



An  
Bord  
Pleanála

## Inspector's Report ABP-301320-18

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<b>Question</b>	Whether an extension to the rear is or is not development or is or is not exempted development
<b>Location</b>	26 Estuary Road, Malahide, County Dublin
<b>Declaration</b>	
Planning Authority	Fingal County Council
Planning Authority Reg. Ref.	26 Estuary Road
Applicant for Declaration	Fingal County Council
Planning Authority Decision	None
<b>Referral</b>	
<b>Referred by</b>	Fingal County Council
<b>Owner/ Occupier</b>	Mark Mohun
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	3 <sup>rd</sup> April 2019
<b>Inspector</b>	Colm McLoughlin

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## 1.0 Site Location and Description

- 1.1. The referral site measures approximately 0.02ha in area and is located 1.8km west of Malahide village centre. It is situated on the southeastern side of Estuary Road within a residential area dominated by semi-detached and detached housing.
- 1.2. Currently on site is a two-storey semi-detached house with extensions at ground and first-floor level to the rear and an original ground-floor front-bay projection. Side access is available to the rear garden area, which is primarily enclosed by 1.8m-high block walls and accommodates a single-storey shed structure in the southeastern corner. To the front of the house is a small garden area enclosed by a low-boundary wall, with space to park two cars. The Church of the Sacred Heart is located opposite the site on Estuary Road. Ground levels in the area drop gradually moving north towards the coast.

## 2.0 The Question

- 2.1. The following is questioned by the referrer:
  - ‘whether the amendments to the ground and first-floor extension to the rear of 26 Estuary Road, Malahide, County Dublin is or is not exempted development’;
- 2.2. Noting information gathered during my site inspection, and in the interest of clarity, it is considered appropriate that the question referred to the Board be reworded as follows:
  - whether the existing ground and first-floor extension works to the rear of the house at 26 Estuary Road, Malahide, County Dublin is or is not development, or is or is not exempted development.
- 2.3. I intend to proceed with my assessment on the basis of the reworded question.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

- 3.1.1. The Planning Authority referred the question directly to the Board for a decision, under the provisions of section 5(4) of the Planning & Development Act 2000, as amended (hereinafter referred to as 'the 2000 Act').

### **3.2. Planning Authority Reports**

#### 3.2.1. Planning Reports

- None received.

#### 3.2.2. Other Technical Reports

- None received.

## **4.0 Planning History**

### **4.1. Referral Site**

- 4.1.1. The most recent planning history associated with the referral site, includes the following planning applications and referrals:
- An Bord Pleanála (ABP) Ref. PL06F.RL3438 / Fingal County Council (FCC) Ref. FS5/038/15 – whether the ground and first-floor extension to the rear is or is not exempted development. In June 2016 the Board determined that the extension to the rear of the existing dwelling was development and was not exempted development, as it exceeded floor area limitations for extensions and porches set under the Local Government (Planning and Development) Regulations, 1994 (hereinafter referred to as 'the 1994 Regulations');
  - FCC Ref. F13B/0061 – retention permission was refused in June 2013 for rear extensions comprising a ground-floor bay-window and a first-floor mansard roof, due to the proximity of the first-floor window to the rear (8m) and side (2m-2.5m) boundaries, the obtrusive appearance of the development and the precedent that this would set;

- ABP Ref. PL06F.RL2994 / FCC Ref. FS5/002/12 – whether or not the additional extension above an existing extension to the rear is or is not exempted development. In December 2012 the Board determined that the additional extension was not exempted development given its proximity to the site boundaries;
- ABP Ref. PL06F.106222 / FCC Ref. F97B/0535 – permission was refused in August 1998 by the Board for a two-storey rear extension due to the excessive depth of the extension and the resultant impact on No.25 Estuary Road.

4.1.2. I am aware of at least four previous enforcement cases relating to the site (FCC Refs. ENF16/163A, ENF13/09A, ENF11/97A and 11731 [2001]).

## **4.2. Relevant Referrals**

4.2.1. The following recent referrals decided by the Board are considered relevant:

- ABP Ref. PL04.301363 – in November 2018 the Board decided that the extension to the rear of a house at 80 Woodview, Pinecroft, Grange, Co. Cork is development and is exempted development;
- ABP Ref. PL09.RL3555 – in April 2018 the Board decided that the extension to the rear of an existing single-storey semi-detached house at 8 River Lawns, Kill, Co. Kildare is development and is not exempted development;
- ABP Ref. PL03.RL3506 – in May 2017 the Board decided that the reconstruction and extension of a house at Gurraun, Kilkee, County Clare is development and is not exempted development;
- ABP Ref. PL29S.RL3523 – in April 2017 the Board decided that the first-floor side and rear extension to a house at 5 Church Avenue, Sandymount, Dublin 4 is development and is not exempted development;
- ABP Ref. PL29S.RL3497 – in December 2016 the Board decided that the rear extension to a house at 66 Derravaragh Road, Terenure, Dublin 6W is development and is not exempted development.

## 5.0 Policy & Context

### 5.1. Fingal Development Plan 2017-2023

- 5.1.1. The appeal site and surrounding area has a zoning objective 'RS – Residential' within the Fingal Development Plan 2017-2023, with a stated objective to 'provide for residential development and protect and improve residential amenity'. The site and surrounding area does not have any conservation status. A route for the Greater Dublin Area cycle network is located along Estuary Road directly to the front of the site.

## 6.0 Statutory Provisions

### 6.1. Planning and Development Act 2000, as amended

- 6.1.1. Section 2(1) of the 2000 Act states the following:
- 'development' has the meaning assigned to it by Section 3;
  - 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ....'
- 6.1.2. Section 3(1) states that:
- 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 over land'.
- 6.1.3. Section 4(1) of the Act sets out various forms and circumstances in which development is exempted development for the purposes of the Act, including Section 4(1)(h) providing for the carrying out of works for the maintenance, improvement or alteration of any structure that only affect the interior of the structure or which do not materially affect the external appearance so as to render it inconsistent with the character of neighbouring structures.
- 6.1.4. Section 4(2) of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision are the Planning and Development Regulations 2001-2018.

6.1.5. Under section 32 of the Act there is a general obligation to obtain permission in respect of any development of land not being exempted development and in the case of development which is unauthorised for the retention of that unauthorised development.

**6.2. Planning and Development Regulations 2001-2018**

6.2.1. Article 6(1) of the Planning and Development Regulations 2001-2018 (hereinafter ‘the 2001 Regulations’) provide that ‘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’.

6.2.2. As provided for in Article 9(1)(a), the following development to which article 6 relates, shall not be exempted development, if the carrying out of such development would, inter alia:

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act;

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.

6.2.3. Schedule 2 of Part 1 to the Regulations set out the classes of exempted development including those pertaining to ‘general development within the curtilage of a house’:

<b>Column 1 - Description of Development</b>	<b>Column 2 - Conditions and Limitations</b>
Class 1 - The extension of a house, by the construction or erection of an extension (including a conservatory) to the rear of the house, or by the conversion for use as part of the house of any garage, store, shed or other similar structure attached to the rear or to the side of the house.	1(a) Where the house has not been extended previously, the floor area of any such extension shall not exceed 40 sq.m. (b) Subject to paragraph (a), where the house is terraced or semi-detached, the floor area of any extension above ground level shall not exceed 12sq.m. 3. Any above ground floor extension shall be a distance of not less than 2m from any party boundary. 4(a). Where the rear wall of the house does not include a gable, the height of the walls of any such extension shall not exceed the height of the rear wall of the house. 4(b). Where the rear wall of the house includes a gable,

	<p>the height of the walls of any such extension shall not exceed the height of the side walls of the house.</p> <p>4(c). The height of the highest part of the roof of any such extension shall not exceed, in the case of a flat roofed extension, the height of the eaves or parapet, as may be appropriate, or, in any other case, shall not exceed the height of the highest part of the roof of the dwelling.</p> <p>5. The construction or erection of any such extension to the rear of the house shall not reduce the area of private open space, reserved exclusively for the use of the occupants of the house, to the rear of the house to less than 25sq.m.</p> <p>6(a). Any window proposed at ground level in any such extension shall not be less than 1m from the boundary it faces.</p> <p>6(b) Any window proposed above ground level in any such extension shall not be less than 11m from the boundary it faces.</p>
<p>CLASS 3 - The construction, erection or placing within the curtilage of a house of any tent, awning, shade or other object, greenhouse, garage, store, shed or other similar structure.</p>	<ol style="list-style-type: none"> <li>1. No such structure shall be constructed, erected or placed forward of the front wall of a house.</li> <li>2. The total area of such structures constructed, erected or placed within the curtilage of a house shall not, taken together with any other such structures previously constructed, erected or placed within the said curtilage, exceed 25sq.m.</li> <li>3. The construction, erection or placing within the curtilage of a house of any such structure shall not reduce the amount of private open space reserved exclusively for the use of the occupants of the house to the rear or to the side of the house to less than 25sq.m.</li> <li>4. The external finishes of any garage or other structure constructed, erected or placed to the side of a house, and the roof covering where any such structure has a tiled or slated roof, shall conform with those of the house.</li> <li>5. The height of any such structure shall not exceed, in the case of a building with a tiled or slated pitched roof, 4m or, in any other case, 3m.</li> <li>6. The structure shall not be used for human habitation or for the keeping of pigs, poultry, pigeons, ponies or horses, or for any other purpose other than a purpose incidental to the enjoyment of the house as such.</li> </ol>
<p>Class 7 - The construction or erection of a porch outside any external door of a house.</p>	<ol style="list-style-type: none"> <li>1. Any such structure shall be situated not less than 2m from any road.</li> <li>2. The floor area of any such structure shall not exceed 2sq.m.</li> <li>3. The height of any such structure shall not exceed, in the case of a structure with a tiled or slated pitched roof, 4m or, in any other case, 3m.</li> </ol>



6.2.4. Article 3 of the 2001 Regulations defines 'gross floor space' as 'the area ascertained by the internal measurement of the floor space on each floor of a building (including internal walls and partitions) disregarding any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building'.

### **6.3. Local Government (Planning and Development) Act 1963, as amended**

6.3.1. The Local Government (Planning and Development) Act 1963, as amended (hereinafter 'the 1963 Act') is laid out in a similar manner to its succeeding legislation, the 2000 Act. Section 2(1) of the 1963 Act states the following:

In this Act, except where the context otherwise requires –

- 'development' has the meaning assigned to it by Section 3 and 'develop' shall be construed accordingly;
- 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

6.3.2. Section 3(1) of the 1963 Act states the following:

- In this Act, 'development' means, save where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any structures or other land'.

6.3.3. Section 4(1) sets out various forms and circumstances in which development is exempted development for the purposes of the 1963 Act, including Section 4(1)(g) providing for 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 such appearance inconsistent with the character of the structure or of neighbouring structures.

6.3.4. Section 4(2) of the 1963 Act provided that the Minister may, by regulations, provide for any class of development to be exempted development. The main regulations made under this provision relevant to the subject referral are the 1994 Regulations.

6.3.5. Under section 24 of the 1963 Act there is a general obligation to obtain permission in respect of any development of land not being exempted development and in the

case of development which is unauthorised for the retention of that unauthorised development.

#### 6.4. Local Government (Planning and Development) Regulations, 1994

- 6.4.1. The 1994 Regulations are laid out in a similar manner to their succeeding legislation, the 2001 Regulations. Article 9(1) of the said regulations provide that subject to ‘article 10, development of a class specified in column 1 of Part I of the Second Schedule shall be exempted development for the purposes of the Acts, provided that such development complies with the conditions and limitations specified in column 2 of the said Part I opposite the mention of that class in the said column 1’.
- 6.4.2. The Second Schedule of Part 1 to the 1994 Regulations set out the classes of exempted development including ‘development within the curtilage of a dwellinghouse’:

<b>Column 1 - Description of Development</b>	<b>Column 2 - Conditions and Limitations</b>
<p>Class 1 - The extension of a dwellinghouse, by the construction or erection of an extension (including a conservatory) to the rear of the dwellinghouse or by the conversion for use as part of the dwellinghouse of any garage, store, shed or other similar structure attached to the rear or to the side of the dwellinghouse.</p>	<p>1(a) Where the dwellinghouse has not been extended previously, the floor area of any such extension shall not exceed 23sq.m.</p> <p>(b) Where the dwellinghouse has been extended previously, the floor area of any such extension, taken together with the floor area of any previous extension or extensions, shall not exceed 23sq.m.</p> <p>2. The height of any such extension shall not exceed the height of the eaves or parapet, as may be appropriate, of the dwellinghouse.</p> <p>3. The construction or erection of any such extension to the rear of the dwellinghouse shall not reduce the area of private open space of the dwellinghouse to the rear of the dwellinghouse to less than 25sq.m.</p>
<p>Class 3 – The construction erection or placing within the curtilage of a dwellinghouse of any tent, awning, shade or other object, greenhouse, garage, store, shed or other similar structure</p>	<p>1. No such structure shall be constructed, erected or placed forward of the front wall of the dwellinghouse.</p> <p>2. The total area of such structures constructed, erected or placed within the curtilage of a dwellinghouse shall not, taken together with any other such structures previously constructed, erected or placed within the said curtilage, exceed 25sq.m.</p> <p>3. The construction, erection or placing within the curtilage of a dwellinghouse of any such structure shall not reduce the amount of private open space of the dwellinghouse to the rear or to the side of the dwellinghouse to less than 25sq.m.</p> <p>4. The external finishes of any garage or other structure</p>

	<p>constructed, erected or placed to the side of a dwellinghouse, and the roof covering where any such structure has a tiled or slated roof, shall conform with those of the dwellinghouse.</p> <p>5. The height of any such structure shall not exceed, in the case of a building with a tiled or slated pitched roof, 4 metres or, in any other case, 3m.</p> <p>6. The structure shall not be used for human habitation or for the keeping of pigs, poultry, horses, ponies or pigeons or for any other purpose other than a purpose incidental to the enjoyment of the dwellinghouse as such.</p>
Class 7 - The construction or erection of a porch outside any external door of a dwellinghouse.	<p>1. Any such structure shall be situate not less than 2m from any road.</p> <p>2. The floor area of any such structure shall not exceed 2m.</p> <p>3. The height of any such structure shall not exceed, in the case of a structure with a tiled or slated pitched roof, 4m or, in any other case, 3m.</p>

6.4.3. In addressing the content of applications, Article 18(2) of the 1994 Regulations defines ‘gross floor space’ as ‘the area ascertained by the internal measurement of the floor space on each floor of a building or buildings (including internal walls and partitions), disregarding any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to development to which the application primarily relates’.

## 7.0 The Referral

### 7.1. Referrer’s Case

7.1.1. The referrer’s submission dated the 29<sup>th</sup> day of March 2018 outlines the following:

#### Current Situation

- the Planning Authority accept that the works on site constitute development;
- difficulties emerged during the enforcement proceedings, due to contradictory evidence and as the measurements taken by an Enforcement Officer of the Planning Authority, differed from those used by the Planning Inspectors assessing previous referral cases on site (ABP Refs. PL06F.RL2994 & PL06F.RL3438);
- the most recent enforcement file (FCC Ref. ENF16/163A) relating to the site was closed in March 2017;

- the matter was referred to the Office of the Ombudsman and it was agreed that the Planning Authority would seek a Declaration under section 5(4) of the 2000 Act from An Bord Pleanála in order to clarify matters;

### Background

- a ground-floor and first-floor rear extension was constructed to the house in 2000. An inspection of the site by the Planning Authority in 2001 (under enforcement file ref. 11731) concluded that the extensions at the time were exempt, based on the provisions for Class 1 to Part 1 of the Second Schedule of the 1994 Regulations;
- in 2011 an extension was added to the first-floor extension, but this was removed, as confirmed during a site visit by the Planning Authority Enforcement Officer in April 2015;
- the Planning Inspector assessing the referral question in March 2016 under ABP Ref. PL06F.RL3438 failed to refer to the exempted development provisions under the 1994 Regulations in deliberating on the matter. However, the Board did refer to the 1994 Regulations within their Order dating from June 2016;
- a subsequent inspection by the Planning Authority Enforcement Officer to the site in December 2016 identified that the ground-floor extension floor area was unaltered from the 2001 inspection, comprising an internal area measuring 10.62sq.m. The adjoining open area with tiled roof covering was not considered to form habitable space and does not form part of the ground-floor area calculation. Furthermore, this rear area is not considered to form a 'porch' feature;
- the remaining first-floor extension, considered to be the original extension (i.e. constructed in 1999-2000), comprises an internal area measuring 12.25sq.m following the removal of a previously unauthorised element, thus bringing the total internal floor area of extensions to 22.87sq.m. This floor area is below the 23sq.m limitation set within the 1994 Regulations;

- should the extensions be exempted under the 1994 Regulations, then the modifications to the extensions could be considered exempt under section 4(1)(h) of the 2000 Act;
- the Board are requested to clarify - 1.) 'whether the rear extension as originally constructed benefits from the exemptions allowed under Class 1 of the 1994 Regulations, 2.) whether the rear canopy is exempted development, and 3.) whether the works as currently undertaken to the rear canopy of the structure benefit from exemptions under section 4(1)(h) of the 2000 Act 2000, potentially being works which would not be precluded by Article 9(1)(a)(viii) of the Planning and Development Regulations 2001-2018'.
- The appendix to the Referrer's submission, comprising notes of the Planning Authority's Enforcement Officer, provides additional information regarding the history of development and investigations on site, including measurements taken.

## 8.0 Assessment

### 8.1. Introduction

- 8.1.1. The purpose of this referral is not to determine the acceptability or otherwise of the rear extensions in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development within the meaning of the relevant legislation. Furthermore, planning enforcement is a matter for the Planning Authority and does not fall within the jurisdiction of the Board.
- 8.1.2. Based on the information available on file and on the previous planning and referral files relating to the site, the rear ground-floor and first-floor extensions appear to have been added to the house in 1999-2000. The Planning Authority assert that when pursuing enforcement on these extensions in 2001, they concluded that the extensions were exempt from planning permission, as the extensions complied with the limitations and conditions set for Class 1 of Part 1 to the Second Schedule of the 1994 Regulations. Following this, additional extension works and alterations to the rear of the house were undertaken, including a mansard roof first-floor extension

dating from c.2011, which was added to the rear of the original (1999-2000) rear extension.

- 8.1.3. Under referral case reference PL06F.RL2994, An Bord Pleanála was asked whether or not this additional 2011 extension was exempt development. The Inspector assessing the case in 2012 noted that the original ground-floor extension was also altered by extending the roof area outwards into the garden by approximately 0.9m the full width of the dwelling. This area below the projecting roof and the first-floor extension was in use as a patio, according to the Inspector. The Board decided in December 2012 that the 2011 first-floor extensions were not exempt development, as they did not comply with the conditions and limitations set for Class 1 of Part 1 of Schedule 2 to the 2001 Regulations, as the first-floor extension was located within 2m of the site boundary, as it exceeded the 12sq.m floor area limitation and as it included a rear window within 11m of the rear boundary. Following this, the owners sought retention permission from the Planning Authority (under FCC Ref. F13B/0061) for the rear extensions, but this was refused by the Planning Authority in June 2013 due to the appearance of the extension, the proximity to the extension to the site boundaries and the precedent that this would set.
- 8.1.4. Based on a second referral on the site in March 2016 (ABP Ref. PL06F.RL3438), the mansard-roof first-floor extension dating from 2011 had been removed, while the ground-floor extension, including the area that would have been directly below the removed first-floor extension, remained in situ and covered. In June 2016 the Board determined that the remaining extensions were not exempted development, as they exceeded the floor area limitations set under the 1994 Regulations (i.e. 23sq.m for Class 1 extensions or 2sq.m for Class 7 porches). It was also decided that the 0.9m-deep roofed element along the rear of the house failed to come within the scope of section 4(1)(h) of the 2000 Act and that based on article (9)(1)(a)(viii) of the 2001 Regulations, this element could not avail of exemptions as it consisted of the extension, alteration, repair or renewal of an unauthorised structure.

## **8.2. Is or is not development**

- 8.2.1. The initial question that arises is, whether the construction, as carried out, is or is not development. Sections 3 of the 1963 Act and 2000 Act define development as ‘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'. As defined in sections 2(1) of the 1963 Act and 2000 Act, works include 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal'. The act of extending the house therefore constitutes development. This would not appear to be at issue, as the Planning Authority are in agreement with same, and I note that the determinations under ABP Referral references PL25.RL2994 and PL25.RL3438 concluded that the construction of extensions to the rear of the house comprised works that constituted development.

### **8.3. Is or is not exempted development**

- 8.3.1. The main issue that arises is whether the development is or is not exempted development. The Planning Authority assert that the floor area of the existing ground-floor and first-floor extensions, as currently remain, reflect those areas that existed in 2001 at the time of an Enforcement Officer's inspection, and that these extensions, including their ground and first-floor areas, continue to come within the limitations set for exempted development based on the 1994 Regulations. It is asserted that the modifications that have occurred since 2001 would also come within the scope of section 4(1)(h) of the 2000 Act.

#### Internal Floor Area

- 8.3.2. Firstly, on the basis of the information available and provided, I see no reason to contest the assertion that the extensions, as currently standing, are those that were constructed in 1999-2000, save for the subsequent modifications outlined above in section 8.1. The most relevant consideration is whether the subject extensions would meet the conditions and limitations set for the exemption of extensions under Class 1 of Part 1 of the Second Schedule to the 1994 Regulations. In this regard, the 1994 Regulations require rear extensions not to exceed a gross floor space of 23sq.m, not to exceed the height of the eaves or parapet and not to reduce the rear amenity area below 25sq.m. When excluding the rear detached shed structure (c.7.3sq.m), the rear amenity area measures approximately 44.4sq.m and the height of the extension does not exceed the eaves or parapet of the house. The primary question is whether the floor area of the extensions are below the 23sq.m limitation.

8.3.3. The Planning Authority assert that there are discrepancies between the measurements of the internal floor areas to the extension taken by the Planning Inspector assessing referral case reference PL06F.RL2994 and those taken by an Enforcement Officer from the Planning Authority in 2001 and in 2016. The measurements acquired under the 2012 referral (ABP Ref. PL06F.RL2994) were subsequently relied upon in determining the 2016 referral (ABP Ref. PL06F.RL3438). The Planning Authority calculate that the ground-floor internal extension measures 10.62sq.m and the first-floor internal extension measures 12.25sq.m, thus bringing the total internal floor area to 22.87sq.m; below the 23sq.m limitation set in the 1994 Regulations. I have taken detailed precise measurements and calculations of the internal floor areas on site, taking into consideration the definition of 'gross floor space' as defined in article 18(2) of the 1994 Regulations. The ground floor area measures 10.62sq.m and the first-floor area measures 12.25sq.m according to my measurements, which would appear to conform to the areas identified by the Planning Authority in 2016, therefore the internalised floor area to the extensions measuring a total gross floor area of 22.87sq.m, would be within the 23sq.m limitation set in the 1994 Regulations. The measurements taken largely reflect those taken on two occasions by the Planning Authority and I am satisfied that this provides for a sufficiently precise calculation of the internal floor area to be garnered. Floor plan drawings referred to in the previous referrals and the 2013 application for the site are inconsistent and clearly do not accurately reflect the situation on site. This area does not include those adjoining areas to the rear that are covered.

#### Roofed Area

8.3.4. The Planning Authority assert that the adjoining open areas with tiled roof covering are not habitable spaces and do not form part of the internal ground-floor area calculation (i.e. Class 1 of Part 1 of the Second Schedule to the 2001 Regulations). The house features an L-shaped covered rear area that is roofed, but is not fully enclosed, as it is open to the elements to the rear. These covered areas are understood to have been added with the initial extensions in 1999-2000 and the 0.9m deep canopy extending across the full width of the house after this and prior to 2012. A retractable-awning feature that had been attached to the canopy during the assessment of the 2016 referral has since been removed. The previous referrals on



this site have taken differing positions in assessing whether or not the roofed area to the rear can be considered exempt development.

- 8.3.5. It is stated by the Inspector reporting on the 2012 referral (ABP Ref. PL06F.RL2994) that the area below the projecting roof and below the roof of the first-floor extension is used as a patio. The Inspector did not consider that 'Class 3 (construction, erection or placing within the curtilage of a house of any tent, awning, shade or other object, greenhouse, garage, store, shed, or other similar structure) of the [2001] Regulations applies to the projecting roof part of the development as this is constructed as part of the extension and the first floor extension is actually constructed on top of it'.
- 8.3.6. The Board's decision on the 2016 referral (ABP Ref. PL06F.RL3438) assessed this roofed area as a 'rear porch' that did not come within the scope of Class 7 of Part 1 of the Second Schedule to the 2001 Regulations, as it exceeds 2sq.m in area. In summary, based on previous referrals on site determined by the Board and the assertions of the Planning Authority, the roofed area does not come within the scope of Classes 1, 3 or 7 of Part 1 of the Second Schedule to the 2001 Regulations.
- 8.3.7. Based on the definition of 'gross floor space', as defined in article 3 of the 1994 and 2001 Regulations, I am satisfied that the roofed area to the rear can be excluded from the total floor area of the extensions. Therefore, as this covered area is not considered to come within the scope of Class 1, under the terms set within section 24 of the 1963 Act and section 32 of the Act 2000, there would need to be legislative provisions for this roofed area to be considered exempt development.
- 8.3.8. The overhang element of the roofed area with the first-floor extension above measures approximately 0.9sq.m and this is not considered a substantial overhang, given the overall cover of the roofed area (9.5sq.m). I do not consider that the 'patio' or roofed area is intended to function as a 'porch', nor does it have the appearance of a 'porch' and, as such I do not consider that this area should be defined as a 'porch' or assessed against the criteria in Class 7.
- 8.3.9. I consider that the roofed area more fittingly sits into the category of structures referenced under Class 3, which includes a tent, awning, shade or other object, greenhouse, garage, store, shed, or other similar structure. The Regulations do not stipulate whether or not such a structure needs to be detached or attached to a

house. I am therefore satisfied that the roofed area, can be considered against the conditions and limitations set within Class 3.

8.3.10. The conditions and limitations set for Class 3 under the 1994 and 2001 Regulations refer to matters relating to the positioning (1), finishes (4), height (5) and use (6) of the structure and I am satisfied that the roofed areas would not exceed the limitations or would be contrary to the conditions set out in this regard. It is also stipulated under Class 3 that the construction, erection or placing of a structure within the curtilage of a house, shall not reduce the amount of private open space reserved exclusively for the use of the occupants of the house to the rear or to the side of the house to less than 25sq.m. As detailed above, 44.4sq.m would remain and the amenity space limitation would not be exceeded. The final requirement to be assessed under Class 3 is the need for the total area of such structures constructed, erected or placed within the curtilage of a house, taken together with any other such structures previously constructed, erected or placed within the said curtilage, not to exceed 25sq.m. As detailed above, the roofed area measures a total area of 9.5sq.m and there is a single-storey shed structure located in the rear garden of the property measuring 7.3sq.m. Taken in conjunction with the roofed area, the total floor area of 16.8sq.m does not exceed the 25sq.m limitation. Accordingly, having assessed the roofed area in relation to various provisions in the 1994 and 2001 Regulations, including Class 3 of Part 1 of Schedule 2, relating specifically to exempted development for ancillary structures within the curtilage of a house, I conclude that the development as constructed complies with the 25sq.m cumulative limitation for such structures on site.

#### Modifications

8.3.11. The Planning Authority queries that if the extension works can be considered exempt development, then the modification works to the rear roofed area can come within the scope of Section 4(1)(h), as the works would not be precluded by Article 9(1)(a)(viii) of the 2001 Regulations. The modifications to the extensions and roofed area are external works that do not solely affect the interior of the structure and, as outlined above, the roofed area is considered to come within the conditions and limitations set in the legislation for this development to be considered exempt development. The external appearance to the development, resulting from the modifications, do not render the development inconsistent with the character of

neighbouring structures, particularly given the nature, scale and character of extensions to neighbouring properties. Therefore, I am satisfied that the modifications to the roofed area and extensions can avail of the exemptions set out under the 1994 and 2001 Regulations and, accordingly, they are of a nature and character that come within the scope of section 4(1)(h) of the 2000 Act.

## 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 existing ground and first-floor extension works to the rear of the house at 26 Estuary Road, Malahide, County Dublin is or is not development or is or is not exempted development:

**AND WHEREAS** Fingal County Council requested a declaration on this question on the 29<sup>th</sup> day of March, 2018 from An Bord Pleanála:

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

- (a) section 2(1) and 3(1) of the Local Government (Planning and Development) Act 1963, as amended,
- (b) section 2(1), 3(1) and 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (c) article 9(1) and article 10(1) of the Local Government (Planning and Development) Regulations 1994 and Classes 1, 3 and 7 of Part 1 of the Second Schedule to those Regulations,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations 2001-2018 and Classes 1, 3 and 7 of Part 1 of Schedule 2 to those Regulations,

- (e) the planning and development history of the site,
- (f) the submission of the Planning Authority,
- (g) the report of the Planning Inspector, including measurements taken on site:

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) the development as carried out constitutes development.
- (b) the gross floor area of the extensions do not exceed 23 square metres or reduce the area of garden remaining to less than 25 square metres or exceed the height of the rear eaves or parapet to the house.
- (c) the extension, therefore, comes within the scope of Class 1 of Part 1 of the Second Schedule to the Planning and Development Regulations 1994, as amended, and all Conditions and Limitations attached to this Class.
- (d) the roofed structure open to the rear is not internal habitable space and is not a porch.
- (e) the roofed structure to the rear, in combination with the shed to the rear, do not exceed 25 square metres or reduce the area of garden remaining to less than 25 square metre or exceed 4 metres.
- (f) the roofed structure, therefore, comes within the scope of Class 3 of Part 1 of the Second Schedule to the Planning and Development Regulations 1994, as amended, and Class 3 of Part 1 of Schedule 2 to the Planning and Development Regulations 1994, as amended, and all Conditions and Limitations attached to these Classes.
- (g) the modifications to the extensions and the roofed structure come within the scope of section 4(1)(h) of the Planning and Development Act, 2000, as amended.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(4) of the Planning and Development Act 2000, as amended, hereby decides that the development as carried is development and is exempted development.

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Colm McLoughlin  
Planning Inspector

16<sup>th</sup> April 2019