

<b>COMMENTS AND NOTES</b>
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## **THE CONSIDERATION OF PUBLIC ORDER IN THE GRANT OF LIQUOR LICENCES**

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Is the fact that proposed licensed premises are situated in a known trouble spot a relevant factor for a court to consider when deciding on the grant of a liquor licence? One might think that the answer is a very obvious “yes”. However, a brief survey of our licensing laws and the attitudes of the various parties who participate in the licence-granting process, will show that the current received opinion is that the answer is, in fact, “no”: public order is not a valid consideration. The contention of this note will be that the courts should permit themselves to take into account public order issues as raised by the Police Service. If this does not happen the issue of public order will be totally ignored in licensing law.

### **The Approach Of The Courts**

The only statutory provision under which issues of public order could possibly be considered by a court considering the grant of a licence is art 7(4)(d) of the Licensing (Northern Ireland) Order 1996. This states that: “a court shall refuse an application for the grant of a licence unless it is satisfied (subject to paragraph (5)(b) which concerns conditional grants) that the premises are suitable to be licensed for the sale of intoxicating liquor by retail.”

The dispute between the judges is over the meaning of “suitable”. In short, the weight of authority is for interpreting suitability as concerning the mere fabric of the building; the adequate provision of fire escapes and the like. In *R (Marshall) v Justices of County Tyrone*,<sup>1</sup> the term “suitability of the premises” (as it appeared in s 9 of the Licensing Act (Ireland) 1874) was held in the High Court (where the action had come on a writ of mandamus and certiorari from a case originating at Strabane Petty Sessions) by Sir Peter O’Brien CJ to be:

“. . . confined, in my judgment, to considerations affecting structure – structure in relation to proper accommodation for the public, in relation to the proper conduct of the business in the premises proposed to be licensed, and to considerations affecting site so far as it affects structural fitness upon the site, and access to the premises by the customers.”

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<sup>1</sup> [1894] 2 IR 246 (QBD).

On appeal the Court of Appeal agreed with this view.<sup>2</sup> Palles CB said that suitability “excludes the fitness of the neighbourhood for a peaceable, orderly and well-supervised grocer’s shop.” In *Donnelly v Regency Hotel Limited*<sup>3</sup> Carswell J (as he then was) seemed to approve the *Marshall* doctrine.

What Carswell J said was that he “should be inclined to hold that the concept of suitability is limited to the matters considered in *Marshall*’s case.”<sup>4</sup> Although His Lordship went on to concede that he was, “bound to consider a somewhat wider range of factors,” it seems that by this he meant a planning consideration, which at the time of *Donnelly* was not a statutory precondition to the grant of a licence but was considered as important at common law. However, as shall be seen, even planning considerations do not take account of public order issues.

*Donnelly* and its approval of *Marshall* is now viewed as definite law by the handful of senior members of the Bar who practice in the lucrative world of liquor licensing. The one case that goes against *Donnelly* is not held in high regard.

That case is *Re Philip Russell’s Application*.<sup>5</sup> Kerr J suggested that a broader interpretation of suitability is required. His Lordship’s interpretation would allow the court to consider the suitability of the premises in the social context of the building and accounting for the likelihood that public disturbances would be rendered more likely by the presence of a public house. The clearest way to convey the thoughts of His Lordship is to quote directly from the case:

“. . . “suitability” is to be judged in the context of a general system of control of the sale of alcohol to the public. It would be surprising, indeed anomalous, if the application of such a general system of control did not include any opportunity to assess and evaluate the impact that the location of off licence premises would have on the neighbourhood . . . I believe that it is beyond plausible dispute that there *ought* to be an examination of whether off licence premises should be located in a particular area in terms of the effect that they are likely to have on the character of a locality.” (Original emphasis).

This note is an argument in favour of the approach of Kerr J. It is submitted that *policy alone* requires the adoption of His Lordship’s interpretation. The policy argument will be stated later. However, before leaving *Re Russel*, two points of case law analysis require to be made in order to show that it is a carefully considered case and not a mere policy statement.

Firstly, Kerr J was wary of following Palles CB because in the former’s opinion the Lord Chief Baron placed too much weight on old Irish statutes when construing the 1874 Act. The Beerhouses (Ireland) Act 1864 required publicans to be of good character before they could be granted a licence. It

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<sup>2</sup> [1895] 2 IR 174.

<sup>3</sup> [1985] NI 144.

<sup>4</sup> *Ibid* at p 150.

<sup>5</sup> Unreported (Kerr J, 4<sup>th</sup> June 1993).

seems to have been the opinion of Palles CB in *Marshall* that this requirement covered the “public order” aspect of licensing thus avoiding the necessity of considering it when construing the suitability of the premises. Kerr J doubted if the two Acts had the connection that the Lord Chief Baron perceived. In any event, it is submitted here that the simple fact of a publican’s good character does not diminish the chances of serious alcohol-related public disorder if his premises are situated in a trouble spot.

Secondly, Kerr J examined the text of the 1996 Order and noted that it requires that the premises be “suitable *to be licensed* for the sale of intoxicating liquor” (original emphasis) and not “suitable for the sale of intoxicating liquor”. There is a subtle but significant distinction between saying (i) that a building is suitable for the sale of alcohol and saying (ii) that the premises are fit to be licensed for the same. Any given building in a local trouble spot may quite comfortably satisfy the first criterion while less obviously satisfying the second test. Can it seriously be argued that Parliament (presumably aware of the potential effects of alcohol consumption) intended to ignore the relationship between public disorder and the location of public houses when the 1996 Order was passed? Yet although it is the second test that has been laid down by Parliament, the cases apart from *Re Russel* apply the first test.

### **The Role Of The Planning Service**

By article 7(4)(f) of the 1996 Order it is a necessary condition (save in special circumstances) for the grant of a liquor licence that there is in force planning permission to use the premises for the sale of alcohol. The important question when discussing the role of the planners is to ask how far they consider issues of public order when granting planning permission? While public order *per se* is not a material planning consideration within the meaning of the Planning (Northern Ireland) Order 1991, the impact of development upon the amenity of a neighbourhood is. Does this allow the planners to take account of public order issues? To answer this one must look at the Development Control Advice Note 7 entitled *Public Houses* prepared by the DoE<sup>6</sup> to give supplementary planning guidance.

The note is flawed in that it says that planning permission is not a necessary condition for the grant of a licence. This is wrong and the error arises from the fact that the note relies on the Licensing Act (Northern Ireland) 1971 now repealed. However, the note says that in practice the courts look for planning permission when considering applications for licences and consequently it is still helpful. In any event, the note makes no express reference to public order as a valid planning consideration. It does mention noise and disturbance. However, this seems to be the ordinary type of noise and disturbance associated with public houses. If the planners really considered that public order was a concern one would expect express reference to sectarian interfaces and the like.

It is not the contention of this note that the planners are avoiding responsibility. Quite the contrary, this note argues that the planners should not be fixed with the burden of taking decisions on the suitability of licensed

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<sup>6</sup> Available at [www.doeni.gov.uk/planning](http://www.doeni.gov.uk/planning).

premises from a public order perspective. That is the proper duty of the Police Service and the courts, who together have special expertise in dealing with this subject.

### **The Role Of The Police Service And Public Policy**

So far it has been seen that there is no clear legal mechanism for the consideration of public order as a factor when deciding whether to grant a liquor licence. The weight of judicial authority is that the courts may not; and the Planning Service rightly considers it to be no part of its function.

By schedule 1, paragraph 4 of the 1996 Order, the Police Service may object to the grant of a licence. However, as the courts consider it a non-material consideration, they may not do so on the grounds of public order.

This situation should change. It is strange that in Northern Ireland, where alcohol probably plays a significant part in public disorder, that the relationship between the situation of public houses and incidences of serious public disorder (especially of a sectarian nature) is ignored. This is all the stranger when one considers just how often Crown Court judges (and High Court judges in bail hearings) remark on the link between alcohol and public order offences. Yet those self-same judges have for the most part decided, that public order considerations have no role to play in the grant of liquor licences. This note submits that *Re Russel* should be declared to represent the law at the next available opportunity. Previous cases to the contrary should no longer be followed because the current issue, being one of social importance, requires a fresh approach.

This should not be seen as an attempt to allow the long-dead temperance agenda to rule us from its grave. Indeed judges should always have the very highest regard for one of the most sacrosanct common law rights of the subject: that to trade freely without undue hindrance. However, the law should also allow judges to consider whether a wider public interest outweighs these rights in particular cases.