



An
Bord
Pleanála

Inspector's Report ABP301139.18

Question

Whether the use of four bedrooms for overnight accommodation for up to 16 persons, where each guest bedroom is not used for more than 4 persons is, or is not, development and is, or is not, exempted development.

Location

Woodside Cottage, Tinakilly,
Rathnew, Co. Wicklow

Declaration

Planning Authority

Wicklow County Council

Planning Authority Reg. Ref.

01/18

Applicant for Declaration

Mr. Steven Van den Bergh

Planning Authority Decision

Considered development and not
exempted development.

Referral

Referred by

Steven Van den Bergh

Owner

Steven Van den Bergh

Observer(s)

No observers

Date of Site Inspection

26th June 2018

Inspector

Erika Casey

1.0 Site Location and Description

- 1.1. The subject site, with an area of 0.44 ha is located between the urban settlements of Wicklow and Rathnew, to the east of the R750. Tinakilly House Hotel is located c. 500 metres to the north of the site.
- 1.2. The site currently accommodates a large detached dormer dwelling set within a mature landscaped garden. The property was extended on foot of a permission granted in 2006. The dwelling currently accommodates 7 no. bedrooms in addition to ancillary living, utility, bathroom and hallway accommodation.

2.0 The Question

- 2.1. Whether the use of four bedrooms for overnight accommodation for up to 16 persons, where each guest bedroom is not used for more than 4 persons is, or is not, development and is, or is not, exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- (a) *Having regard to the permitted development, the indicated uses and evident usages, it is considered that the dwelling is being used exclusively on a year round basis for short term commercial letting and therefore the change of use to a dwelling for short term holiday lettings, as described above, raises planning considerations relating to the permitted use as a residential dwelling. In particular (i) the extent and frequency of coming and going to and from the dwelling by short term renters and servicing staff, (ii) the associated concerns of other residents in respect of security and general disturbance, (iii) the fully commercial nature of the activity and (iv) the creation of a traffic hazard at the entrance of the property and at the junction with the public road.*
- (b) *The change of use constitutes, therefore, a material change of use and is development as defined in Section 3 of the Planning and Development Act 2000 and*

- (c) *Neither the Planning and Development Act 2000, as amended, or the Planning and Development Regulations 2001, as amended, provide any exemption in respect of such a material change of use.*

The Planning Authority considers that the use of four bedrooms within Woodside Cottage, Tinakilly, Rathnew for overnight guest accommodation for up to sixteen persons, where each of the guest bedrooms is not used for more than four persons is development but is not exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Report (09.02.2018)

- Notes that the subject dwelling is advertised on the following holiday letting web sites:
www.booking.com – sleeps 26, 6 bedrooms
Homeandaway.com – sleeps 26 people, 7 bedrooms
www.Fivestar.ie – capacity for 16 guests, 7 bedrooms
- Planning permission was granted under PRR 06/4840 for three bedrooms in the subject property, therefore, having regard to the planning history of the site and the online assessment, all of the bedrooms in the property are being offered for short term letting. During the site inspection, a commercial cleaning vehicle was noted on site and there was no evidence on site that this dwelling is being used as a private residential dwelling. Conclude that the subject dwelling is no longer in use as a private residential dwelling and is used for short term holiday letting accommodation.
- The use of this dwelling for short term rental purposes where the entire property is rented on a year round basis for a series of short term holiday lettings (through online rental services), constitutes a change of use from a residential dwelling to commercial use and constitutes a material change of use that is not exempted development.

3.2.2. Other Technical Reports

- No other reports received.

4.0 Planning History

Planning Authority Reference 02/7221

4.1 Permission granted for single storey/dormer extension of 386 sq. metres to existing single storey cottage of 110 sq. metres.

4.2 Condition 3 of this permission stated:

“The existing dwelling and proposed extension shall be jointly occupied as a single housing unit and shall not be sold, let or otherwise transferred or conveyed save as part of the dwelling.”

Reason: *To restrict the use of this extension in the interests of residential amenity.*

4.3 Condition 4 stated:

“This extension shall be used for private domestic use only and for no other purpose.

Reason: *To safeguard the residential amenities of adjoining properties.”*

Planning Authority Reference 06/4840

4.4 Retention permission granted for revisions to approved extension to existing house.

4.5 Condition 2 of this permission stated:

“In all other regards, the development shall continue to comply with the conditions attached to Register Reference 02/7221.

Reason: *For clarification.”*

4.6 It is detailed in the planner’s report that there are a number of enforcement cases relating to the site – UD4803, UD2131 and UD514.

5.0 Policy Context

5.1. Development Plan

5.1.1 The operative Development Plan for the area is the Wicklow Town – Rathnew Development Plan 2013 – 2019. The subject site is zoned RE – Existing Residential.

5.2. Other Relevant Policy/Guidance

Circular Letter PL10/2017 and Circular Letter PL12/2016

5.2.1 These guidance documents issued by the Department of Housing, Planning and Local Government provide guidance to Planning Authorities in relation to short term lettings. Key points from this guidance includes:

PL10/2017:

5.2.2 The guidance notes that in certain instances short term letting can involve residential properties being lost to the residential housing system, meaning that less long term and secure accommodation will be available to the growing number of families who need it. It also notes that there can be further adverse impacts on local communities due to the transient nature of short term letting.

5.2.3 With regard to the specific exemption in Article 10 (4) of the Planning and Development Regulations which consists of the use of a house for overnight guest accommodation, which, therefore, does not require planning permission, it notes that this *“exemption is typically or traditionally relied on in the context of the provision of B&B accommodation.”*

PL12/2016:

5.2.4 This circular refers specifically to the grounds which the Board reached its decision with respect to Referral RL3490. It notes that key considerations were:

- The exclusive use of the apartment on a year round basis for short term commercial lettings.
- The absence of any permanent resident from any portion of the apartment and
- Submissions made by the letting company and those made by other residents of the area.

5.2.5 It is further stated:

“In light of this determination, the continued operation of an apartment or residential unit without planning permission for such a material change of use should be considered unauthorised development and subject to enforcement proceedings by

the relevant Planning Authority. However, it is also important in this connection to distinguish between properties which are

- (a) only made available for short term letting purposes on an occasional basis or for particular periods of the year*
- (b) partially occupied by the residential owners on an ongoing basis and*
- (c) exclusively used for commercial short term letting purposes on a year round basis.*

It should be particularly noted that any planning enforcement action in this area should be focussed on properties coming within scenario (c) above i.e. those being exclusively used for commercial short term letting purposed on a year round basis.”

5.3. Natural Heritage Designations

5.3.1 The nearest Natura 2000 site is the Murrough SPA and SAC located c. 0.5 km to the east of the site.

6.0 The Referral

6.1. Referrer’s Case

- Considers that the Councils decision failed to consider the referral query and focussed on whether the entire house is being used for short term holiday lettings rather than four bedrooms.
- For the purposes of this referral, it is confirmed that the remainder of the structure would be occupied as one dwelling and would be used for year round accommodation as a unit of residential accommodation.
- Consider that the fact that a commercial cleaning vehicle was present on site does not indicate that a material change of use has actually occurred.
- The intimation that the building is not being used for residential purposes is based exclusively on the external inspection of the property. Believe that there is no corroborative evidence that the house is not used for domestic purposes.

- State that undue weight has been placed on online records. Refers to Wicklow County Council v Jessup and Anor.
- The referrer has appended their original submission to Wicklow County Council to their referral. This sets out that condition no. 2 of application reference 02/7221 does not have the effect of de-exempting the overnight guest accommodation and refers to a previous precedent referral - reference RL2616. Also states that B & B use would not contravene condition 4 of this permission.

6.2. Planning Authority Response

- No further response.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2 (1) of the Act provides the following definitions of relevance:

“habitable house” means a house which –

(a) is used as a dwelling,

(b) is not in use but when last used was used, disregarded any unauthorised use, as a dwelling and is not derelict, or

(c) was provided for use as a dwelling but has not been occupied; Planning and Development Regulations, 2001.”

“house” means a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building;

Section 3(1) of the Act states the following in respect of ‘development’:

“In this Act, ‘development’ means, 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.”

Section 4 (2)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

7.2. **Planning and Development Regulations, 2001**

Article 5 (1) set out that “house” does not, as regards development of classes 1, 2, 3, 4, 6(b)(ii), 7 or 8 specified in column 1 of Part 1 of Schedule 2, or development to which articles 10(4) or 10(5) refer, include a building designed for use or used as 2 or more dwellings or a flat, an apartment or other dwelling within such a building.

Article 10 (4) of the Regulations relates to changes of use and states that:

“Development consisting of the use of not more than 4 bedrooms in a house, where each bedroom is used for the accommodation of not more than 4 persons as overnight guest accommodation shall be exempted development for the purposes of the Act provided that such development would not contravene a condition attached to a permission under the Act or be inconsistent with any use specified or included in such a permission.”

7.3 **Relevant Precedents and Case Law**

7.3.1 There have been a number of referrals of relevance to the subject case.

Referrals

RL.3490

Whether the use of a residential apartment for short term holiday letting at apartment 1A, 5-5A Crown Alley, Dublin is or is not development or is or is not exempted development. The Board concluded as follows:

- (a) the use of a residential apartment for short term holiday lettings, as described above, at Apartment 1A, 5-5A Crown Alley, Dublin constitutes a change of use.
- (b) The change of use to an apartment for short term holiday lettings, as described above, raises planning considerations that are materially different to the planning considerations relating to the permitted use as a residential apartment. In particular, (i) the extent and frequency of coming and going to and from the apartment by short term renters and servicing staff (ii) associated concerns for other residents in respect of security and general disturbance and (iii) the fully commercial nature of the activity.

- (c) the change of use constitutes, therefore, a material change of use and is development as defined in section 3 of the Planning and Development Act, 2000 and
- (d) Neither the Planning and Development Act, 2000, as amended nor the Planning and Development Regulations, 2001, as amended provide any exemption in respect of such a change of use.

PL29/8/479

Whether the change of use of town houses at Lansdowne Village, Sandymount Village, Dublin, to holiday homes is a material change of use. The Board declared that this is development that is not exempted development.

RL2317

Whether the change of use of six of the eight apartments within an apartment block situated at the Merrion Grove apartment complex, Stillorgan Road, Stillorgan, Co. Dublin to student accommodation is a material change of use. The Board declared that this is development and is not exempted development. This case is of relevance as it addresses the issue of material change of use in detail.

This referral also addresses Article 10 (1) (b) and (c) of the Regulations which states any exemption that might otherwise apply does not constitute exempted development where it would be inconsistent with any use specified or included in a permission.

The Inspector's report noted:

"Accordingly, even if one were to argue that the change of use was exempted (and I can find no basis for such a supposition), any such exemption would be nullified by the terms of condition 4 of the original permission, and condition 3 of the amending permission, both of which require that each apartment should serve as a single dwelling unit.....I consider that the use of each apartment as student accommodation would be inconsistent with the use that was intended in the relevant permission - i.e. as permanent residential accommodation, and hence would breach the condition.

Accordingly, I consider that this change of use is not only material, and hence development, but is a change of use that conflicts with, and is inconsistent with, by the use specified and included in the planning permission for the apartment block. In

addition, as noted above, use as student accommodation, wherein the units are occupied part time, and could involve short term letting outside of academic term time, is inconsistent with the use included in this permission.”

RL2192

Whether the change of use of permitted holiday apartments to permanent residential accommodation at the Dolmen Hotel, Kilkenny Road, Carlow is a material change of use. The Board declared that this is development that is not exempted development.

Case Law

7.3.2 The following case law is of relevance:

7.3.3 Referral reference PL29/8/279 was the subject of a High Court challenge, McMahon -v- Dublin Corporation 1997 1 ILRM 227, in which the Board’s declaration was upheld. Barron J. held that:

“...in the absence of explicit reference in the planning permission to a permitted use, regard must be had to the use for which the structure was designed, i.e. the use which was objectively intended for the structure having regard to the relevant planning documentation. The purpose for which the plaintiffs’ homes had been designed was private residential, whereas the use to which they were currently being put was commercial.”

7.3.4 The question as to whether a change of use is a material one was addressed by Keane J. in the case of Monaghan County Council -v- Brogan. He stated that the issues of relevance to this question are:

“...the matters which the planning authority would take into account in the event of a planning application being made for the use. If these matters are materially different (from the original use), then the nature of the use must equally be materially different.”

8.0 Assessment

8.1. Preliminary Matters

8.1.1 It should be noted that the purpose of this referral is not to determine the acceptability or otherwise of the guest accommodation but whether the matter in question constitutes development, and if so falls within the scope of exempted development.

8.1.2 As noted above, the subject house is a 7 bedroom dwelling. It is currently actively marketed as a self-catering property with 7 no. bedrooms for short term, commercial lettings. I have reviewed a number of commercial letting/holiday websites and note that on the 14.06.2018, the subject property was available to rent on a short term basis on a number of sites. These include:

www.trivago.ie

www.homeaway.co.uk: advertised as five star self catering accommodation with 7 bedrooms that sleeps 26 people available for an average rental value of £1,716 per night.

www.fivestar.ie: advertised as a holiday let available from €5,900 weekly with accommodation for 16 people.

The property is also advertised on www.myhome.ie as a 7 bedroom house available for €12,000 per month and on www.daft.ie as a 7 bedroom dwelling available for €12,900 per month

8.1.3 Notwithstanding this, the specific question before the Board is whether the use of four bedrooms for overnight accommodation for up to 16 persons, where each guest bedroom is not used for more than 4 persons, is or is not, development and is, or is not, exempted development.

8.1.4 For the purposes of this report, the scope of the assessment will, therefore, solely be restricted to the question as to whether use of 4 bedrooms for overnight guest accommodation is or is not, development and is, or is not, exempted development. It is considered that the use of 7 bedrooms for overnight accommodation is a matter of enforcement and is a matter solely for the Planning Authority.

8.2 Is or is not development

8.2.1 The definition of ‘development’ involves 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. The question that is relevant in this instance is whether the use of 4 bedrooms for overnight accommodation for up to 16 persons, where each of the guest bedrooms is not used for more than 4 persons constitutes a change of use of the existing dwelling, and whether this change is material.

8.2.2 Article 10(4) of the Regulations essentially indicates that any change of a dwelling house to guest accommodation is a material change of use. The existing house is clearly a ‘house’ for the purposes of Article 10 (4). The applicant, however, sets out in their original submission to Wicklow County Council, that notwithstanding this provision, the use of the dwelling for overnight guest accommodation does not actually constitute development, in that it is not a material change of use. This matter is considered further below.

8.2.3 The planning history of the site indicates that permission was granted for a dwelling house on the subject site. Under the most recent planning application - Planning Authority Reference 06/4840 - permission was granted for amendments to a previously approved extension. The drawings submitted with this application indicate a 3 no. bedroom dwelling with gym, study, living room, family room, dining area, kitchen and utility room. The conditions attached to this permission and those preceding clearly state that the dwelling and extension shall be jointly occupied as a single housing unit and used for private domestic use only.

8.2.4 Under Section 2(1) of the Planning and Development Act, 2000 – 2015, the definition of “house” includes a building which is being or has been occupied as a dwelling and the definition of a “habitable house” is a house which is used as a dwelling. While the Act or the accompanying Regulations do not proceed to define “dwelling”, a common dictionary definition is *“a building or place of shelter to live in; place of residence; abode; home.”*

8.2.5 Having regard to the McMahon -v- Dublin Corporation case, the design and layout of the dwelling as per its planning history including the application drawings and development description clearly indicate that the subject house was designed to be a private residential dwelling. The use of 4 bedrooms for overnight accommodation,

therefore, in my view constitutes a change of use. The key issue here is whether the use of 4 bedrooms within the dwelling for overnight accommodation constitutes a material change of use.

- 8.2.6 Having regard to the Brogan Case, materiality can be identified where under a planning scenario, the planning authority would take into account matters that would differ from those taken into account when the original use was assessed. The case law has determined that a change of use is material if the character of the first use is substantially different, in planning terms, from the second use and also if the change of use impacts on the proper planning and sustainable development of the area. I find that the character of the first (and authorised use) as private residential accommodation is different, in planning terms, to the proposed second use as overnight guest accommodation.
- 8.2.7 As per the report of the Planning Authority, I would concur that the change of use to overnight guest accommodation raises planning considerations that are materially different to the planning considerations relating to the permitted use as a domestic residential dwelling. This use is clearly distinguishable from a normal domestic use due to the commercial nature of such use; the high turnover of visitors associated with it; issues of security due to the transient nature of such overnight accommodation; differences in the pattern of usage, and times of usage of the development, as compared to those arising from private residential development and potential disturbance to the amenities of local residents. There is also a higher level of support activities that service a higher turnover of occupants such as cleaning staff in attendance between visitor stays. Such greater intensity of use does in my view change the character and function of the dwelling and it is materially different in planning terms.
- 8.2.8 In the light of the foregoing, the intensification of the use of the subject dwelling for overnight guest accommodation on a short term letting basis and the differing needs and amenity expectations of visitors, as distinct from residents, lead to matters that differ from those that would arise under an assessment of the subject dwelling for residential use. It is considered, therefore, that the use of 4 bedrooms within the dwelling for overnight accommodation for up to 16 persons, where each of the guest bedrooms is not used for more than four guests would comprise a material change of

use and would, therefore, constitute development under section 3 (2) (b) (i) of the Act.

8.3 Is or is not exempted development

8.3.1 In determining whether the development is exempted or not regard must be had to **Article 10 (4)** of the Regulations. This states that:

“Development consisting of the use of not more than 4 bedrooms in a house, where each bedroom is used for the accommodation of not more than 4 persons as overnight guest accommodation shall be exempted development for the purposes of the Act provided that such development would not contravene a condition attached to a permission under the Act or be inconsistent with any use specified or included in such a permission.”

8.3.2 It is evident that, the under this provision, the use of 4 bedrooms in a house for overnight accommodation constitutes exempted development. However, the latter restrictions regarding contravention of a condition and whether the development would be consistent with any use specified in a permission must be considered in relation to the subject dwelling.

8.3.3 As detailed in the planning history section, there have been a number of previous planning applications on the site, under which the current dwelling was constructed. Of particular note is Condition 3 and 4 of Planning Authority Reference 02/7221 which stated

“The existing dwelling and proposed extension shall be jointly occupied as a single housing unit and shall not be sold, let or otherwise transferred or conveyed save as part of the dwelling.”

Reason: *To restrict the use of this extension in the interests of residential amenity.*

“This extension shall be used for private domestic use only and for no other purpose.

Reason: *To safeguard the residential amenities of adjoining properties.*

8.3.4 Furthermore, condition 2 of Planning Authority Reference 06/4840 stated:

“In all other regards, the development shall continue to comply with the conditions attached to Register Reference 02/7221.

- 8.3.5 I consider that the use of 4 bedrooms for overnight guest accommodation as proposed would clearly contravene conditions 3 and 4 of 02/72321.
- 8.3.6 It is noted that the referrer in their original submission to Wicklow County Council set out that condition 3 of Application Reference 02/7221 does not have the effect of de-exempting this activity, so as to bring guest accommodation within the scope of planning control. Reference is made to a previous decision by the Board under Referral Reference RL2616 which noted that a condition which stated *“the proposed house shall be used solely as a single dwelling unit”* was a condition designed to prevent subdivision of an existing unit and not intended to prevent a change of use or de-exempt the dwelling from a change of use.
- 8.3.7 I do not, however, consider this to be a relevant precedent. Condition 3 of Planning Authority Reference 02/7221 was clearly intended to preclude the letting of the extension and that the dwelling in its entirety should be utilised as a single dwelling unit. Therefore, the letting of 4 bedrooms for overnight guest accommodation, would be clearly in contravention of this condition. Furthermore, regard should be had to the precedent decision under RL2317 and the Inspectors conclusion that *“any such exemption would be nullified by the terms of condition 4 of the original permission, and condition 3 of the amending permission, both of which require that each apartment should serve as a single dwelling unit”*.
- 8.3.8 Condition 4 of 02/7221 is also explicit that the extension shall be used for private domestic use only and for no other purpose. I consider that the use of 4 bedrooms for overnight accommodation does not constitute private domestic use and thus is in clear contravention of this condition. In conclusion, the development would both contravene conditions of a previous permission and be inconsistent with the use specified in the permission. In this regard, the provisions of Article 10 (4) of the Regulations are in my view not applicable to the subject site.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the use of four bedrooms

for overnight accommodation for up to 16 persons, where each guest bedroom is not used for more than 4 persons is, or is not, development and is, or is not, exempted development:

AND WHEREAS Steven Van Den Bergh requested a declaration on this question from Wicklow County Council and the Council issued a declaration on the 9th day of February 2018 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 7th day of March, 2018:

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

- (a) Section 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Article 10 (4) of the Planning and Development Regulations, 2001, as amended,
- (c) The High Court decision of Barron, J in Thomas Mc Mahon and Other v. Right Honourable The Lord Mayor, Alderman and Burgesses of Dublin (High Court 1989 No. 9870P),
- (d) The planning history of the site,
- (e) The report of the Inspector.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The use of four bedrooms for overnight accommodation for up to 16 persons, where each guest bedroom is not used for more than 4 persons at Woodside Cottage, Tinnakilly, Rathnew, Co. Wicklow constitutes a material change of use and is development in

accordance with section 3 (i) of the Act and

(b) By reference to Article 10 (4) the subject use does not constitute exempted development because it would contravene condition 2 of planning authority reference 06/4840 and condition 3 and 4 of planning authority reference 02/7221.

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 use of four bedrooms for overnight accommodation for up to 16 persons, where each guest bedroom is not used for more than 4 persons at Woodside Cottage, Tinakilly, Rathnew, Co. Wicklow is development and is not exempted development.

Erika Casey
Senior Planning Inspector

27th June 2018