



An
Bord
Pleanála

Inspector's Report 301138-18

Question	Whether the installation of 6 no. windows on first floor of Liber House is or is not development or is or is not exempted development
Location	Liber House, Monavalley, Tralee, County Kerry
Declaration	
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	EX 639
Applicant for Declaration	Liam Davis
Planning Authority Decision	Is not exempted development
Referral	
Referred by	Liam Davis
Owner/ Occupier	Liam Davis
Observer(s)	None
Date of Site Inspection	23 rd July 2018

1.0 Site Location and Description

- 1.1.** The site is located at Monavalley, which is on the northern outskirts of Tralee town. Monavalley Industrial Estate is located on the western side of the R556, Ballybunnion Road, and there are housing estates located to the south and on the eastern side of the main road. The housing estate to the south is known as St. Brendan's Park and southwest is known as Gallowsfield. There is a road to the south of the site which provides access to the residential areas but there is no access to the site from this road. The site is accessed by means of the internal industrial estate road, which is known as Gallowsfield Estate Road.
- 1.2.** The site comprises a 2 and 3 storey commercial building with basement, which is known as Liber House. The building is in use as offices and educational use and incorporates Brookfield College. The building faces west towards a landscaped car park and further commercial blocks. The lands to the north of the estate road are in commercial use including Kerry ETB Training Centre. The lands to the immediate south comprise a single dwelling which bounds the majority of the southern boundary of the site. This dwelling is also bounded to the east by Ballybunnion Road and to the south by the residential distributor road. This site is occupied by a third-party observer.
- 1.3.** The main entrance to Liber house is at the north-western corner of the building and the entrance to the basement car park is located at the south-western corner of the building. The south-western elevation is approx. 4m from the southern boundary, which is defined by a masonry wall with mature trees on the southern side of the wall, with a recessed element (adjacent to basement ramp) which is c. 12m from the common boundary. There is a fire escape door a First Floor level of this elevation with an associated fire-escape stairs, and a further fire escape on the north-western (front) elevation. There is also a substation on the southern boundary which abuts the rear boundary of the residential property.
- 1.4.** From my observations on site, I can confirm that there are no windows on the south-western elevation of the building. The only opening on this elevation is the fire-escape door at First Floor level and 2 no. personnel doors at Second Floor level, which is recessed behind the plane of the main elevation.

2.0 The Question

2.1. The question has arisen as to whether the installation of 6 no. windows to the southwest elevation on the first floor of Liber House is or is not development or is or is not exempted development. The Referrer accepts that installing windows is development. However, it is stated that the windows in question were permitted as part of the parent permission (Reg. Ref. 06/307281) but that as the unit was not constructed in accordance with this permission, in so far as the windows in question were not installed. Thus, the question includes whether the original permission can be implemented in terms of rectifying the omission of the windows.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1. The P.A. made the following declaration on 19th February 2018

- (a) the proposed development comprising the installation of 6 no. windows at first floor level to the south western elevation of Liber House...would constitute works that would come within the scope of Section 2(1) of the Planning and Development Acts 2000-2017.
- (b) The said works would constitute development that comes within the scope of Section 3(1) of the Planning and Development Acts 2000-2017.
- (c) The grant of planning permission by Tralee Town Council under Planning Register No. 06/307281 for a warehousing/light industrial building with provision for 6 no. windows at first floor level to the south-western elevation on this site expired in 2012. Furthermore, this grant of planning permission has been superseded by grant of retention permission by Kerry County Council to retain the educational/warehousing/light industrial development within the revised site boundaries under Planning Register No. 15/240.

3.1.2. Therefore, the proposed works would constitute development which is not exempted development.

3.2. Planning Authority Reports

There are no planning reports on file.

4.0 Planning History

4.1 **Ref. 06/307281** – planning permission granted to CMS Developments Ltd. on 29th January 2007 to demolish existing building and construct a three storey over basement building of 5,590m² comprising warehousing/light industrial with ancillary office use, basement car park for 41 cars, surface parking for 26 cars, new entrance and associated site works.

Ref. 07/7446 – Permission granted for ESB sub-station on the site and to provide 3 no. additional car parking spaces at basement level in lieu of at ground level.

ABP 227826 (Ref. 07/7552) – Permission granted for alterations to fenestration and external doors of already permitted building. The alterations on the Southwest elevation were confined to the second floor which involved the replacement of two windows with two personnel doors.

Ref. 14/308163 – Permission granted by way of Material Contravention procedures for change of use of 1,026m² at ground floor level from permitted warehouse/light industrial use to educational use. The building had been constructed at this point in time but there were no windows indicated at GF/FF levels on the SW elevations, either existing or proposed.

Ref. 15/240 – Permission granted for retention of a change of use of an additional approx. 2000m² from permitted warehousing/light industrial to Class 3 Office use. Conditions 2 and 3 relating to financial contributions were appealed to the Board (245576). The existing and proposed elevations showed no windows at GF or FF level on the Southwestern elevation.

5.0 Policy Context

5.1. Development Plan

The lands are zoned General Industry in the Tralee Town Development Plan 2009-2015.

6.0 The Referral

6.1. Referrer's Case

- 6.1.1 **Background** – The site of the referral had been subject to a grant of planning permission under 06/307281, which had included a proposal to insert windows at GF and FF levels on the Southwestern elevation, of which 6 no. were indicated at first floor level. Subsequently, permission was granted under 07/7552 for amendments to the external elevations including changes to fenestration patterns and installation of fire escapes. The six windows in question were shown on the submitted drawings. The building remained vacant until a further grant of planning permission facilitated a change of use of part of the building to educational use in 2014 (Ref. 14/8163). However, the unit was not constructed in accordance with the original permission, as no windows were inserted in the south-western elevation at either GF or FF level.
- 6.1.2 **No application for omission of windows** – The Referrer states that although retention permission was granted under 15/240, this application did not apply for the omission of the 6 no. FF windows on the south-western elevation.
- 6.1.3 **Legislation** – it is submitted that the insertion of windows falls within the definition of works and is therefore development in accordance with Section 3(1) of the Act. It is further submitted that, by reference to the exempted development provisions of Section 4(1)(h) of the P & D Act, the said windows would constitute an alteration of the building but would not render the building inconsistent with neighbouring sites.
- 6.1.4 **Windows already permitted** – given that the windows were already permitted in the original parent permission, but not provided at that time, the question arises as to whether the windows can be inserted without requiring planning permission. This would add to the amenity of the office space without causing any impact on the neighbouring structures.

6.2. Planning Authority Response

The P.A. has not responded to the referral.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

7.1.1 Section 2 (1)

“Works” are defined in this section as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

“Structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and –

- (a) Where the context so admits, includes the land on, in or under which the structure is situate,”

7.1.2 Section 3 (1) of the Act defines “*Development*” as, ‘except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land’.

7.1.3 Section 4 of the Act refers to ‘*Exempted Development*’ and Subsection (1) sets out categories of development that shall be exempted development for the purposes of this Act. Subsection (1) (h) states the following:

‘development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures’.

8.0 Relevant Board Decisions The following Board decisions in relation to Section 5 Reference/Referral cases are considered to be of relevance.

RL2287 – whether the provision of one number window within the northern gable wall at first floor level of 32 Ballinclea Heights, Killiney Co. Dublin is or is not development or is or is not exempted development.

The Board concluded (2006) that the said provision of a window in the northern gable of the dwellinghouse constitutes development which materially affects the external appearance of the structure and which renders its appearance inconsistent with the character of the structure and of neighbouring structures, and thereby did not come within the scope of Section 4(1)(h) of the 2000 Act. It is noted that concerns raised by observers in this particular case had related to the impact of the window in terms of overlooking and loss of privacy. The Inspector's report had referenced case law - Cairnduff v. O'Connell 1986 - in which it had been established by the Supreme Court that the character of a structure relates to its shape, colour, design, ornamental features and layout, and not to its particular use. The Inspector had argued that on this basis, the impact in terms of interference with privacy is not relevant to the interpretation of this section of the Act, and focussed instead on the key elements of the term "character" as set out in the Supreme Court judgement (Cairnduff case), and as outlined above.

The Inspector concluded that whilst the installation of the rear gable window materially affected the external appearance of the bungalow, it did not render this appearance inconsistent with the character of the structure nor of neighbouring structures. Thus it was concluded that it came within the scope of S4(1)(h) of the 2000 Act. However, the Board did not agree and considered that the insertion of a window into the gable of a dwelling constituted a significant departure from the established character of the structure and of neighbouring structures in terms of design and layout. It was, therefore, concluded that the works comprising the insertion of a new window in the gable wall was development and was not exempted development.

RL2769 – Whether development consisting of the change of a window to a door in the front elevation of the Temple Bar Hotel, 13-18 Fleet Street, Dublin is or is not development and is or is not exempted development.

The Board concluded (2010) that the said change from a window to a door in the front elevation of the hotel constituted a significant change in the streetscape, which is inconsistent with the character of the (hotel) structure and, therefore, the development did not come within the scope of the exempted development provisions of Section 4(1)(h) of the Planning and Development Act 2000 as amended. In respect of S 4(1)(h), the Inspector's report had referenced Cairnduff v. O'Connell in terms of what is meant by the character of a structure. However, the Inspector considered that the development materially affected the external appearance and that such an effect would render it inconsistent with the character of the structure and of neighbouring structures. The Board agreed and it was, therefore, concluded that the works were development and were not exempted development.

RL2689 – Whether the insertion of a second rear facing window in the rear elevation of 8 Grattan Road, Claddagh, Galway is or is not development or is or is not exempted development.

The Board (2010) concluded that the installation of the additional northernmost window in the first floor elevation of a rear extension was not consistent with the character of the structure authorised by the grant of planning permission Ref. 04/215 (ABP Ref. PL61.213367). The Inspector had noted that a previous permission had permitted two windows, one of which was on the northern elevation but that development carried out on site did not accord with this permission, and that a further permission to retain the changes was subsequently granted (213367). The Inspector considered that the latter permission superseded the earlier permission.

The issues of concern raised by the Referring party related to overlooking and loss of privacy, but the Inspector had noted that rear facing windows were a feature of all extensions in the vicinity. It was concluded that the window would materially affect the external appearance, but did not consider that the window in question would render the appearance inconsistent with the character of the structure or of

neighbouring structures. On this basis, it was considered that the works were development and exempted development. However, the Board disagreed and concluded that the as the insertion of the window was inconsistent with the character of the structure as authorised by the grant of planning permission, it did not come within the scope of Section 4(1)(h) of the P & D Act, 2000.

RL3511 – Whether the replacement of an opaque, fixed, inaccessible party wall at the rear of a commercial premises with a fully glazed openable and accessible window and door facing onto a private communal open space at 98A Rathgar Road, Rathgar, Dublin is or is not development or is or is not exempted development.

The Board (2017) concluded that the replacement of the party wall with a window and door would materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure and of neighbouring structures. The Board, therefore, concluded that the works did not come within the scope of the exempted development provisions of Section 4(1)(h) of the P & D Act 2000, as amended, and are therefore development and are not exempted development. The Inspector had noted the concerns of the referring party that the expressive change from solid, opaque, fixed, weathered industrial, historic siding, which had seldom been opened in the last 30 years, to a glazed, brightly lit shop window including a door and full height glazing would be a significant departure in terms of consistency of character, impact including on residential amenity of neighbouring properties. The Inspector had generally accepted that the said works were materially different from the former use of the timber siding as presented in the documentation on file.

9.0 Assessment

The questions arising from this referral fall into three main parts. Firstly, whether the works of installation of windows are development; secondly, whether the installation of the windows at first floor level on the southwestern elevation affects only the interior of the structure and/or whether there has been a material change in the external appearance of the structure which renders it inconsistent with the character of the structure or of neighbouring structures; and thirdly, whether the installation of

the windows as permitted under the parent permission constitute works requiring planning permission.

However, it is noted that there is no dispute between the parties as to whether the works constitute 'development' within the meaning of Sections 2 and 3 of the Planning and Development Act 2000 (as amended). It is considered, therefore that the question should be restated as follows:

- Are the works of installation of six windows at first floor level of the southwestern elevation exempted development under S4(1)(h) of the P & D Act 2000 (as amended)?
- Are the works of installation of six windows at first floor level of the southwestern elevation consistent with the development of the structure as permitted under planning permission Ref. 06/307281?

9.1. Do the works of installation of six windows at first floor level of the southwestern elevation constitute exempted development?

9.1.1. The existing southwestern elevation of the building comprises a largely blank façade of metal cladding, which is silver in colour, with just two openings, one at ground floor and one at first floor level. These openings are personnel doors and there is an associated fire escape stairs leading to the first floor door. There are no window openings in the façade which measures approx. 7.5m x 45m. Part of the façade is recessed to allow for the basement ramp. Although technically the second floor has a couple of small openings, this façade is recessed so far behind the plane of the main SW elevation that it does not visually register as part of the elevation when viewed from the ground or from outside the site. Thus, the introduction of a row of 6 windows at first floor level would materially affect the external appearance of the structure.

9.1.2. The in terms of whether the works would render the appearance inconsistent with the character of the structure, I would refer to case law (Cairnduff v. O'Connell, 1986), in which the matter of the character of the structure was discussed. The key elements of character to which the Supreme Court had regard included shape, colour, design, ornamental features and layout. The board has previously considered that works consisting of the insertion of a window/windows would

significantly alter the character of a structure in terms of design and layout. In this particular case, it is considered that the proposed insertion of 6 window openings would introduce a horizontal element and a series of voids which hitherto have not been present on this elevation. Given that the elevation is visible from adjoining public roads, this would represent a new feature of considerable note, which would amount to a change to the design and layout of the façade. Given that the windows are likely to be openable and lit from behind, it is considered that this would further alter the character of this part of the structure. Thus, it is considered that the proposed windows would render the appearance of a substantial part of the structure inconsistent with the existing character of the structure.

9.1.3. However, it is considered that the introduction of a row of windows in a blank façade such as this would not render the appearance of the structure inconsistent with the character of neighbouring structures. The building is located within an industrial estate which is characterised by similar styles of buildings. It is considered that it would not be unusual to have facades in such buildings with windows such as those the subject of this referral.

9.1.4. In conclusion, the works do not solely affect the interior of the structure and would materially affect the external appearance of the structure, so as to render the appearance inconsistent with the character of the structure. I am satisfied that the works do not come within the scope of Section 4(1)(h) of the Planning and Development Act 2000 (as amended) and cannot be considered to be exempted development by virtue of this section.

9.3 Could windows be inserted in accordance with previous permissions?

9.3.1 The Referring Party had sought direction from the P.A. as to whether the six windows could be inserted without planning permission, given that they were included in the original parent planning permission (06/7281). I note from the submissions on file that this permission, which permitted the construction of the building (5,590m²) and its use as a Warehouse/Light Industrial building, was not implemented in accordance with the permitted plans and particulars. Drawing Nos 06.11.06 (Rev. D-F) showed a proposal to insert 11 windows on the south-western elevation, 5 at GF and 6 at FF levels.

9.3.2 It is noted that a further permission was granted by the Board on appeal (227826, Reg. Ref. 07/7552) for alterations to the permitted plans, which related mainly to changes to the fenestration pattern, but were confined to the North-western elevation and the second floor level on the southwestern elevation. The Board's Inspector noted that the building was almost complete at the time of inspection. The submitted drawings showed the same fenestration pattern as that permitted under 06/7821. However, the referring party has acknowledged that it was not constructed in accordance with the permitted drawings. It is further noted that drawings submitted in respect of subsequent permissions for alterations to the permitted use/development in 2014 and 2015, (14/308163 and 15/240, respectively), indicated that there were no window openings on the southwestern elevation at ground and first floor levels, on either the existing or proposed elevations.

9.3.2 The P.A. in its Declaration stated that the permission 06/307281 expired in 2012 and that this grant of permission had, in any case, been superseded by the grant of retention permission under Ref. 15/240, which had not included any windows at first floor level on the south-western elevation. I would agree with this and further consider that the proposed windows represent just part of the originally permitted fenestration pattern. Thus, the insertion of six windows at first floor level on the south-western elevation could not be carried out under the terms of the parent permission.

9.4 Conclusion

9.4.1 I would agree that the proposed insertion of 6 no. windows at first floor level on the southwestern elevation constitute works, in accordance with Section 2 and which is development in accordance with Section 3 of the Planning and Development Act 2000, as amended. The works do not, however, come within the scope of Section 4(1)(h) of the 2000 Act for the reasons outlined above. Thus, the proposed development is development and is not exempted development.

10 Recommendation

10.1 I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether (a) the insertion of six windows at first floor level on the southwestern elevation of Liber House is development or is exempted development under S4(1)(h) of the Planning & Development Act 2000 (as amended), and (b) the insertion of six windows at first floor level on the southwestern elevation of Liber House is already permitted under the parent permission 06/307281.

AND WHEREAS Liam Davis, “Rockall”, The Spa, Tralee, Co. Kerry requested a declaration on this question from Kerry County Council and the Council issued a declaration on the 19th day of February, 2018 stating that the matter was development and was not exempted development:

AND WHEREAS Liam Davis referred this declaration for review to An Bord Pleanála on the 13th day of March, 2018:

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

- (a) Sections 2 and 3 of the Planning and Development Act, 2000, as amended,
- (b) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (c) the planning history of the site,
- (d) the nature and extent of the works
- (e) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The works of insertion of six windows on the southwestern elevation of the building come within the scope of ‘development’ as set out in Section 3 of the Planning and Development Act 2000 (as amended);

- (b) The insertion of a row of six windows at first floor level on the southwestern elevation would materially affect the external appearance of this elevation of the building, which is visible from the public road, so as to render the appearance inconsistent with the character of the structure.
- (c) Therefore, the insertion of six windows at first floor level on the southwestern elevation of the building does not come within the scope of the exemptions provided by Section 4(1)(h) of the Planning and Development Act 2000 as amended, and is not therefore exempted development.
- (d) The insertion of the said six windows was authorised by the grant of permission under Ref. 06/307281, but as the development was not completed in accordance with the permitted plans, and has since been superseded by a further grant of planning permission under Ref. 15/240, which did not include the insertion of any windows at first floor level of the southwestern elevation. Thus, the insertion of the said six windows is not authorised by any current planning permission.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that (a) the insertion of the said six windows at first floor level of the southwestern elevation of Liber House is development and is not exempted development; and (b) the insertion of the said windows do not constitute works that are already permitted as the permission under which they were originally granted has been superseded by a new planning permission which does not include the said windows.

Mary Kennelly
Planning Inspector
5th November 2018