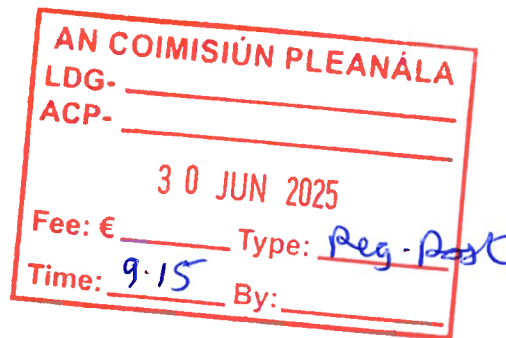


Upper Bridge Street
Killorglin
Co. Kerry
V93 V3WF

26th June 2025



The Secretary
An Coimisiún Pleanála
64 Marlborough Street
Dublin 1

Reference: ABP-321791-25
Planning Authority Reference Number: EX1313

Referral under Section 5(3)(a) of the Planning and Development Act 2000 (as amended)
Application for a Section 5 Declaration in relation to the premises known as 'Sheila Buns', Upper
Bridge Street, Killorglin, Co. Kerry V93 PN34

Dear Sir/Madam,

In regard to the above mentioned case reference, please find enclosed observations in respect of the submission received from Frank Coffey Consulting Engineers on behalf of Tom Crowley.

We feel that many of the issues raised by Mr. Coffey in his submission are not relevant to a request for a Section 5 determination, and it is not appropriate to re-litigate a Section 160 enforcement action in this context. We note that it is not a role for the planning authority to decide on issues of law, or to interpret the intention of a court beyond the scope of the court's declaration of unauthorised development. Many of the points raised seem personal rather than addressing issues of planning and development. However, for completeness and in the event that anything might be considered relevant, we will also address these issues below.

The status of this site from June 26th 2024 is that the developments carried out by Mr. Crowley between May 2023 and June 2024 are unauthorised developments, and that the use of the entire premises since August 2023 constituted a material change of use as a result of intensification and is therefore an unauthorised use. We refer again to the order of the Circuit Court dated June 26th 2024, figure 4 of our referral submission dated January 31st 2025. These unauthorised

developments, as outlined in our submission and litigated extensively in the court proceedings, include the following:

- Change of use of rear yard to a beer garden
- Construction of a beer garden in the rear yard, including an extension of the hard concrete surfaced area of approximately 50 square metres, electrical wiring the full length of the yard, new gravel surface, new lighting including light fixtures attached to walls and string lighting across the width of the yard, an outdoor speaker system, construction of a new bar serving area, demolition of an outbuilding to extend the footprint of the beer garden and open up access to main building, construction of a steel fabricated covered structure of approximately 36.6 square metres, demolition of an elevated platform and construction of a hard surface concrete area for use as a stage.
- Construction of an extension to an outbuilding and change of use of same to a keg store
- Change of use of side corridor from an access passage to rear of premises to a public area and a part of the main bar
- Demolition of part of the side wall of the main building to integrate the side corridor into the main bar area
- Construction of a wooden partition with window and doorway access to side corridor to create new smoking area
- A material change of use of the whole premises as a result of intensification

We note that this judgement was not appealed, and that the court awarded us liberty to apply should we need to clarify any elements of the judgement at a future date. We assume that these facts are not in dispute, however to address any possible misunderstandings, in point (ii) of Mr. Coffey's submission, he states *'notwithstanding that the use of the yard as a beer garden and music venue required was deemed to be "intensification of use"'* (sic); we would like to clarify that the use of the entire premises was deemed to be a material change of use due to intensification. The court also formed the opinion that the Beer Garden as constructed by Mr. Crowley between May 2023 and December 2023 was a structure capable of enforcement, and even if it were not, it was comprised of structures which were capable of enforcement. We refer to Figure 7 of our referral submission dated January 31st 2025 to show the new Beer Garden structure, and structures, built in 2023. The structure that is the Beer Garden, or the individual structures themselves, as outlined in more detail in the preceding paragraph, are unauthorised development.

This is a request to the authority for a Section 5 determination, and not an unauthorised development investigation. Of concern to us is the question of whether the use of the rear of the premises since the date of August 13th 2024 has changed, whether this change is development, and if so, whether it is exempted development. The premises is now (June 2025) either closed, or not opening regularly – it has shown that it can open for occasions at short notice, so our request is still a reasonable one; should the premises continue to operate using the rear yard in the manner in which it did between August 13th and September 22nd 2024, and on dates in November and December 2024, is this development and if so, is it development which is exempt.

It is this usage, and in particular the reopening in December 2024, which has prompted this request for a Section 5 determination. While the premises has not opened since, a precedent has been set for a sporadic reopening on an event by event basis. Mr. Crowley was critical in his legal arguments before the court that we did not pursue a Section 5 determination before pursuing Section 160 enforcement proceedings; we feel that it is entirely reasonable that we now use the statutory process of a Section 5 determination to ask the question of whether new development requiring planning permission has occurred, particularly as he has shown a willingness to open sporadically at peak times, and is yet to bring forward an application to retain his unauthorised developments.

As stated in our previous submission, Mr. Crowley appears to have made a public announcement via social media that the unauthorised beer garden was to close on August 13th. After this date the public house continued to operate, making use of the rear yard in a manner which appeared to us to be very similar to that of a beer garden, but with the addition of four signs referring to the rear yard as a 'smoking area'. Please refer to figures 5, 6 and 7 of our referral submission dated January 31st 2025.

It is incorrect to state, as Mr. Coffey has in point (i) of his submission, that *'The bar is now closed and has been since 13th August 2024 and no development has taken place since – nor has the back yard been used for any purpose'*

We assume that this fact is not in dispute, and that Mr. Coffey might just not be aware, but the public house, including the rear yard, was open to the public from August 13th until September 22nd 2024, and again for a number of days in December 2024. It also opened to the public for a ticket only event on November 1st 2024. It is this use of the premises which is of concern to this request for a Section 5 determination.

Our referral submission of January 31st 2025 includes a photograph dated August 25th 2024 and showing patrons sitting at an outdoor bench at the rear of the 'Rear Yard/Beer Garden/Smoking Area' consuming alcohol (Figure 7). Lest there be any confusion about whether or not the premises has been operating in the period after August 13th 2024, we also include with this submission photographs from September 8th 2024 showing use of the rear yard (Figure 1), a social media post from September 20th 2024 advertising the musical line-up (Figure 2), a social media post from December 13th 2024 advertising that the premises will be open for a period leading up to Christmas 2024 (Figure 3), and social media posts from December 17th 2024 and December 20th 2024 respectively (Figure 4).

In our opinion there has been no change of use, the rear yard is continuing to operate as a beer garden on the occasions that the public house is operating; calling it by a different name does not in fact change what it is.

We have noted in our referral submission dated January 31st 2025 the tables for seating, stools, decorative lighting, areas to place drinks glasses and bottles, and evidence of groups of people gathering to consume alcohol in this area for several hours at a time, during August and September 2024, and this also occurred in December 2024. We are of the opinion that this is the use of a beer garden, and as such it represents a substantial extension of the footprint of the public house. Again, we refer to precedent from An Bord Pleanála case ABP-304059-19 where the inspector, at paragraph 8.2.2 of his report, defines a distinction between a smoking area and a beer garden.

"However, in light of the assortment of tables, bar stools and other seating areas provided within the 'smoking area', the likelihood that patrons of the premises may opt to consume their drinks within this space (as evidenced by the presence of some discarded items observed during the course of my site inspection e.g. drink mixers), and the referrer's own admission that the space is used as a 'beer garden / smoking area', I would suggest that this roof terrace is used in practice as some combination of 'smoking area' and 'beer garden' and thus the Board should have regard to same in its determination of the referral."

This distinction between smoking area and beer garden is also referred to in case ABP-307112-20, at paragraph 8.3.3 of the inspector's report.

"Given the assortment of tables, bar stools and other seating areas provided within the 'smoking area', the likelihood is that patrons of the premises may consume their drinks within this space. I draw the Boards attention to the decision under ABP-304059-19 within which such a scenario was considered to be development and not to be exempted development. I note the finding of the Inspector that "the smoking area / beer garden would constitute an extension to the internal seating area of the existing public house". I concur with that assessment and find it applicable to the subject premises."

Mr. Coffey states in his conclusion *'The smoking area is after all, an established and permitted usage'*, and at point (ii) his use of the term *'PRE-EXISTED'* (sic) in block capitals in relation to the 'smoking area' suggests he places great emphases on this point. If he is implying that the rear yard has ceased to be used as a beer garden and has now reverted to a previous use of 'Smoking Area', then this should be considered. Should An Coimisiún decide that the use of the rear yard is that of a smoking area ancillary to the use of a public house, and if An Coimisiún is of the belief that there was a previous use of the rear yard as a smoking area, then it was not a permitted use. An examination of the planning history of the site does not show any enacted permissions related to the rear yard. Kerry County Council Planning Reference 93871, which was enacted, allowed for an extension to be constructed to the main building and the creation of the side corridor. Mr. Coffey will be aware that Planning Reference 2277 (ABP-313775-22) which sought and was granted permission for a change of use of the rear of the premises from a rear yard to Beer Garden has not been enacted, and he has not stated that his client wishes to enact it.

We refer An Coimisiún to the case of *Sligo County Council v Martin [2007] IEHC 178*, where it was held that when an unauthorised but immune structure is later replaced with something that looks identical, the new structure becomes capable of enforcement; it is not possible to retain the immune status – immunity from enforcement, once lost, cannot be reclaimed. The clock has been reset on this site; it is not now possible to turn it back. In the case of Mr. Crowley's unauthorised Beer Garden, it is not now possible to somehow revert to a previous unauthorised use, if that is what Mr. Coffey is suggesting. It is a matter for An Coimisiún to decide if it is even possible at this stage to unravel the new 2023 development of the Beer Garden and revert to a previous use, were that use to be a permitted use. The demolition and excavation that occurred in 2023 as part of the building of the new beer garden, and the construction of new structures, renders the rear yard different today than previously, with a different material impact on the site and its neighbours. It could perhaps be possible to revert to the previous authorised use of 'rear yard' while still retaining the unauthorised structures, however the implication of 'rear yard' is that it is private space associated with the residential accommodation of the site, and not an extension of the footprint of the public house. It would be incongruous were a premises to have a smoking area that is over twice the size of the footprint of the actual premises, even if we ignored the facilities available in this area which in our

opinion make it a Beer Garden rather than a 'smoking area'. In this regard, and referenced in our referral submission of January 31st 2025, we note the alternative smoking area available for use by the premises, created in 2023 by the demolition of a wall in the main bar and the expansion of the external passageway, and more appropriately sized in consideration of the footprint of the public house.

Should An Coimisiún form the opinion that a change of use has occurred from a beer garden or from a rear yard to a smoking area, then we would suggest that this is development and that it is not exempted development. It represents a substantial increase in the size of the public house, being an area of approximately 200 square metres, while the main building (prior to unauthorised development) has a footprint of approximately 83 square metres. The total floor space authorised for use as a public house under Kerry County Council Planning Reference 93871 was approximately 50 square metres. An extension of this magnitude in the floor space available for consumption of alcohol on this site has significant and material impacts on the site and on the neighbouring properties.

Should An Coimisiún consider that a change of use has occurred which is development, then we submit that due to the number of unauthorised developments which the new 'smoking area' is sited on and makes use of, and the unauthorised developments in the main building which the 'smoking area' extends and enhances, it cannot avail of any exemptions.

Regarding the other points made, we note that as Mr. Coffey did not attend the court hearings and was not present for the delivery of the judgement, he may not appreciate the detail of the court order.

We do not believe that debate around the court order is relevant to this Section 5 determination; should there be dispute over the meaning or the intention of the court then it is open to either party to return to the court for further clarification, and this is the only appropriate way to address this issue. We note the order of the court granting us liberty to apply in this regard. However, for the benefit of all parties, we would like to highlight again the third order made by the court:

3. An injunction pursuant to section 160(3) of the Act aforesaid restraining the Respondent from making use of the unauthorized development at the rear of his premises namely the beer garden and live music venue (to include also the projection of music or sound from external speakers) otherwise than in accordance with a planning permission regulating the use of the beer garden and live music venue.

And the subsequent order number 5:

5. That the premises can trade using only the external passageway and smoking area to the rear.

It was clear to all present at the delivery of the judgement that the court was referring in this order to the smoking area within the external passageway, and not to the beer garden. The court was keen to clarify with Mr. Crowley's representation that there was an alternative to the rear yard available for use as a smoking area, as this was regarded as a necessity for the operation of the premises. It was also made entirely clear that it was the order of the court that no use whatsoever be made of the unauthorised developments to the rear of the premises, namely the beer garden and live music venue. The argument being put forward in point (ii) of Mr. Coffey's submission would imply that order 3 and order 5 of the court are in conflict with each other and cannot co-exist. We would

suggest that Mr. Crowley would more appropriately make this point before the court – we believe that it is not a function of An Coimisiún to determine the legality of anything, and we do not believe that this request for a Section 5 determination is asking An Coimisiún to do such.

Finally, regarding point (iii) and the conclusion, we are extremely sorry that Mr. Coffey and Mr. Crowley are of this view. We have expressed support for the redevelopment of this premises both personally to Mr. Crowley and, significantly, through the planning process. All we have asked at all stages of the process were that our concerns, principally around noise nuisance from the development, would be addressed. We highlight the following excerpt from the submission prepared on our behalf to An Bórd Pleanála, under case reference ABP-313775-22:

'My clients welcome, in general, the proposed refurbishment and re-use of the existing derelict building s located on the site adjacent to their property. They do however have serious concerns with regard to the noise that will be generated as a consequence of the use of the proposed buildings.'

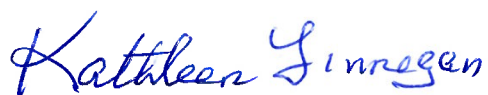
We also made clear to Mr. Crowley before we initiated Section 160 enforcement proceedings that we were happy with the outcome of his grant of planning permission, and we made clear to the court that we were entirely happy with this permission and if it had been enacted then there would be no need for proceedings. This fact was commented on by the court in the delivery of its judgement.

At every available opportunity, we made Mr. Crowley aware that we care little about what goes on in his premises, but we were extremely concerned about the potential for serious noise disturbance. We gave Mr. Crowley every possible opportunity to seek adequate and professional legal and planning advice. We would highlight that Mr. Crowley constructed the steel fabricated covered structure in his rear yard after the initiation of Section 160 enforcement proceedings in the Circuit Court.

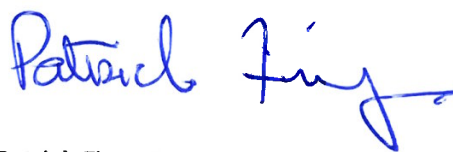
We are at a loss to understand why Mr. Coffey would describe 'a persistent campaign to undermine the redevelopment of a traditional pub business'; Mr Coffey, having commissioned a sound analysis survey on Mr. Crowley's behalf conducted in August 2024 by Mr. Diarmuid Keaney of ICANN Acoustics, and being in possession of a report with the results of same, is at this stage well aware of the scale of the disturbance caused by the unlawful developments on Mr. Crowley's premises. Despite the implication of Mr. Coffey in point (iii), Mr. Crowley was not operating his live music venue as 'a viable beer garden (with) reasonable music levels' – had he been doing so and had he been operating reasonably, it is unlikely that a court would issue an order to restrict in any way his ability to trade. In reality, the noise levels from Mr. Crowley's illegal music venue that reached the inside of our building, a residential home, were measured at 90dB(a) – we recorded LAeq(5min) levels in the 70-75dB(a) range, and even the 4 or 5 hour LAeq was still consistently 69/70 dB(a) on the evenings that the premises was operating as a live music venue. This is an absolutely obscene level of noise. It disappoints us that Mr. Coffey would seek to now suggest that Mr. Crowley is a victim because he is unable to operate a beer garden and outdoor live music venue as he wishes without restriction, in the full knowledge that it is illegal and in the full knowledge of what the planning authorities consider to be proper and sustainable planning for the site, and in the full knowledge of the immense distress he is causing to his neighbours.

We thank An Coimisiún for its consideration in this matter, and we hope that An Coimisiún now has enough information to determine this referral in a timely manner for the benefit of all parties.

Yours sincerely



Kathleen Finnegan



Patrick Finnegan

Figure 1 – Use of rear yard on September 8th 2024



Figure 2 – Social media post from September 20th 2024 advertising music line-up



Figure 3 – Social media post from December 13th 2024 advertising opening before Christmas 2024

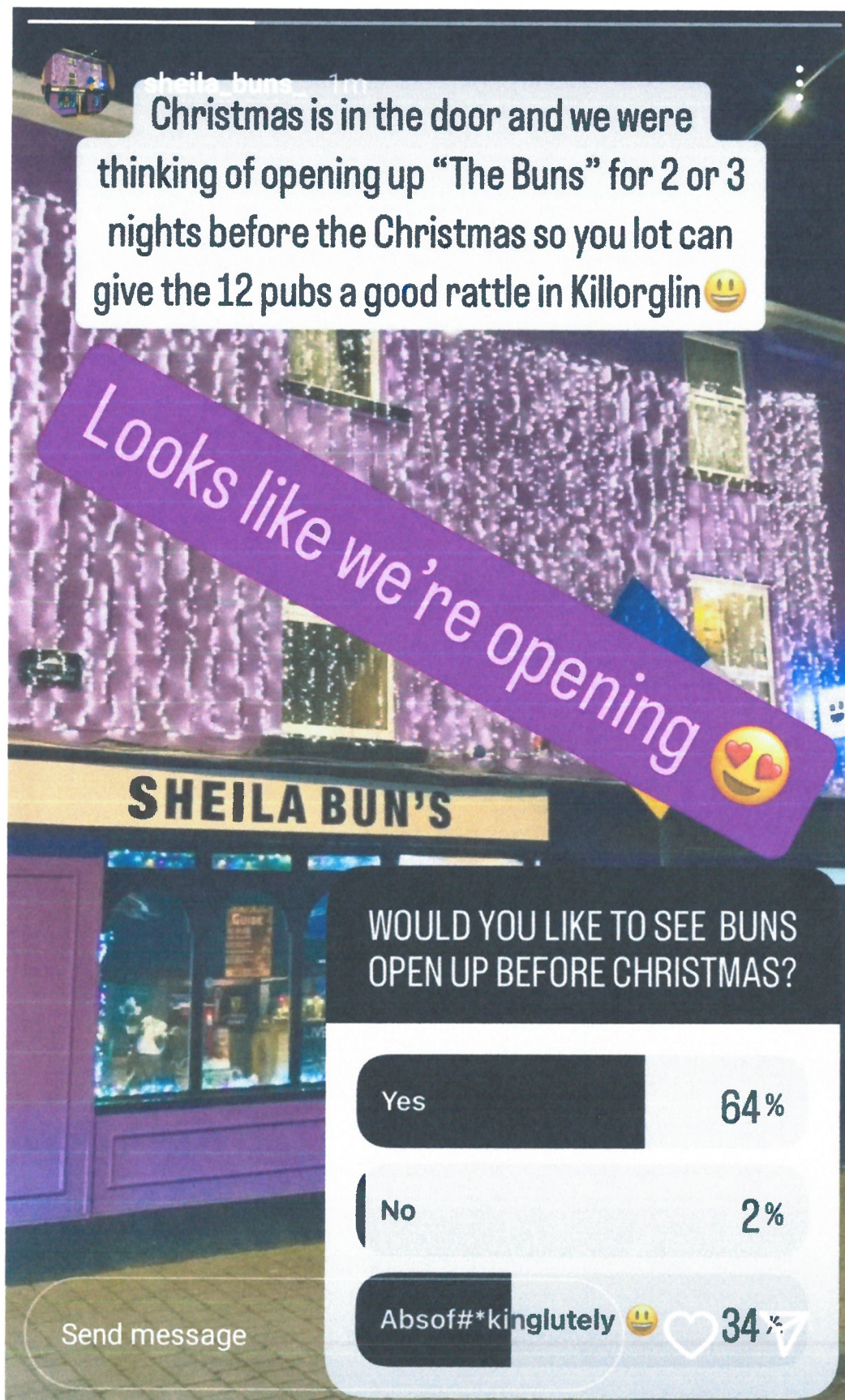
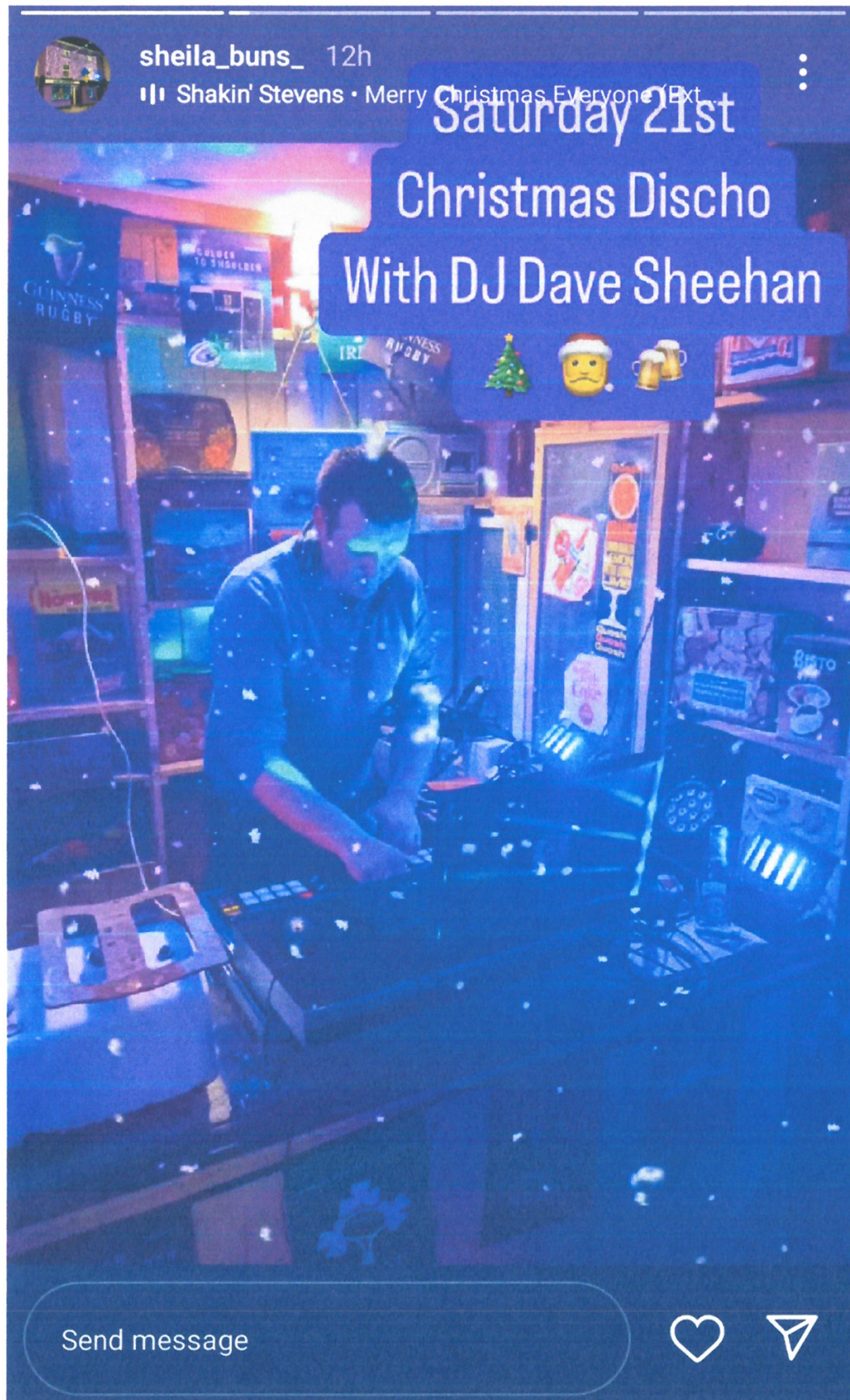


Figure 4 – Social Media posts from December 17th and 20th 2024 respectively, advertng upcoming music events



jack52fitz03 18h



And ladies and gents
I will see you in
@sheila_buns Sunday
night and Monday
night
22nd and 23rd

@cillianhickey4

Oh my it's good to
be back ...

Send message



