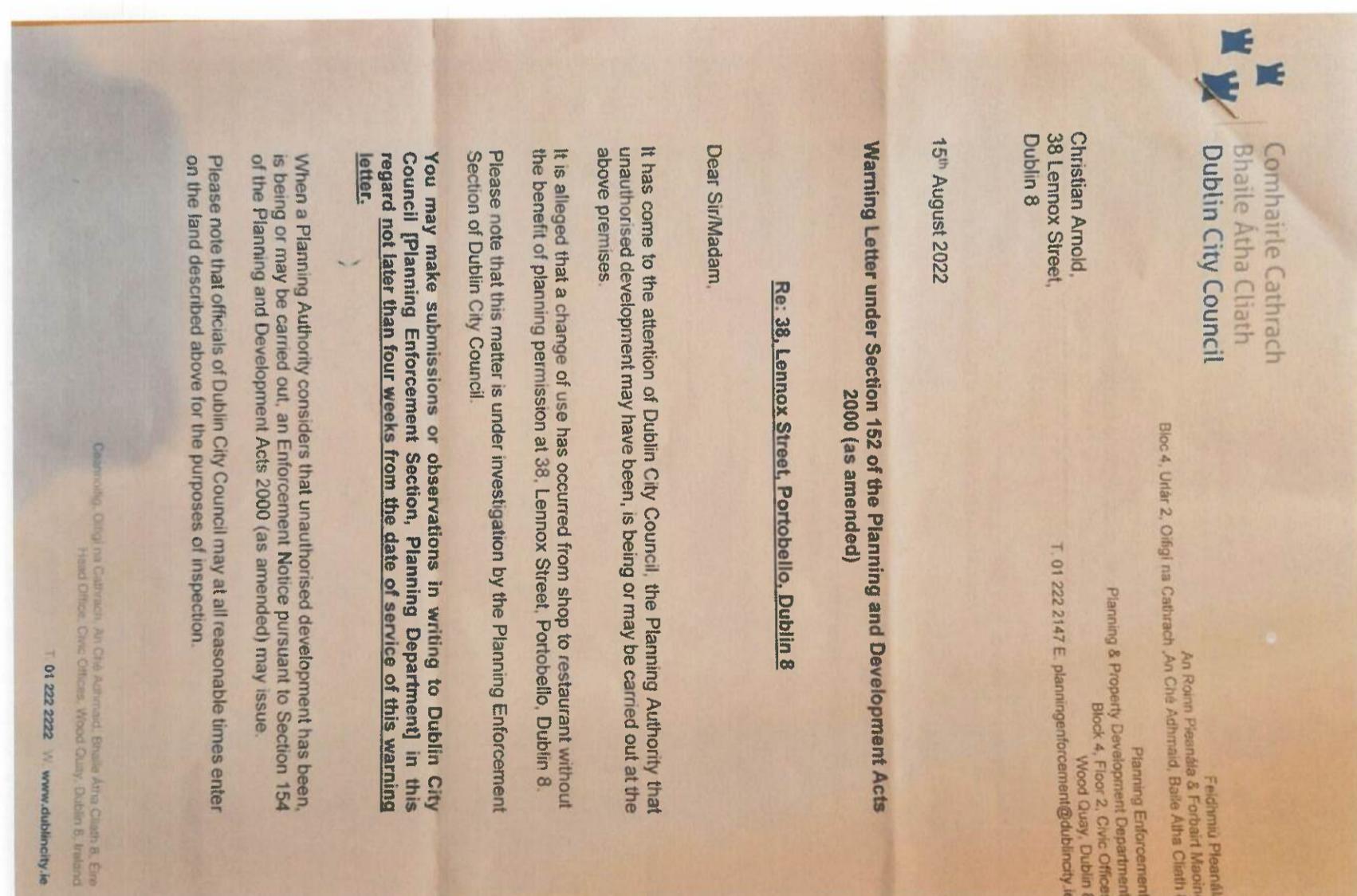
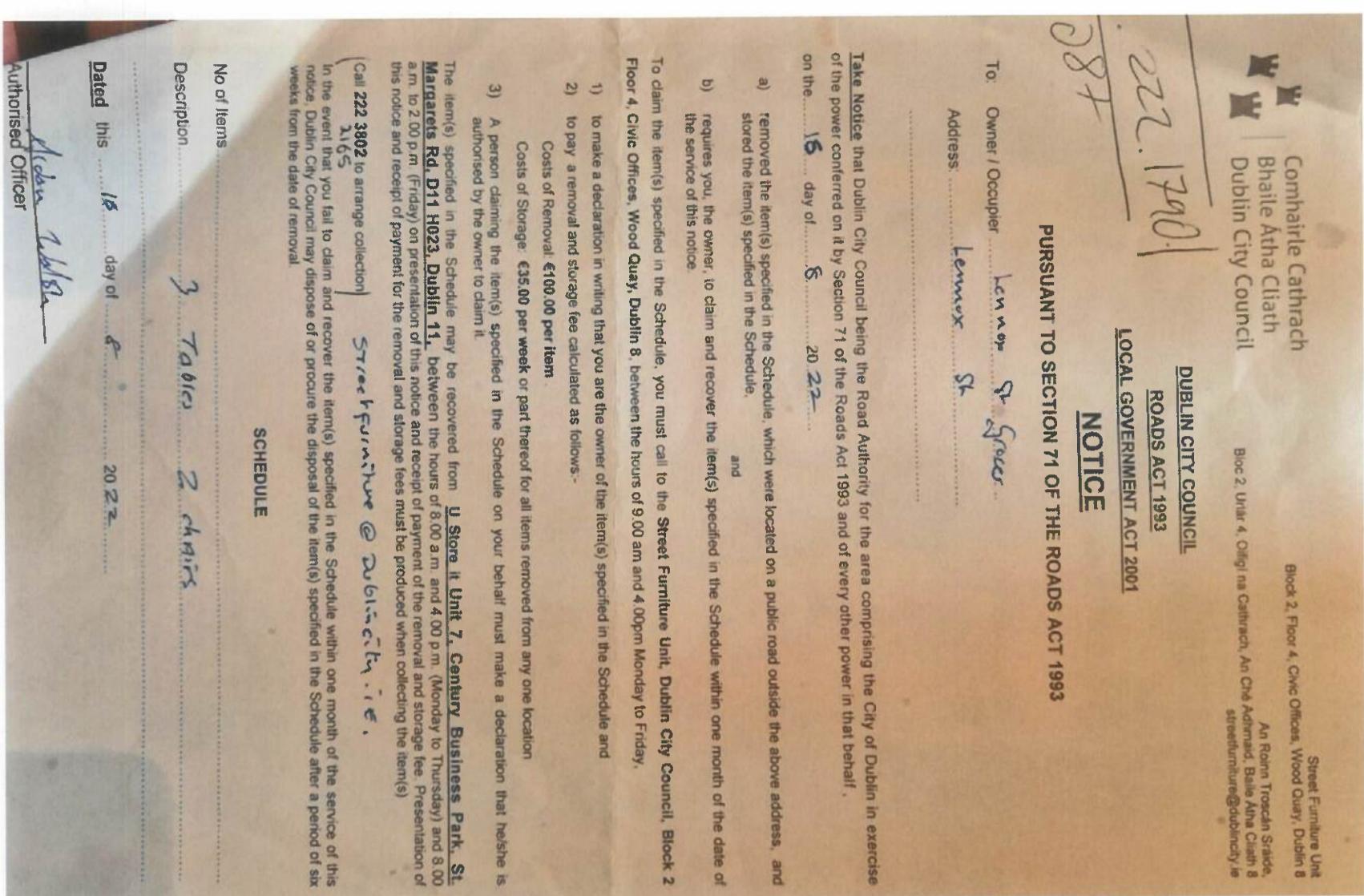
To:  
La Gourmande Limited  
Paul Arnold & Co  
38 Lennox Street,  
Dublin 8  
D08 RSP0

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

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

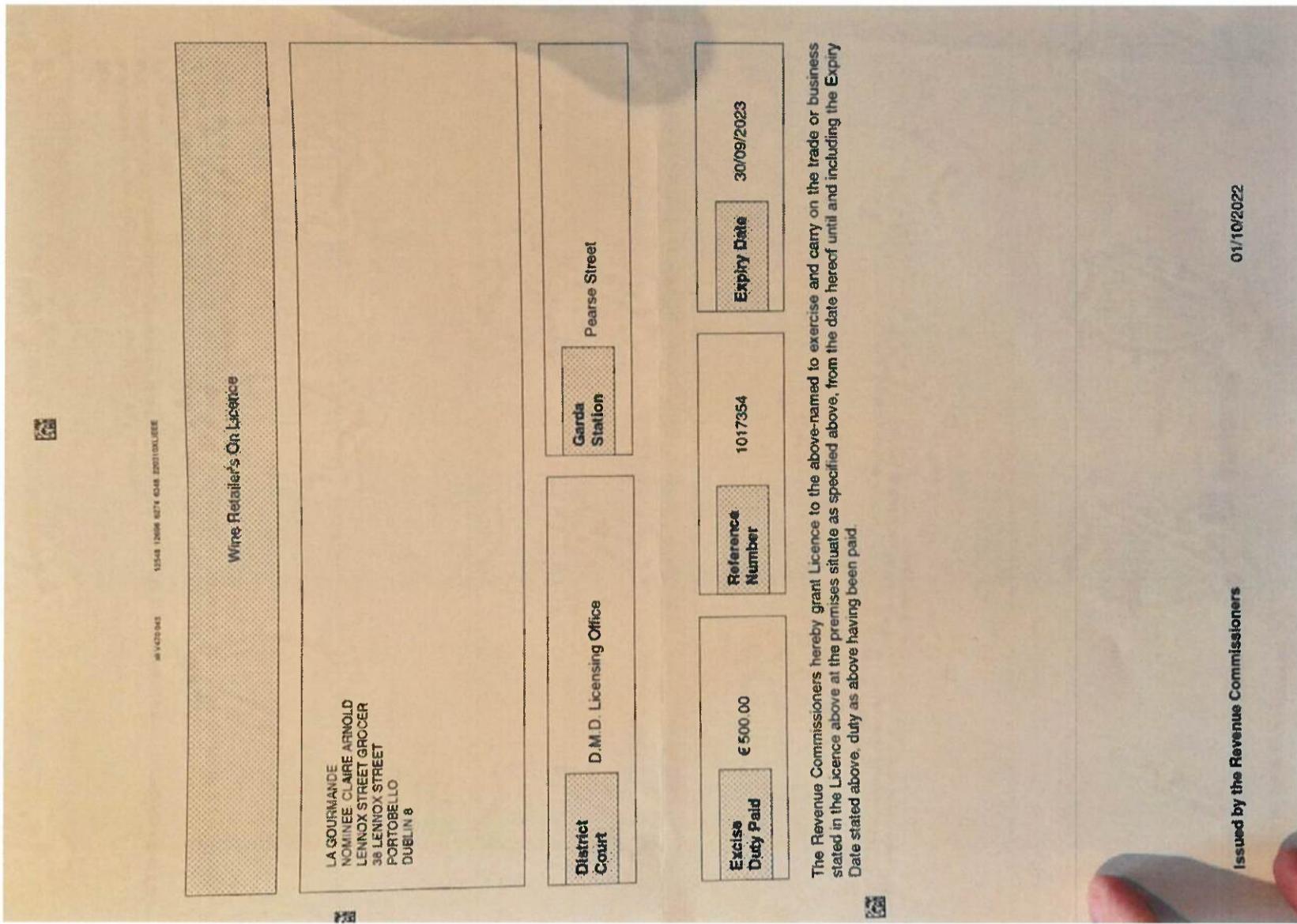
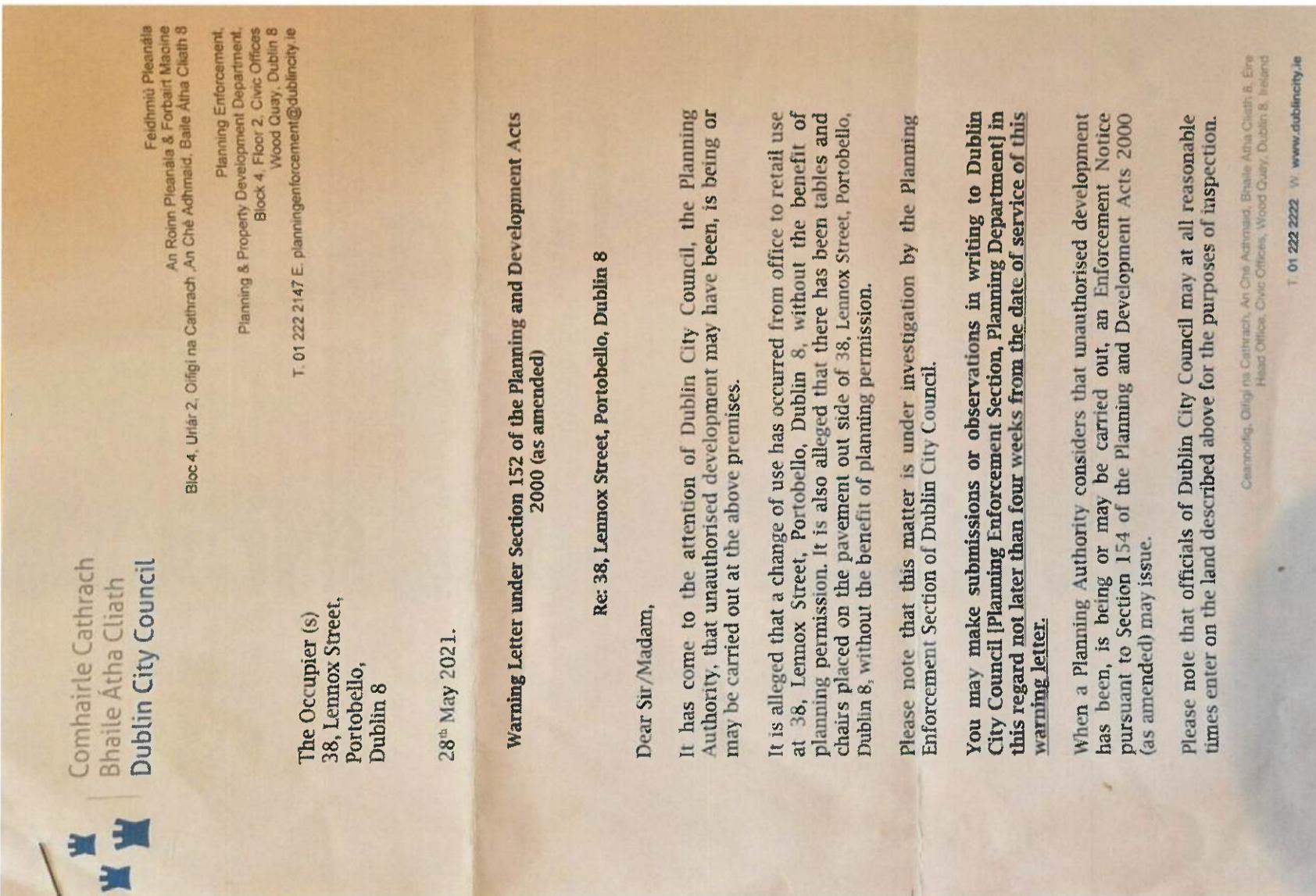


## APPENDIX F: LETTER FROM DUBLIN CITY COUNCIL DATED 18 AUGUST 2022



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

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



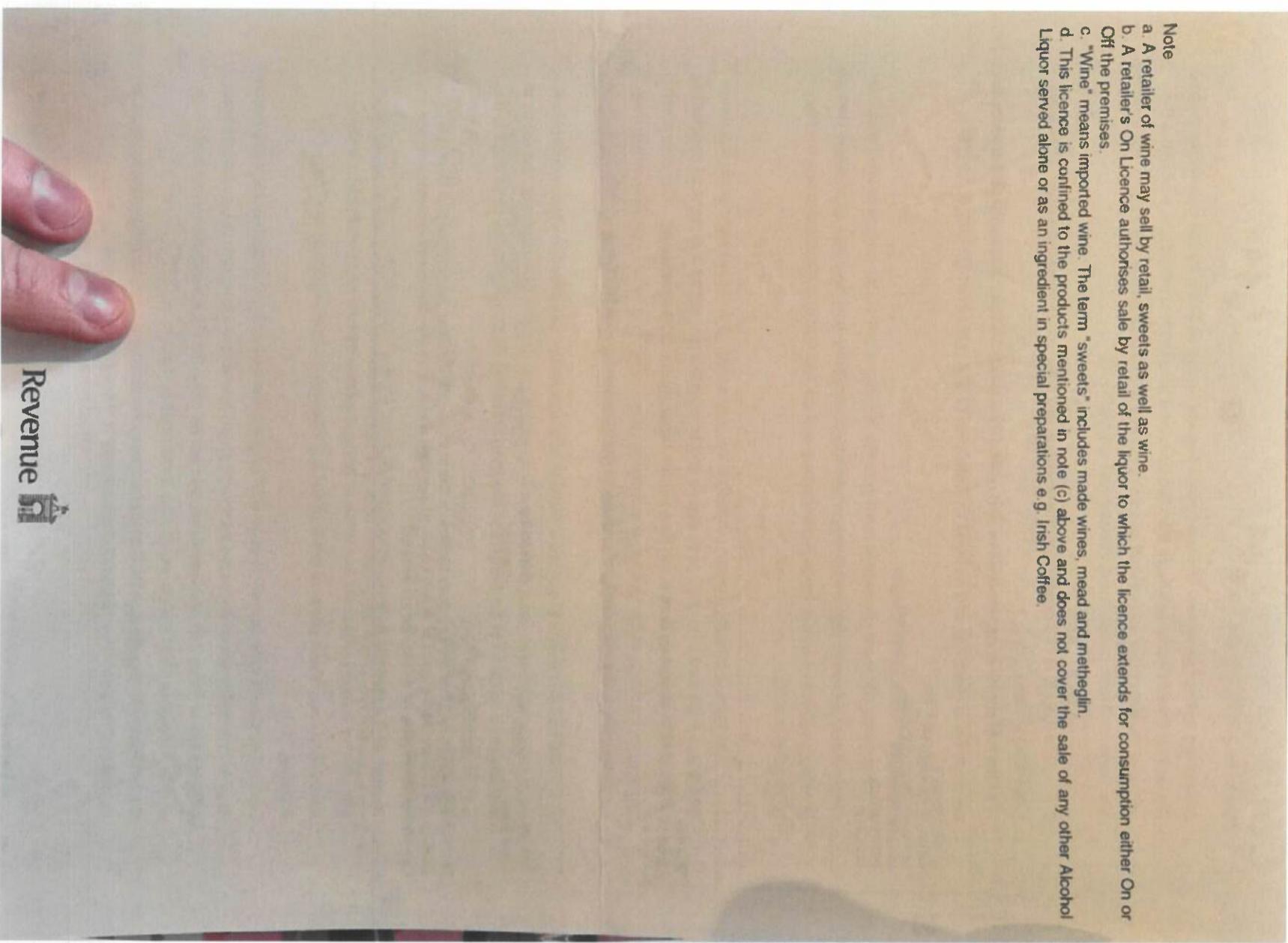


## APPENDIX J: NOTE FROM CONSERVATION ARCHITECT PAUL ARNOLD (RIAI GRADE 1) WHO OWNS THE PREMISES

- 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 metheglin.
  - 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.

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

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



### Contents

Pages 2 to 4	Explanatory Note
Page 5	Location Map
Page 6	Revenue On-liscence Web Page
Pages 7 to 9	Photos

**Section 6 Declaration Application**  
**The Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin D03R55P0**

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-liscence.
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-liscence: 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-liscence rather than an Off-liscence.

5. The on-liscence 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 2000 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.

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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

**Revenue**  
Cain agus Cusaimh na hÉireann  
Irish Tax and Customs

Home → Companies and charities → Excise and licences

## 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:**

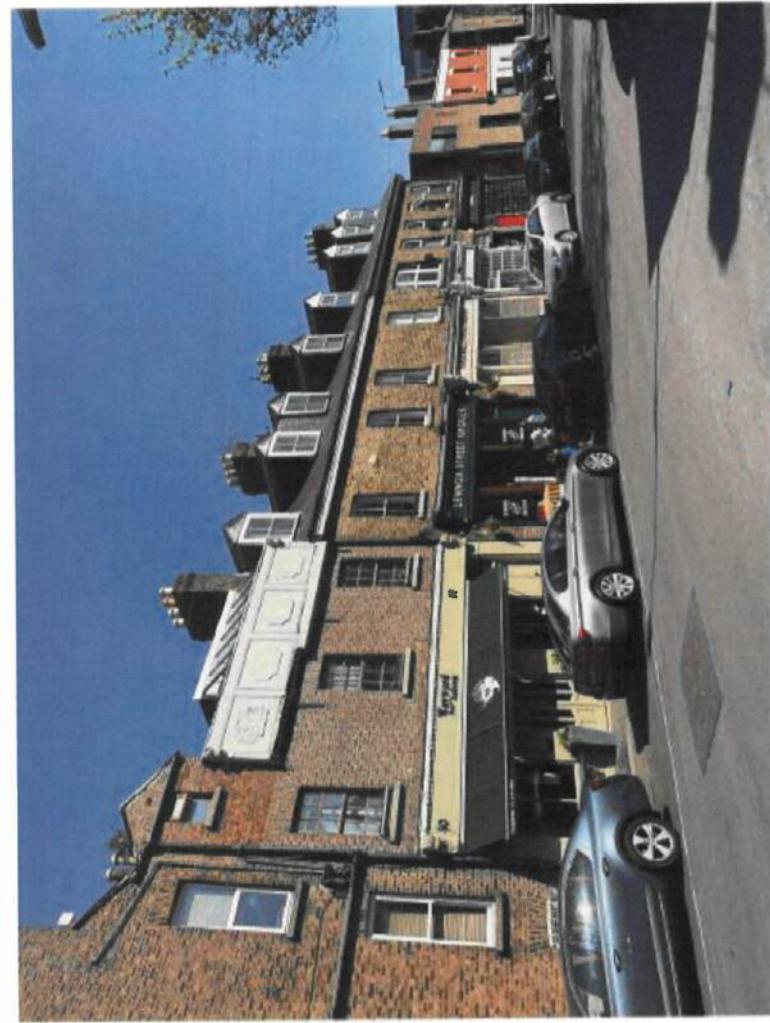
The waiver of Excise Duty on on-trade liquor licences will not be extended to renewals in 2022.

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.

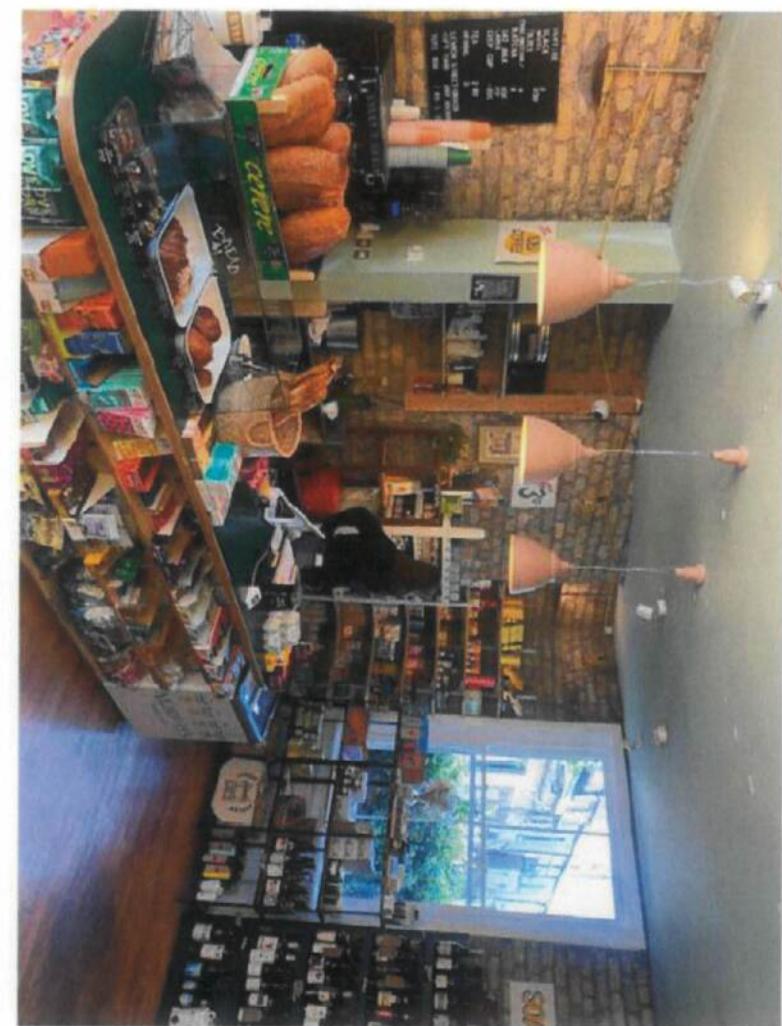


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## APPENDIX K: ABP REC. RL3037 INSPECTOR'S REPORT

### 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. 20N.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 RDO of the Dublin City Development Plan 2011-2017 which seeks "to prohibit the further expansion of off-licences and part off-licences 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-licences uses which would be contrary to Policy RDO, 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'.

**Appendices:**

Key Map and Photographs

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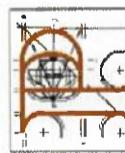
An Bord Pleanála

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Inspector's Report  
RL.3037

**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)

Dublin City Council

**Planning Authority:**

**Planning Authority Reference:**  
0083/12

**Inspector:**  
Joanna Kelly

**Date of Site Inspection:**  
30<sup>th</sup> October 2012



### 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) considered 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.

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 sole 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 sole 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-licences. 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 or 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 laundrette 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 Classes 2 or 3 of Part 4 of Schedule 2 applies'. (my emphasis)

#### 6.0 ASSESSMENT

##### 6.1 THE REFERRED 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?'



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?

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 of 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.

#### 6.2.0

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. PL.29N.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. PL.29N.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:

(i) The premises shall not be used for the sale of alcohol (my emphasis)

(ii) 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 PL.239124 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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#### 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, 2<sup>nd</sup> floor Seagrave House, 19-20 Earlston Terrace Dublin 2

Requested a declaration on the said question from Dublin City Council and the said Council issued a declaration on the 7<sup>th</sup> 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 Regulations 2001 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 PL.239124 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

30<sup>th</sup> October 2012



**Figure 1 – The Lennox Grocer (No. 38 Lennox Street, Dublin 8, D08 R5P0) Site Location Map with subject site outlined in Red. (Source: Myplan.ie, April 2023, cropped and annotated by TPA.)**





**Figure 2 – The Lennox Grocer (No. 38 Lennox Street, Dublin 8, D08 R5P0) Site Location Map with subject site outlined in Red. (Source: Myplan.ie, April 2023, cropped and annotated by TPA.)**



**Section 5 Referral to Dublin City Council in relation to the hosting of events or promotions at the Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8, D08 R5PO whereby food and alcoholic beverages are consumed for a fee is considered development and if so does it constitute exempted development?**

**Prepared for:**

La Gourmande Limited  
Lennox Street Grocer  
38 Lennox Street  
Portobello

Dublin 8  
D08 R5PO

**Prepared by:**

Tom Phillips + Associates  
80 Harcourt Street  
Dublin 2  
D02 F449

t: 01 478 6055  
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Principal Planning Officer  
Planning Department  
Dublin City Council  
Civic Offices  
Block 4  
Ground Floor  
Wood Quay  
Dublin 8  
D08 RF3F

Dear Sir / Madam

RE: REQUEST FOR DECLARATION UNDER SECTION 5 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) IN RELATION TO WHETHER THE HOSTING OF EVENTS OR PROMOTIONS AT THE LENNOX STREET GROCER, 38 LENNOX STREET, PORTOBELLO, DUBLIN 8, D08 R5PO, WHERE FOOD AND ALCOHOLIC BEVERAGES ARE CONSUMED FOR A FEE IS CONSIDERED DEVELOPMENT AND IF SO DOES IT CONSTITUTE EXEMPTED DEVELOPMENT?

## 1.0 INTRODUCTION

### 1.1 Addressing issues of interpretation by DCC Enforcement at the District Court on Tuesday, 25 April

La Gourmande Limited and Ms Claire Arnold<sup>1</sup> have retained Tom Phillips + Associates<sup>2</sup>, Town Planning Consultants, to request a Declaration under Section 5 of the *Planning and Development Act 2000*, as amended ("the Acts").

The Referral relates to the Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8, D08 R5PO.

We append the requisite documentation and fee to support this Referral.

The context for this Referral is that we are advised that Counsel for La Gourmande Limited and Ms Arnold met officials from Dublin City Council's Enforcement Section at the District Court Session on Tuesday, 25 April.

The DCC officials, whilst acknowledging that a Section 5 had been received, requested that the key question be rephrased to be more in keeping with the actual wording of the Summons.

Accordingly, we have rephrased our earlier Submission of 25 April (Reg. Ref 0139/23) in this dated 28 April to reflect the Summons's wording.

### 1.1.1. The earlier referral

As referenced, we submitted an earlier Section 5 Referral to DCC on Tuesday, 25 April 2023 (Reg. Ref. 0139/23) on a related matter.

It posed the question:

*"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)?"*

The DCC Officials questioned the wording at the meeting with Counsel. This the second Section 5 Reference document, with this Submission specifically addressing issues raised by Dublin City Council.

### 1.1.2 The Revised Question submitted at Dublin City Council's Request

Appendix A sets out a copy of a *District Court Summons*, dated 8 March 2023.

The Summons to La Gourmande Ltd. alleges *inter alia* that:

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

Accordingly, as the DCC Enforcement personnel requested La Gourmande Limited's and Ms Claire Arnold's Counsel that Tom Phillips + Associates rephrase the question, we wish to refer the following question for determination:

*"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 Planning and Development Act 2000 (as amended) and the Planning and Development Regulations, 2001 (as amended)?"*

<sup>1</sup> Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin 8, D08 R5PO.

<sup>2</sup> 80 Harcourt Street, Dublin 2, D02 F449.



### 1.1.3 Distilling down to the issue at hand

La Gourmande has been the recipient of several letters from Dublin City Council on a range of alleged issues ranging from the use of the premises as a retail unit to the residual issue of food and alcoholic beverages, the subject of this Referral.

The letters are as follows:

1. District Court Summons from the District Court Dublin Metropolitan District dated 8 March 2023. (Events and promotions.)
2. Enforcement letter from Dublin City Council dated February 2023. (Sale of food and alcoholic beverages.)
3. Warning Letter from Dublin City Council dated 22 September 2022.
4. Letter from Dublin City Council dated 18 August 2022.
5. Warning Letter from Dublin City Council dated 15 August 2022.
6. Warning Letter from Dublin City Council dated 28 May 2021.

These are set out in Appendices A to F.

La Gourmande Limited received an Enforcement Letter from Dublin City Council dated February 2023 stating that unauthorised change of use may have been carried out at the Lennox Street Grocer.

Subsequently, the operator received a District Court Summons dated 8 March 2023 (see Appendix A and B). The letter alleges that “*the unauthorised use of No. 38 Lennox Street, Portobello, Dublin 8, a shop, for the sale of food and alcoholic beverage for consumption on the premises*” had occurred.

The earlier issues have been resolved as the retail use of the premises is in accordance with the premises’ historic use and in compliance with an earlier temporary use, which reverted to retail on its expiration as office.

It is crucial to note that in addition to the planning definition of retail (which includes the ancillary sale of wine, the Referrer obtained a *Wine Retailer’s On-Licence* issued by the Revenue Commissioners dated 1 October 2022 (see Appendix G).

The Licence permits La Gourmande to exercise and carry on the trade (wine retailers on licence) at No. 38 Lennox Street until 30 September 2023.

**Importantly, Note ‘b’ of the Licence states that “*a retailers On Licence authorises sale by retail of the liquor to which the licence extends for consumption either On or Off premises*”.**

### 1.1.4 Our initial response to the Revised Question

As a town planner with some 34 years’ experience, I am unhappy with Dublin City Council’s broad references in the Summons. For example, there is a distinct difference in planning terms between references to ‘alcohol’ and to ‘wine’ respectively.

Similarly, ‘food’ has many interpretations.

In addition, DCC does not reference the frequency of events.

As noted by Mr Paul Arnold for example in Appendix H (see also Section 1.2 below), only four wine-tasting sessions were held in 2022. Such events are clearly ancillary to the primary use.

There is a material difference between 4 No. and 365 No. such “events/promotions” per annum (to use the Planning Authority Classification).

We invite Dublin City Council in assessing this Reference to draw a distinction between what occurs at Lennox Street Grocer on occasion versus the rather open-ended phraseology of the Requested Question.

1.2 Complementary documentation from the premises’ owner: infrequent, ancillary use Appendix H below set out the following from the noted conservation architect Paul Arnold (R/AI Grade 1) who owns the premises.

Mr Arnold outlines the context and notes *inter alia*:

*“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-liscence.*

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-llicences, normally without the benefit of a Wine Retailers On-liscence. 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-liscence rather than an Off-Licence.
5. The on-liscence 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.”

[Our emphasis.]

### 1.3 A Previous Section 5 Reference adds substance to our Submission

In preparing this Reference we searched An Bord Pleanála's online database. Most references to "wine" refer to "winebars" or where "wine" is in the premises' address (e.g. "Wine Street").

We could find no reference to "wine tasting" in a Section 5 reference.

We did, however, find an earlier Reference of interest, but one where that retail premises had a specific condition precluding the sale of wine.

That does not apply to the subject case.

We append a copy of An Bord Pleanála's (Senior) Inspector's Report in respect of RL3037. Unlike the subject case, that premises had a specific condition precluding the sale of alcohol.

It was a determining factor in the Board's ultimate Decision. (See Appendix I.)

### 1.4 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 1.1.)

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<sup>3</sup> that stop near The Lennox Street Grocer in Portobello, Dublin 8.

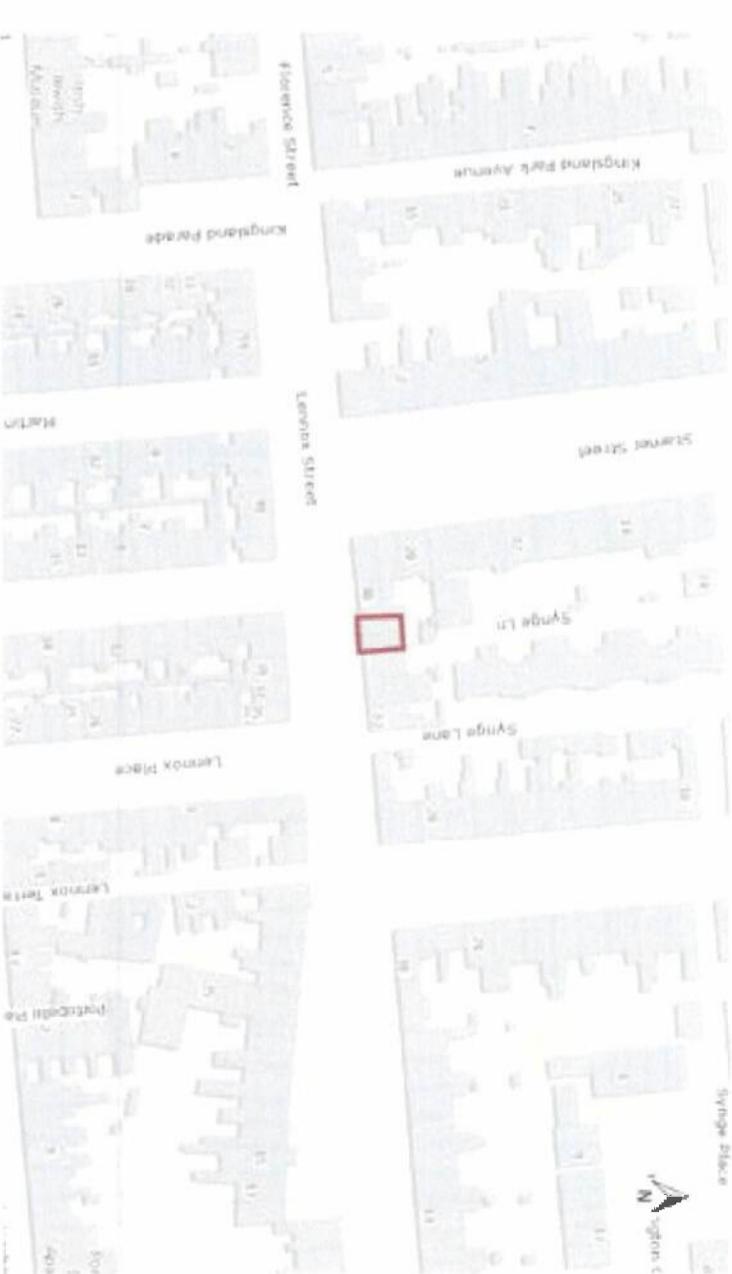


Figure 1.1: Site Location Map. (Source: Myplan.ie, April 2023, annotated by TPA April 2023.)

The premises is abutted by: No. 40 Lennox Street (Wayward Hair Salon) (Figure 1.2); and No. 36 Lennox Street (Portobello Physiotherapy) (Figure 1.3).

No. 34 Lennox Street is occupied by Brindle Coffee & Wine (Figure 1.4).

<sup>3</sup> The following bus routes are the most convenient for accessing the grocer: Bus route 16 (Dublin Airport to Ballinteer) stops at the South Circular Road, which is a short walk from The Lennox Street Grocer. Bus route 9 (Limekiln Avenue to Charlestown) stops at Leonard's Corner, which is a 5-minute walk from the grocer. Bus route 122 (Ashington to Drimnagh) stops at the South Circular Road, which is a short walk

from The Lennox Street Grocer. Bus route 83 (Kimmage to St. James's Hospital) stops at Leonard's Corner, which is a 5-minute walk from the grocer.

As illustrated by the interior images Figures 1.6 to 1.11, the scale of wine sales in the Lennox Street Grocer in floorspace terms is ancillary to the balance of the retail unit.



Figure 1.2: Wayward Hair Salon, No. 40 Lennox Street, Dublin. (Source: TPA, April 2023.)



Figure 1.3: Portobello Physiotherapy, No. 36 Lennox Street, Dublin. (Source: TPA, April 2023.)



Figure 1.4: 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.

## 1.5 Ethos

"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 Beechlawn 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 "authorises sale by retail of the liquor to which the Licence extends for consumption either On or Off the premises".

[Our emphasis. See Appendix G.]

*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.

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.)

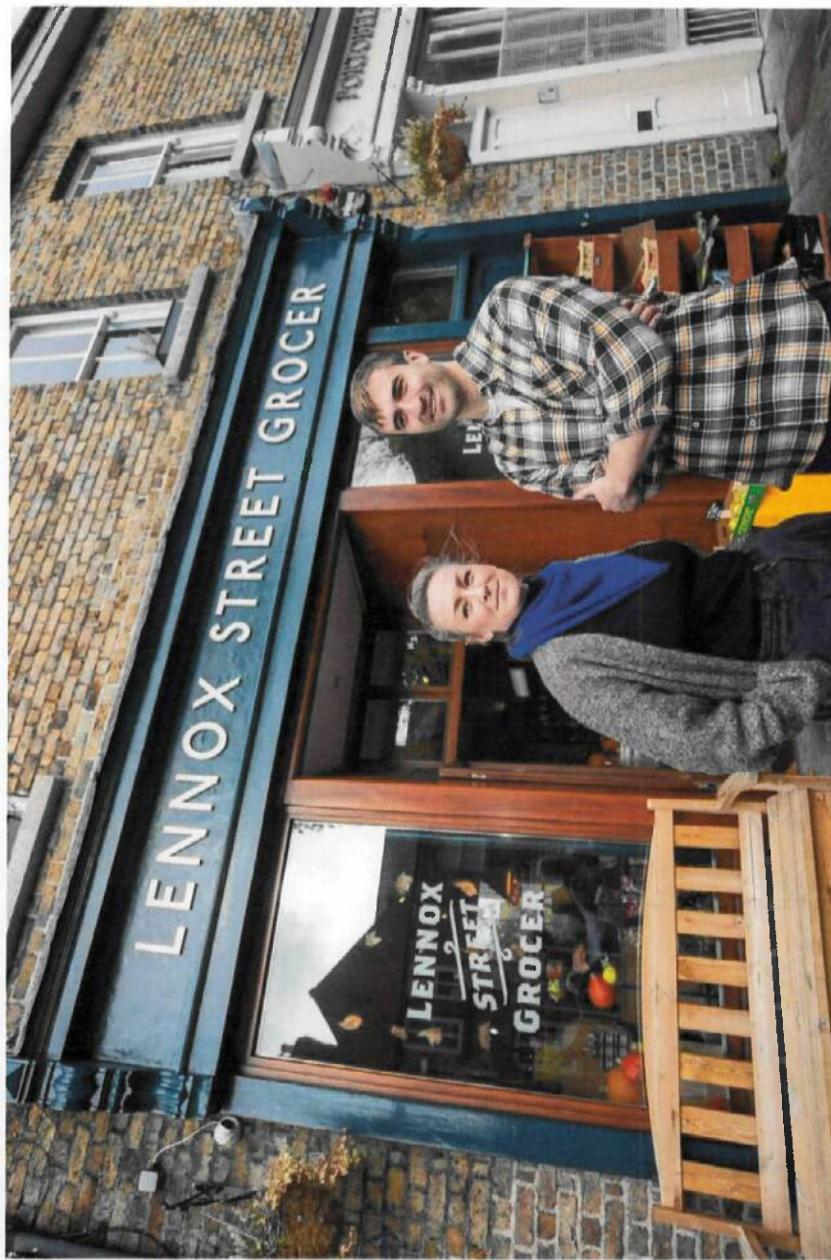


Figure 1.5: Christopher and Claire Arnold at Lennox Street Grocer in Portobello.  
(Source: Tom Honan/*The Irish Times*, November 2022.)

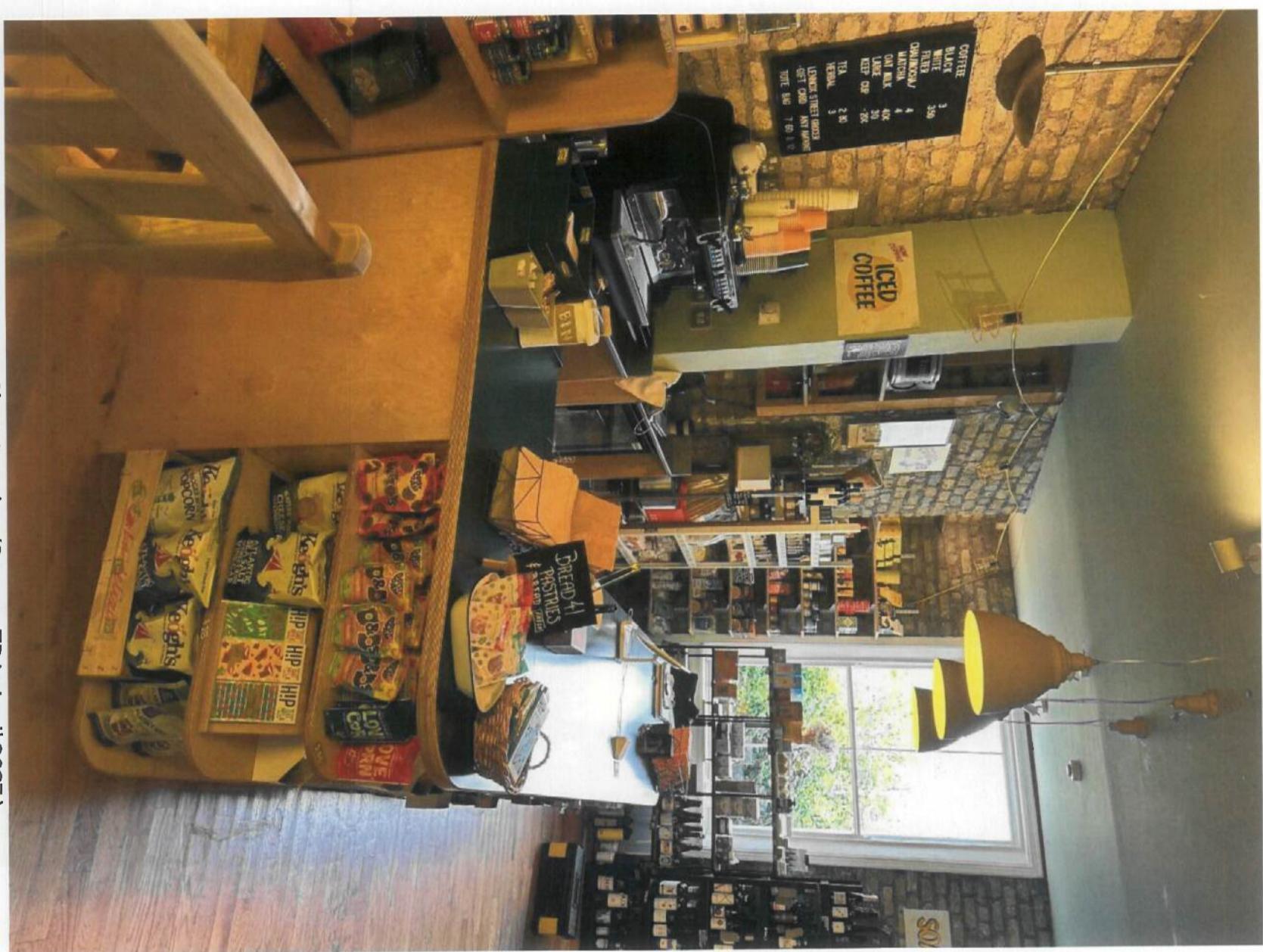


Figure 1.6: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



Figure 1.7: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)

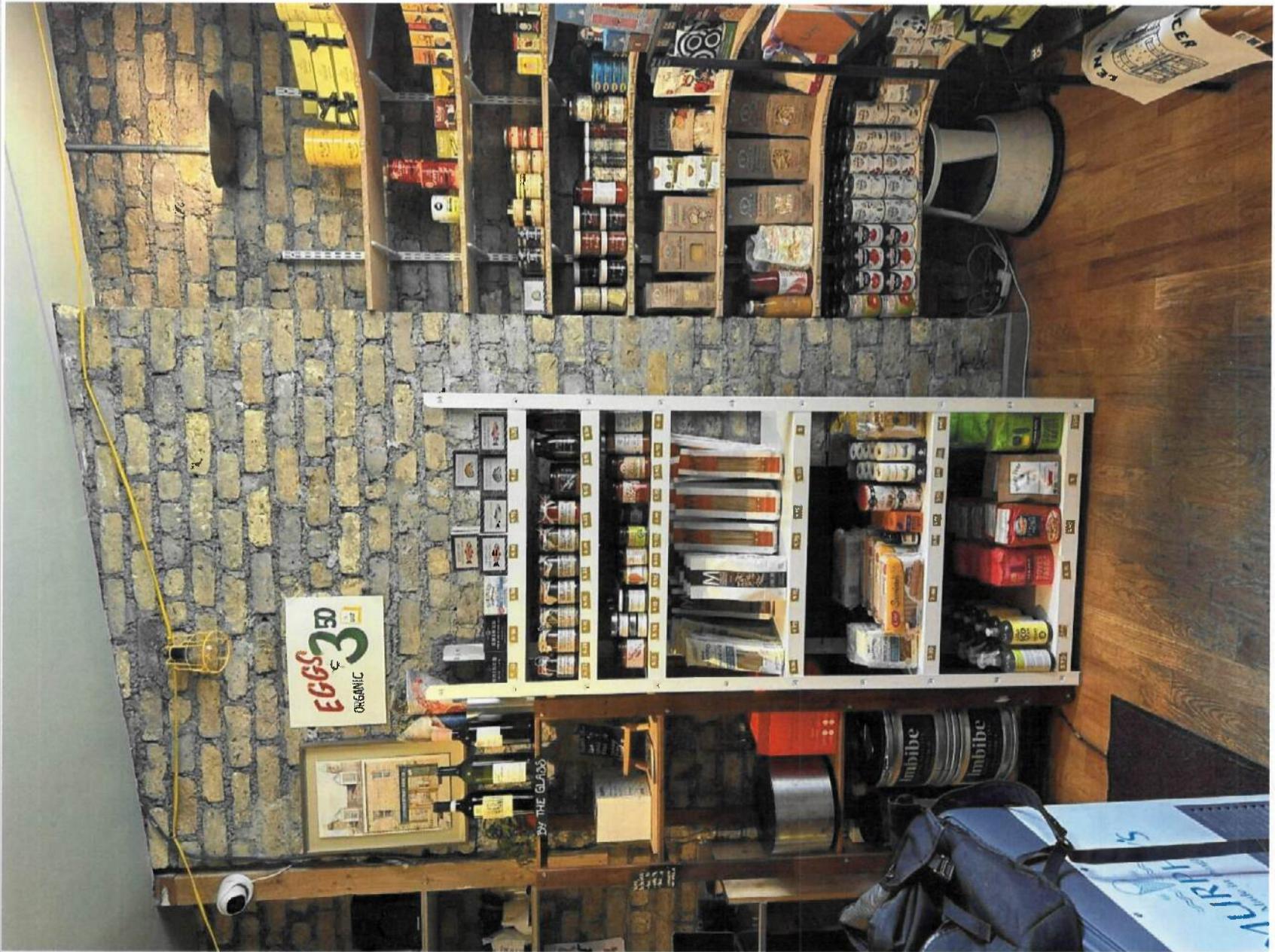


Figure 1.8: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)

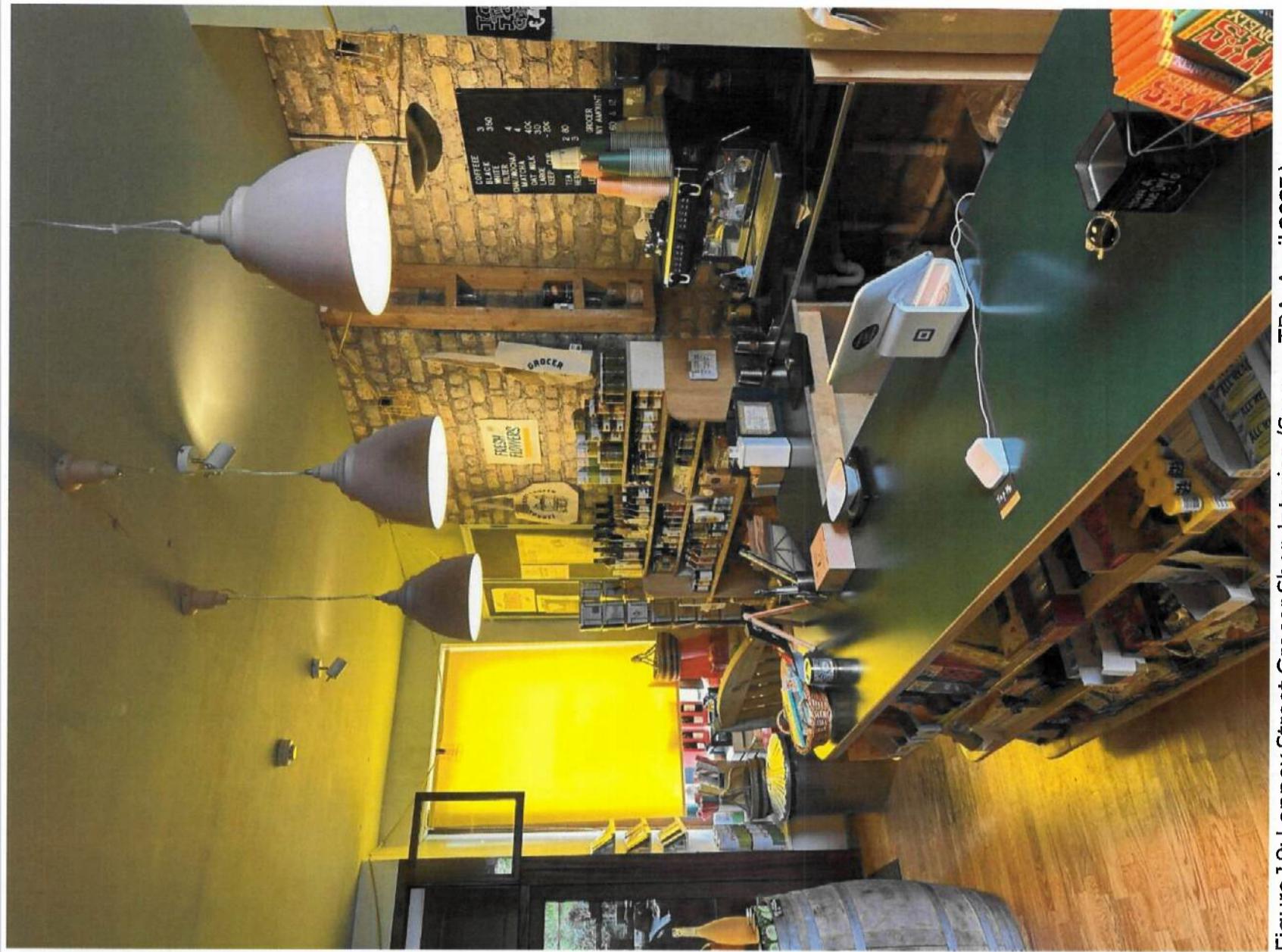


Figure 1.9: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)



Figure 1.10: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)

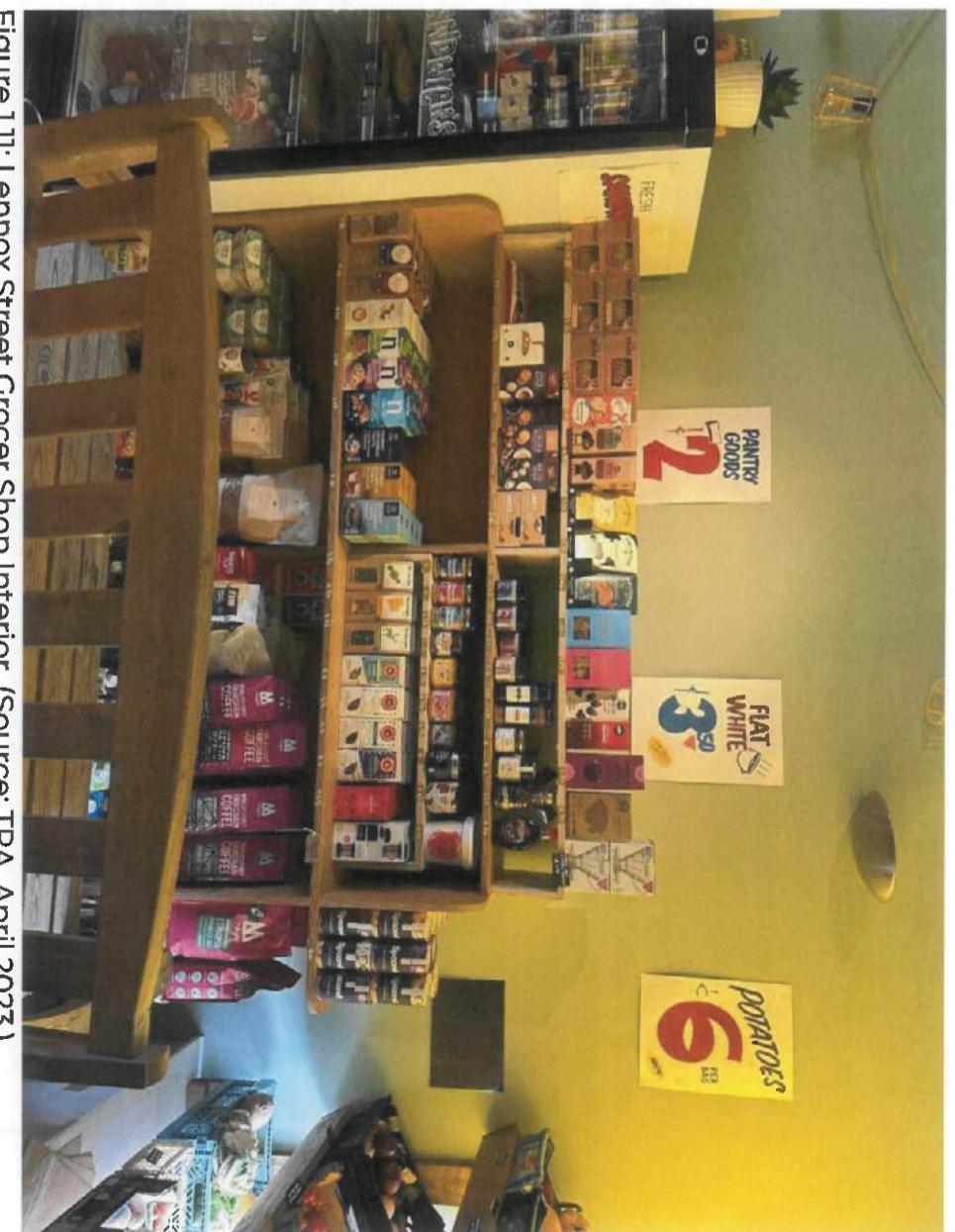


Figure 1.11: Lennox Street Grocer Shop Interior. (Source: TPA, April 2023.)

The gross floor area of the retail element confirms the premises as a small shop.

## 2.0 PLANNING HISTORY – AN AUTHORISED RETAIL UNIT

### 2.1 Planning History relating to 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	<b>Grant Permission 03/05/2000</b>	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.

**Table 5:1: Table outlining relevant planning history relating to the subject site.**

Importantly, 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 (shop)/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.

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

Section 4.0 below sets out the Planning definitions of "retail". It includes the sale of wine.

## 3.0 LOCAL PLANNING CONTEXT

### 3.1 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)*.

### 3.2 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."*

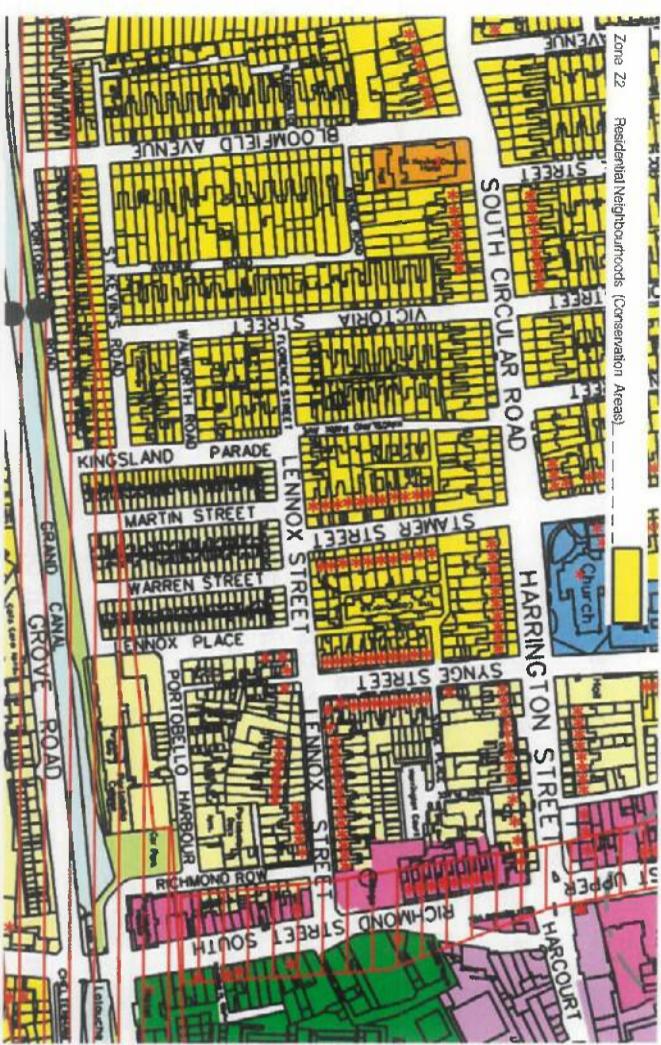


Figure 3.1: Location of Subject Site in the context of Development Plan Zoning Map. (Source: *Dublin City Development Plan 2022-2028, Volume 3, Mapset E*)

<sup>4</sup> A permissible use is one which is generally acceptable in principle in the relevant zone, but which is subject to normal planning consideration, including policies and objectives outlined in the Plan.

<sup>5</sup> An 'an open for consideration' use is one which may be permitted where the planning authority is satisfied that the proposed development would be compatible with the overall policies and objectives for the zone, would not have undesirable effects on the permitted uses, and would otherwise be consistent with the proper planning and sustainable development of the area".

### Z2 – Permissible Uses<sup>4</sup>

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 Uses<sup>5</sup>

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.]

### 3.3 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."

## 4.0 THE LEGISLATIVE CONTEXT

### 4.1 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".

**4.1.1 Retail facilitates the sale of wine – "wine" is defined with reference to a wine retailers off-licence**

In one An Bord Pleanala case (Reg. Ref. RL29NR13037), 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;
  - (j) for 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 (only) four wine tasting sessions in 2022.

Mr Arnold notes it has had six since it opened.  
In our professional town planning opinion based on interpretation, the sale of wine is ancillary.



#### 4.1.2 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 247"

#### 4.1.3 Promotions

Whereas the consolidated *Planning and Development Act 2000* (as amended) makes 10 No. references to "promotion", unlike events, it is not defined as a noun.



## 5.0 THE BASIS FOR THIS SECTION 5 REFERRAL

### 5.1 The Key Question

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

*"Whether the hosting of events or promotions whereby food and alcoholic beverage is consumed for a fee 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)?"*

The wine tasting events act as social and recreational opportunity for friends to gather in a lively and eccentric street of Dublin City.

Being a business established during Covid, this was beneficial in providing to local residents an outlet where they could gather and socialise with friends (as guidance allowed).

As outlined previously, 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 that such infrequency is clearly ancillary. The Lennox Street Grocer has a goal of hosting one event per month, following the resolution / regularisation of this enforcement case.

Therefore, in our professional town planning opinion, we question whether or whether not the provision of 'Wine Tasting' events by Our Client (as described) constitutes exempted development?

### 5.2 Not a Material Change of Use

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".

### 5.3 Why does the Summons purport activities in excess of what occurred?

With respect, we do not understand DCC's insistence on reference to "alcohol". The Lennox Street Grocer does not sell beer or spirits. It sells wine within the definition of planning and its Revenue Licence.

In my professional town planning opinion, the planning unit is a shop permitted to sell wine.

As noted by Mr Arnold above:

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."*

[Our emphasis.]



## 6.0 DOCUMENTS SUBMITTED AS PART OF THIS APPLICATION

### *Request for Declaration fee*

- An EFT to Dublin City Council in the amount of €80.00 representing the declaration of exempted development fee payable in accordance with the provisions of Schedule 10 of the *Planning and Development Regulations 2001*. See Appendix J for proof of EFT payment.

The fee amount is as follows:

Category of Fee	Amount
Request for a declaration under section 5 of the Acts	€80.00

### *Declaration of Development & Exempted Development Form*

- A duly completed current *Dublin City Council Declaration of Development & Exempted Development Form*, dated Friday, 28 April 2023.

### *Site Location Map*

- 2 No. copies of site location map with site clearly outlined in red.

### *Section 5 Referral*

- A copy of this *Section 5 Referral*, prepared by Tom Phillips + Associates, dated Friday, 28 April 2023.

## 7.0 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 Dublin City Council.

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

Yours faithfully



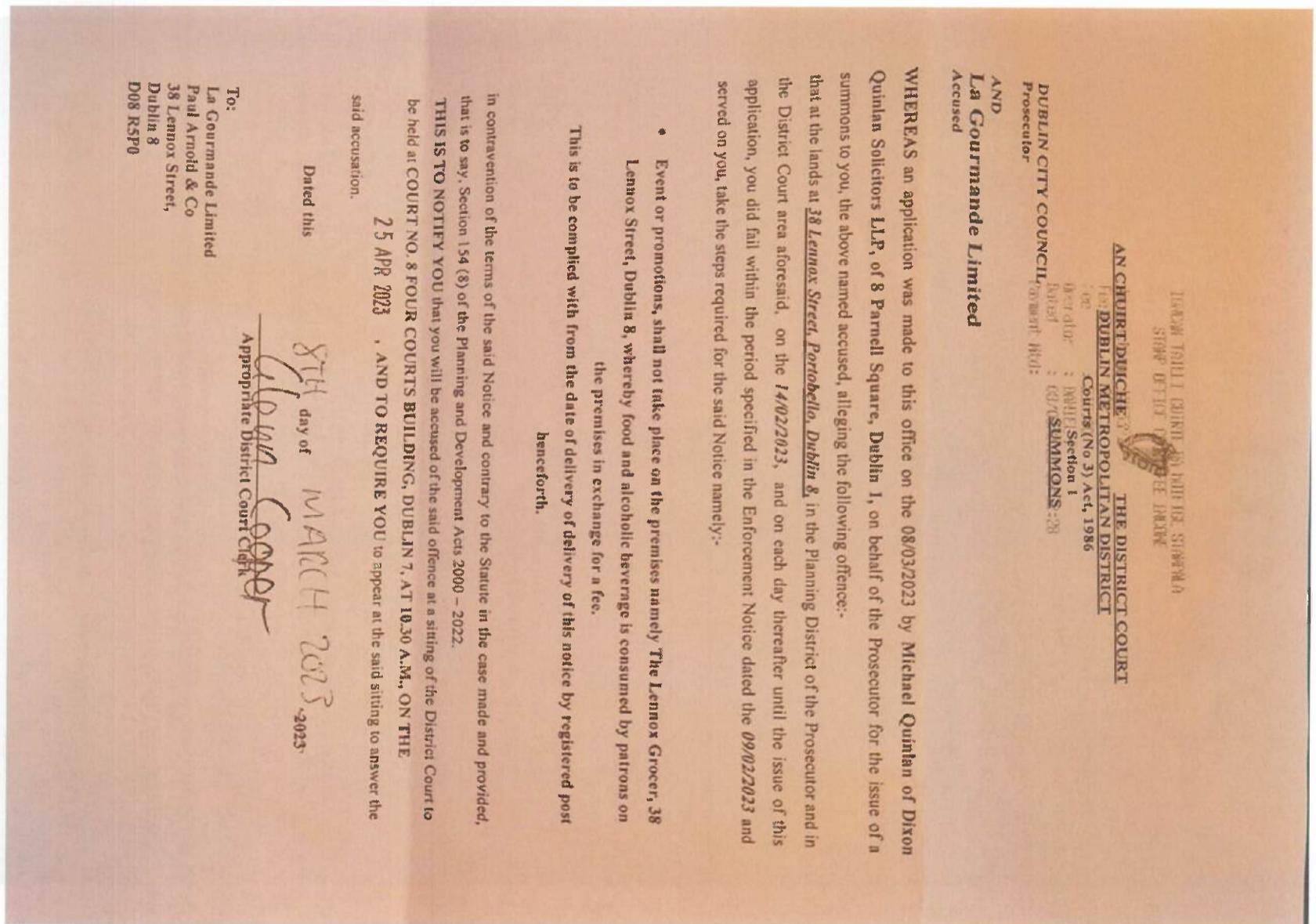
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Tom Phillips  
Managing Director  
Tom Phillips + Associates

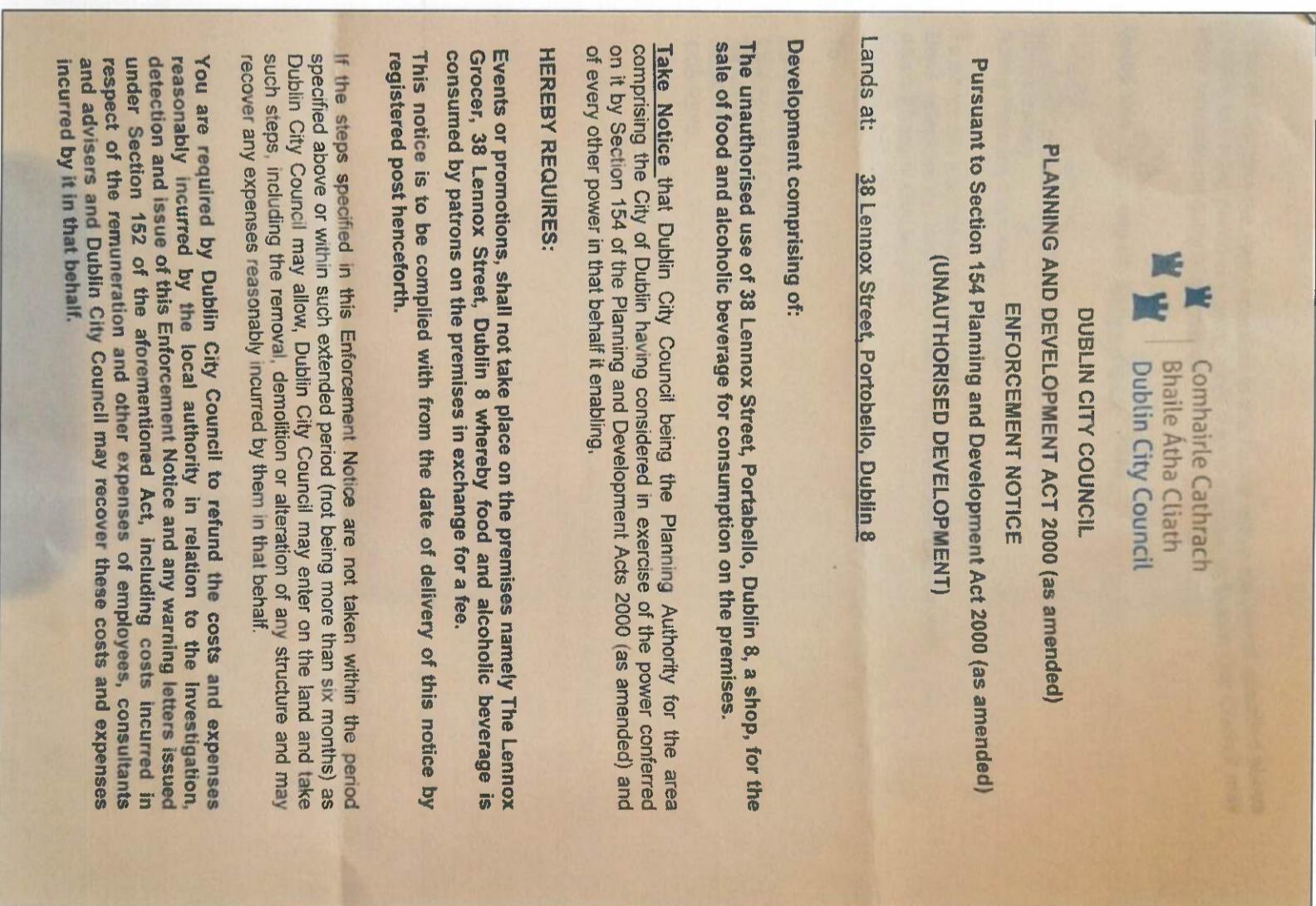
Encl.

CC Planning Enforcement Dublin City Council (planningenforcement@dublincity.ie)

## APPENDIX A – THE DISTRICT COURT SUMMONS, DATED 8 MARCH 2023.

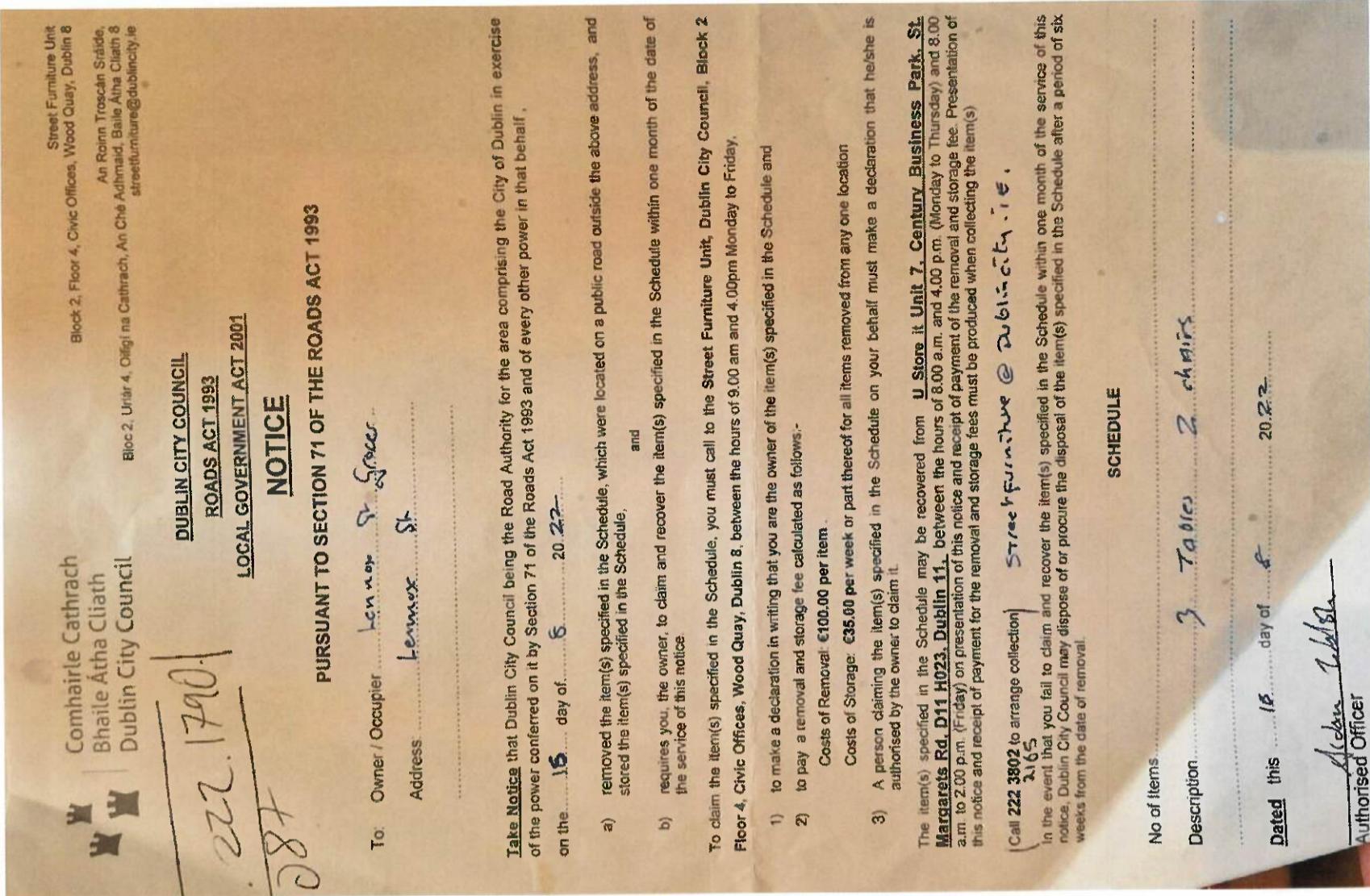
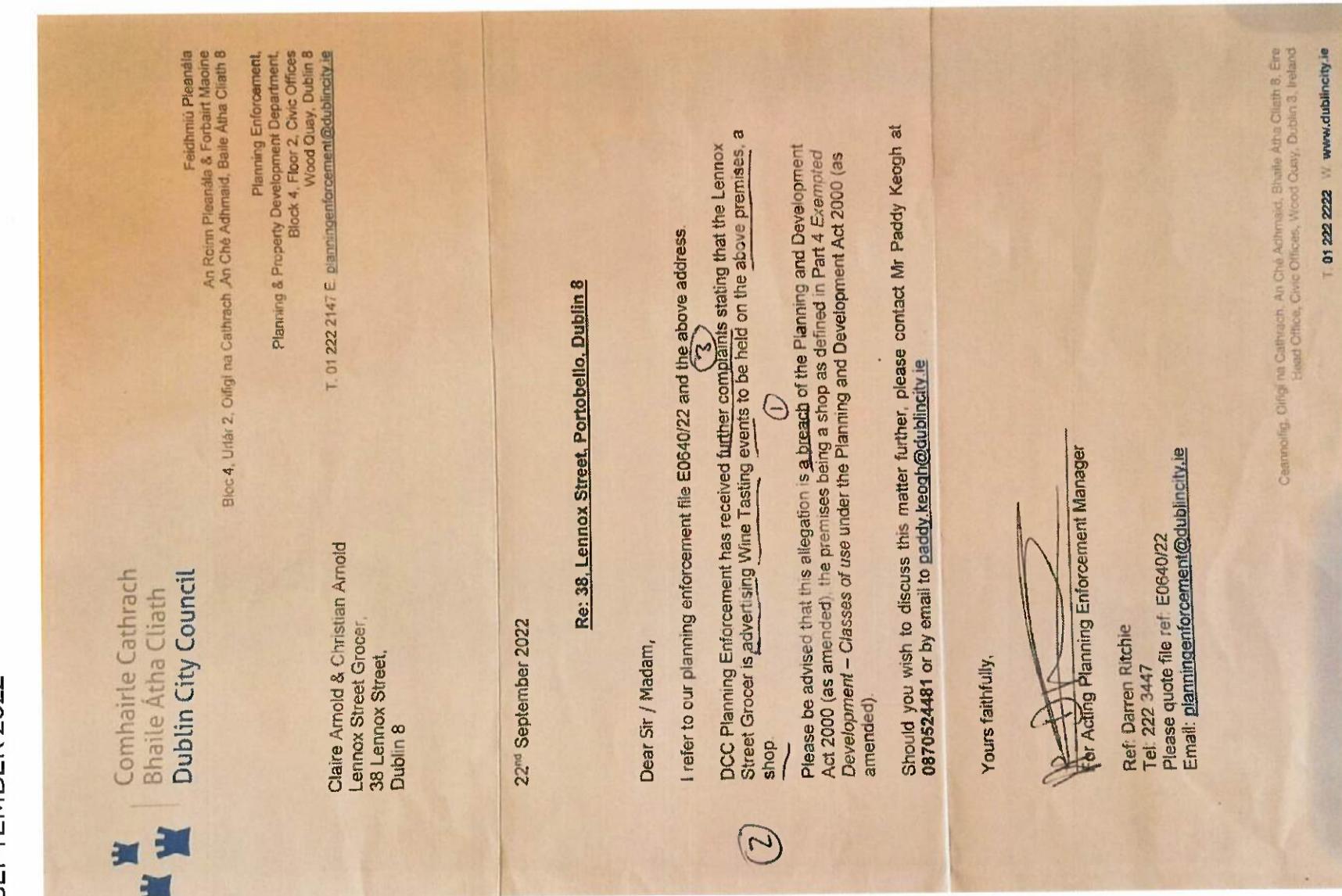


## APPENDIX B – ENFORCEMENT LETTER FROM DUBLIN CITY COUNCIL DATED FEBRUARY 2023

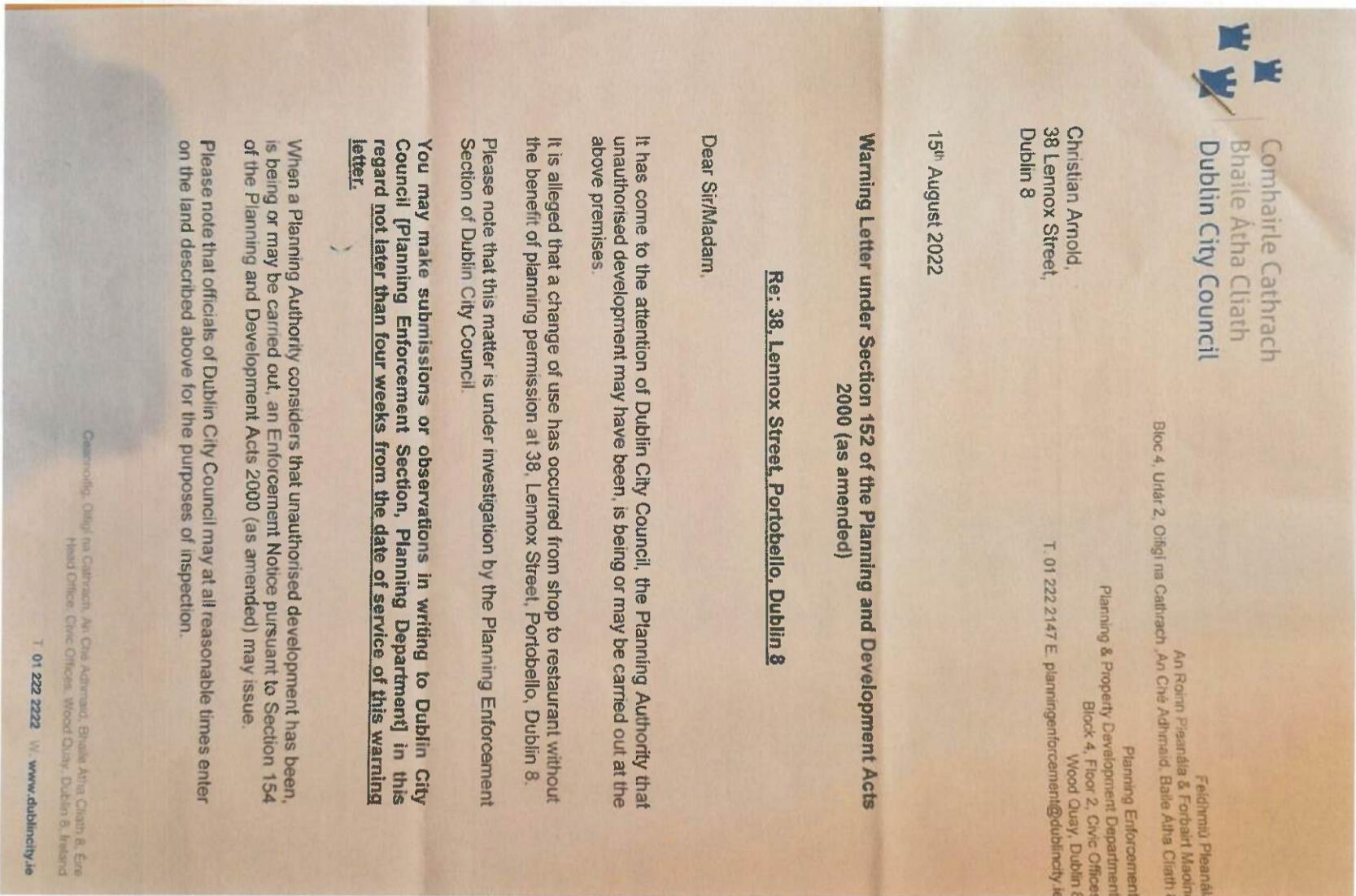


APPENDIX C - WARNING LETTER FROM DUBLIN CITY COUNCIL DATED 22 SEPTEMBER 2022

APPENDIX D - LETTER FROM DUBLIN CITY COUNCIL DATED 18 AUGUST 2022



**APPENDIX E – WARNING LETTER FROM DUBLIN CITY COUNCIL DATED 15 AUGUST 2022.**



Comhairle Cathrach  
Bhaile Átha Cliath  
Dublin City Council

An Roinn Pleanála & Forbairt Maonála  
Féilimíodh Pleanála  
Bloc 4, Uirlár 2, Oifigí na Cathrach, An Chéad Aithneadh, Baile Átha Cliath 8

Christian Arnold,  
38 Lennox Street,  
Dublin 8

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

15<sup>th</sup> August 2022

**Warning Letter under Section 152 of the Planning and Development Acts 2000 (as amended)**

**Re: 38, Lennox Street, Portobello, Dublin 8**

Dear Sir/Madam,

It has come to the attention of Dublin City Council, the Planning Authority that unauthorised development may have been, is being or may be carried out at the above premises.

It is alleged that a change of use has occurred from shop to restaurant without the benefit of planning permission at 38, Lennox Street, Portobello, Dublin 8.

Please note that this matter is under investigation by the Planning Enforcement Section of Dublin City Council.

You may make submissions or observations in writing to Dublin City Council [Planning Enforcement Section, Planning Department] in this regard not later than four weeks from the date of service of this warning letter.

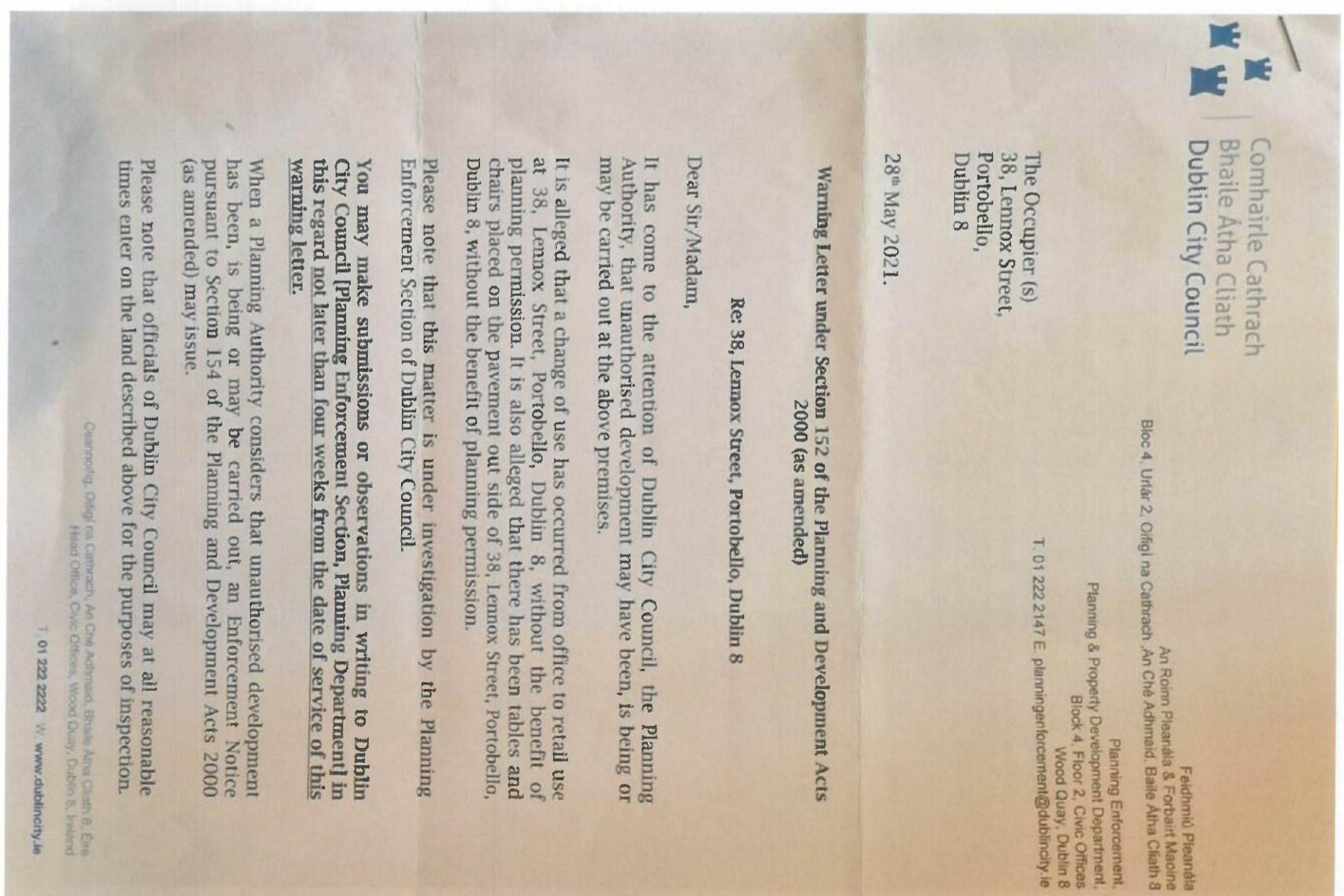
When a Planning Authority considers that unauthorised development has been, is being or may be carried out, an Enforcement Notice pursuant to Section 154 of the Planning and Development Acts 2000 (as amended) may issue.

Please note that officials of Dublin City Council may at all reasonable times enter on the land described above for the purposes of inspection.

Cearnogla, Oifigí na Cathrach, Áitiú Chéad Aithneadh, Bhaile Átha Cliath 8, Éire  
Head Office, Civic Offices, Wood Quay, Dublin 8, Ireland

T. 01 222 2222 W. [www.dublincity.ie](http://www.dublincity.ie)

**APPENDIX F - WARNING LETTER FROM DUBLIN CITY COUNCIL DATED 28 MAY 2021**



Comhairle Cathrach  
Bhaile Átha Cliath  
Dublin City Council

An Roinn Pleanála & Forbairt Maonála  
Féilimíodh Pleanála  
Bloc 4, Uirlár 2, Oifigí na Cathrach, An Chéad Aithneadh, Baile Átha Cliath 8

The Occupier (s)  
38, Lennox Street,  
Portobello,  
Dublin 8

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

28<sup>th</sup> May 2021.

**Warning Letter under Section 152 of the Planning and Development Acts 2000 (as amended)**

**Re: 38, Lennox Street, Portobello, Dublin 8**

Dear Sir/Madam,

It has come to the attention of Dublin City Council, the Planning Authority, that unauthorised development may have been, is being or may be carried out at the above premises.

It is alleged that a change of use has occurred from office to retail use at 38, Lennox Street, Portobello, Dublin 8, without the benefit of planning permission. It is also alleged that there has been tables and chairs placed on the pavement out side of 38, Lennox Street, Portobello, Dublin 8, without the benefit of planning permission.

Please note that this matter is under investigation by the Planning Enforcement Section of Dublin City Council.

You may make submissions or observations in writing to Dublin City Council [Planning Enforcement Section, Planning Department] in this regard not later than four weeks from the date of service of this warning letter.

When a Planning Authority considers that unauthorised development has been, is being or may be carried out, an Enforcement Notice pursuant to Section 154 of the Planning and Development Acts 2000 (as amended) may issue.

Please note that officials of Dublin City Council may at all reasonable times enter on the land described above for the purposes of inspection.

Cearnogla, Oifigí na Cathrach, Áitiú Chéad Aithneadh, Bhaile Átha Cliath 8, Éire  
Head Office, Civic Offices, Wood Quay, Dublin 8, Ireland

T. 01 222 2222 W. [www.dublincity.ie](http://www.dublincity.ie)

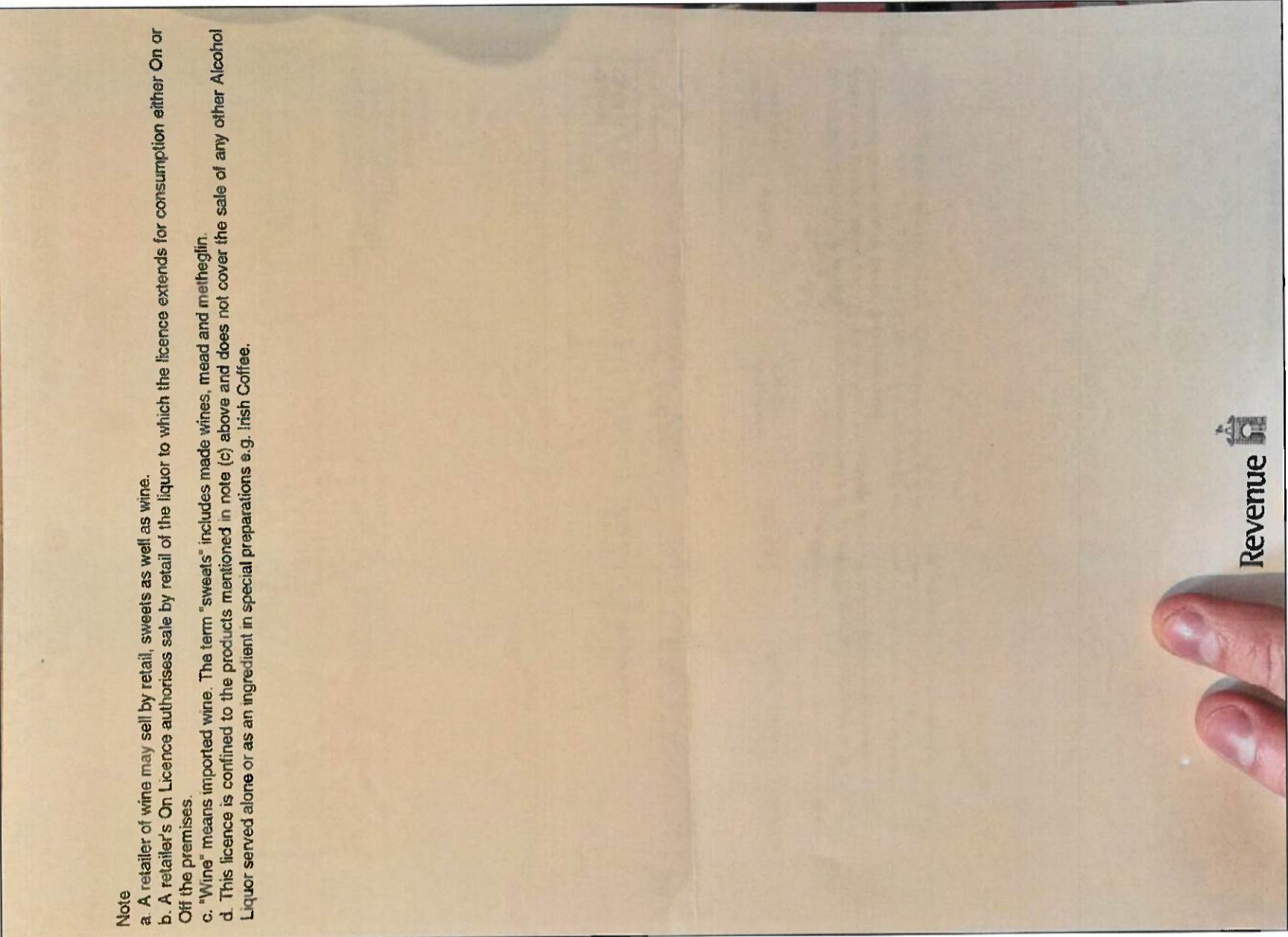


APPENDIX G - WINE RETAILER'S ON LICENCE ISSUED BY THE REVENUE  
COMMISSIONERS DATED 1 OCTOBER 2022.

LA GOURMANDE NOMINÉE CLAIRE ARNOLD LENOX STREET GROCER 38 LENNOX STREET PORTOBELLO DUBLIN 8	District Court D.M.D. Licensing Office	Carrolls 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



**APPENDIX H – NOTE FROM CONSERVATION ARCHITECT PAUL ARNOLD (RIA)  
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 D08E6PO**

**Section 5 Declaration Application**

**The Lennox Street Grocer, 38 Lennox Street, Portobello, Dublin D08E6PO**

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-liscence.

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-liscence: 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-liscence rather than an Off-Liscence.

5. The on-liscence also allows the sale of wine for consumption on the premises on a regular basis. In this regard the distinction between a cafe 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

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.

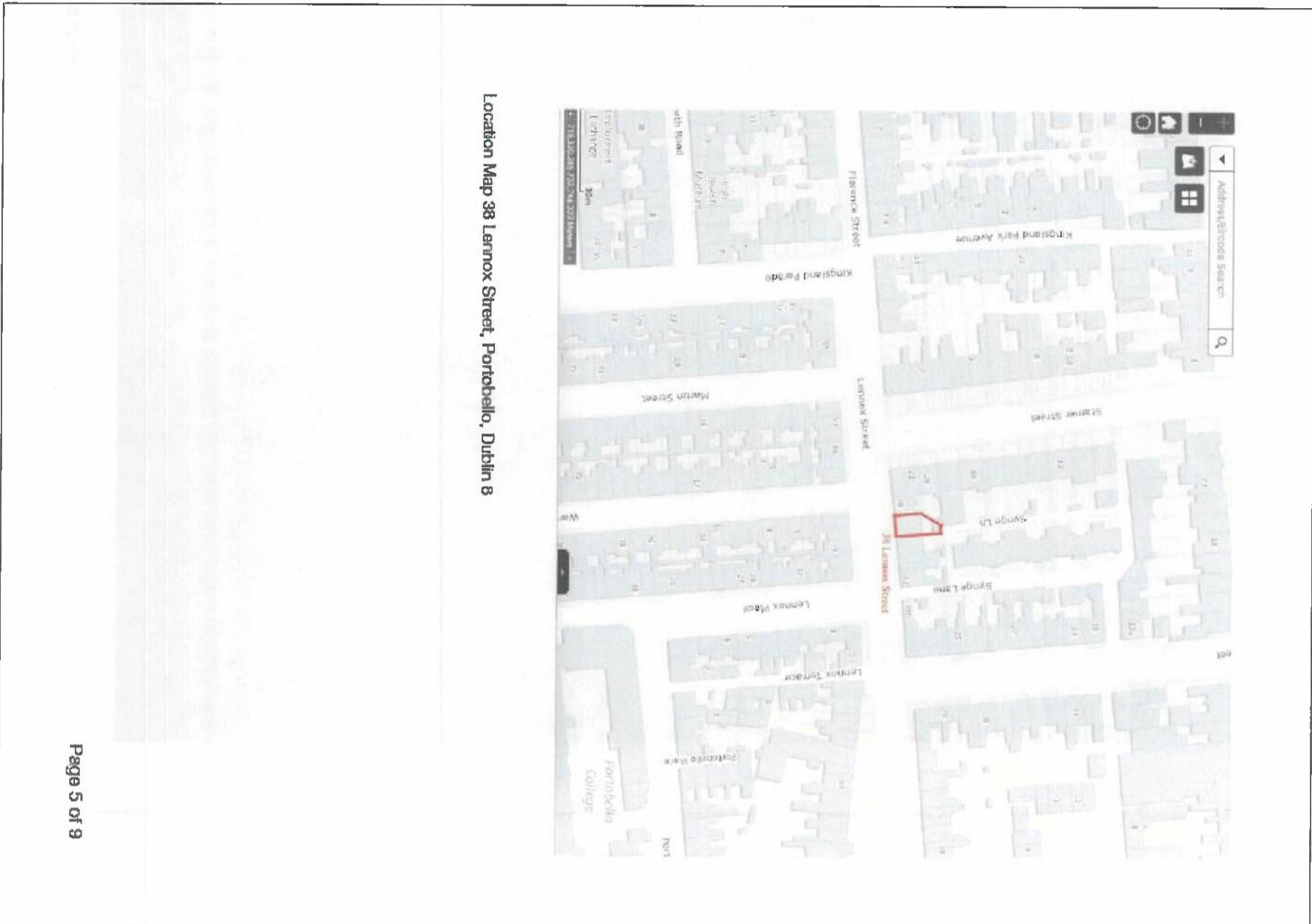
Dublin City Council will actively engage with property owners and other stakeholders at a national level to investigate other alternative measures in addition to the Living City Initiative to expedite bringing upper floors into residential use, and will be actioned by the City Recovery Task Force and 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

**Revenue**  
Cain agus Custaim, na hÉireann  
Irish Tax and Customs

Home → Companies and charities → Excise and licences

## 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:

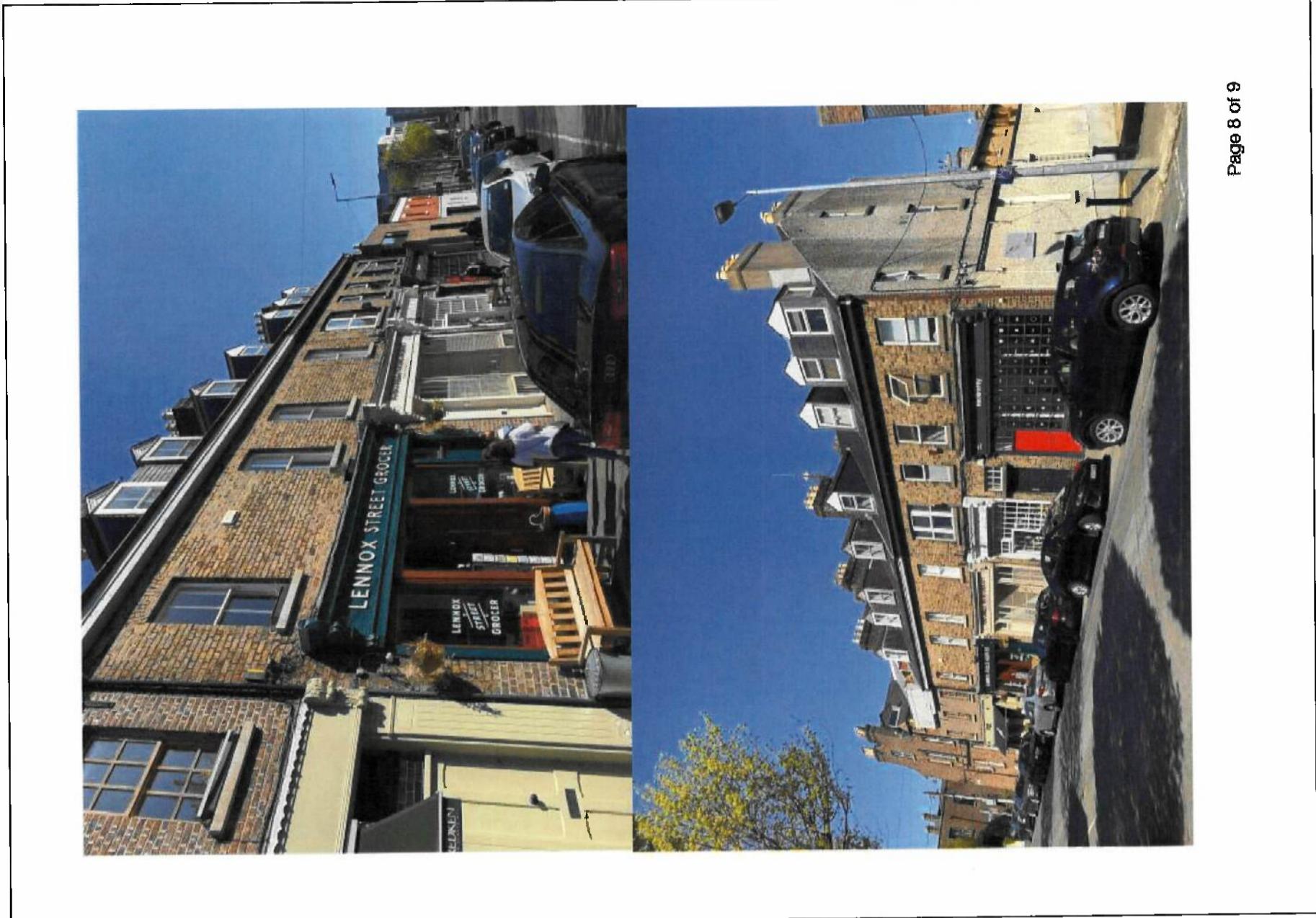
The [Waiver of Excise Duty on on-trade liquor licences](#) will not be extended to renewals in 2022.

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.

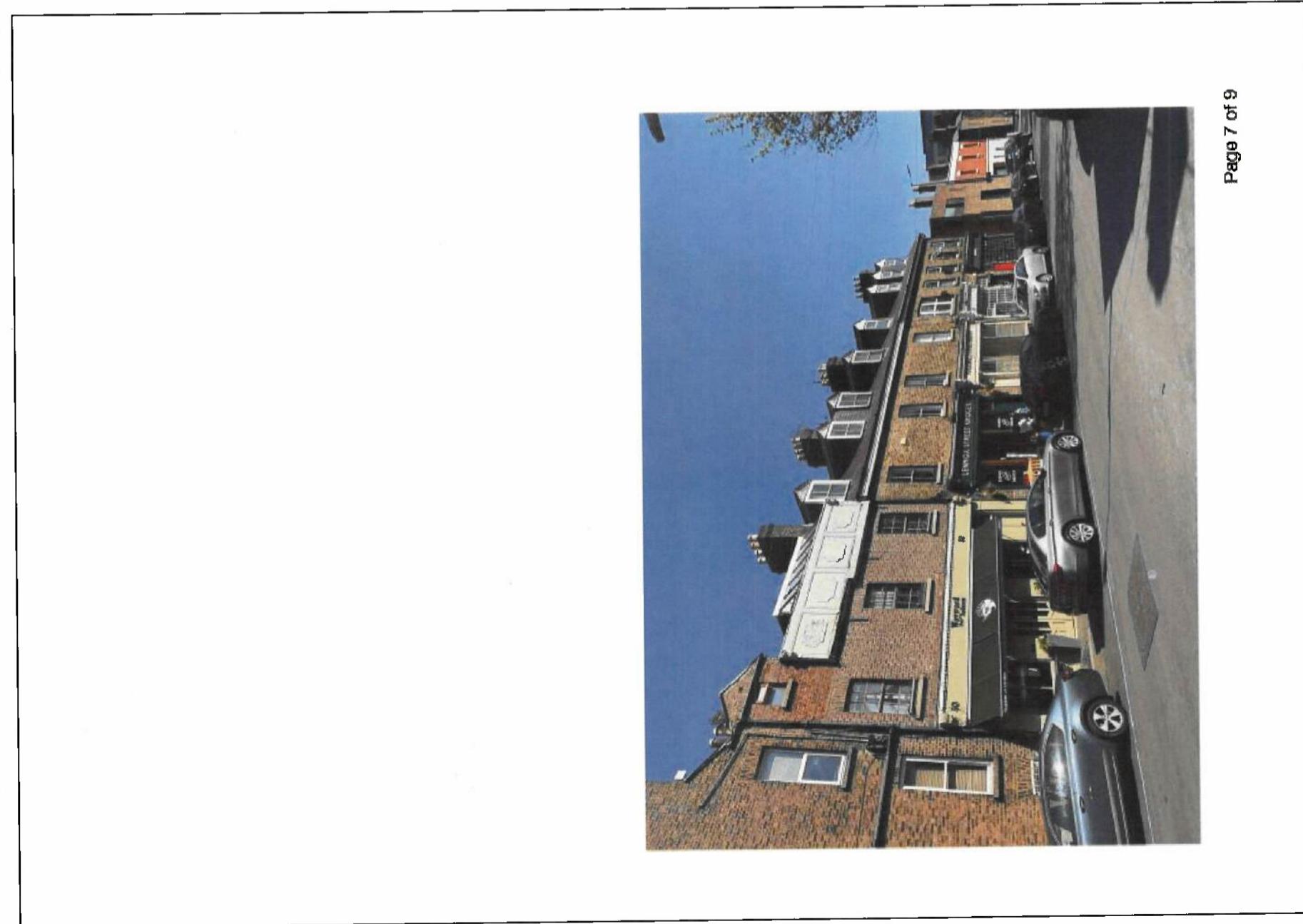
A Refreshment House is defined as:

'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.



Page 8 of 9

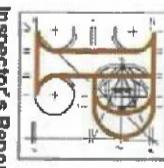


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## APPENDIX I – ABP REG. REF. RL3037 INSPECTORS' REPORT.



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.

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<sup>th</sup> October 2012

**Appendices:**

Key Map and Photographs

RL29N.13037

1

An Bord Pleanála

**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.

**1.3 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. 4B/3/06 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 R210 of the Dublin City Development Plan 2011-2017 which seeks "to prohibit the further expansion of off-licences and pari-mutuel outlets 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-licences uses which would be contrary to Policy R210, 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'.

RL.29N.13037

An Bord Pleanála

**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.

RL.29N.13037

An Bord Pleanála



"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 referer 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 Referer 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 Referer'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 referer 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-licences. 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 referer 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 Referer's view that the condition attached to the grant of

RL29N.R303/7

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An Bord Pleanála

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 Referer'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 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 or 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 –

RL29N.R303/7

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An Bord Pleanála

- (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,
- (e) 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))
- (f) for hair dressing,
- (g) for the display of goods for sale,
- (h) for the hiring out of domestic or personal goods or articles,
- (i) as a launderette or dry cleaners,
- (j) 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 Referential Question

#### 6.1.1 The referential 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?'*

RL.29N.r13037

An Bord Pleanála

RL.29N.r13037

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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. PL.29N.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. PL.29N.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:
- (i) The premises shall not be used for the sale of alcohol.(my emphasis)
  - (ii) 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 therin.
- 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 PL.239124 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
- An Bord Pleanála



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 considered 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, 2<sup>nd</sup> 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 7<sup>th</sup> 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 PL.239124 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

30<sup>th</sup> October 2012

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## APPENDIX J – PROOF OF EFT PAYMENT DATED 28 APRIL 2023.

22-0-2221, 1.17

AIB

Payment Details

Being processed

Amount to send: **Eur 80.00**

AIB settlement fee Eur 0.00

From: TOM PHILLIPS & ASS  
E564543315450602158

To: DCC  
Bank: 320555014597  
AIBKEED0000  
Ireland

Message:  
DCC re Lennox St

Re-type message:  
Section 5 Referral

Additional information for AIB  
No. 33 Lennox Street Dublin 3 D03 H2E0

When do you want to send?  
28/04/2023

Fees:  
AIB Fees: 2.00% of  
Order fees paid by Payee

Normally, payment details are sent on the same business day. In exceptional cases it may take up to 10 days.



**Figure 1 – The Lennox Grocer (No. 38 Lennox Street, Dublin 8, D08 R5P0) Site Location Map with subject site outlined in Red. (Source: Myplan.ie, April 2023, cropped and annotated by TPA.)**





**Figure 2 – The Lennox Grocer (No. 38 Lennox Street, Dublin 8, D08 R5P0) Site Location Map with subject site outlined in Red. (Source: Myplan.ie, April 2023, cropped and annotated by TPA.)**

