



An  
Bord  
Pleanála

## Inspector's Report ABP-301406-18

### Question

Section 5 referral that certain construction works carried out and being carried out as part of a development are development and not exempted development.

### Location

25 Dalkey Avenue, Dalkey, Co. Dublin

### Declaration

Planning Authority

Dun Laoghaire Rathdown County  
Council

Planning Authority Reg. Ref.

Ref 2018

Applicant for Declaration

Patrick and Charia Cleary

Planning Authority Decision

Is exempted development

### Referral

Referred by

Patrick and Charia Cleary

Owner/ Occupier

Alan Kelly

Observer(s)

None

Date of Site Inspection

25<sup>th</sup> January 2019

**Inspector**

Emer Doyle

## 1.0 Site Location and Description

- 1.1. The site has a stated area of 0.106 hectares and is located on Dalkey Avenue, Dalkey, Co. Dublin.
- 1.2. A large detached dwelling on the site was demolished in recent years in order to construct two detached dwellings. These houses were unoccupied and still under construction at the time of the referral to the Planning Authority. They are now fully completed and occupied.

## 2.0 The Question

- 2.1. Patrick and Charia Cleary seek the Board's determination as to whether the following works are or are not exempted development:
  1. The extension at first floor level currently under construction to the rear of House A,
  2. The extension at first floor level currently under construction to the rear of House B,
  3. The alterations/ extension joining the utility room and living room of House B,
  4. The substitution of a door for the door and window at upper ground floor level in House A,
  5. The extent to which the interior of House A has been constructed other than in accordance with the lodged plans,
  6. The extent to which the interior of House B has been constructed in accordance with the lodged plans,
  7. The extent to which the courtyard/ terrace to the rear of House B has been constructed other than in accordance with the lodged plans,
  8. The extent to which the courtyard/ terrace to the rear of House A has been constructed other than in accordance with the lodged plans, and
  9. The office type structure being constructed within the rear garden of House A.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

The Planning Authority issued a declaration as follows:

Items 1, 2, 3 and 9 constitute development that is exempt development for the purpose of the Act.

#### **Items 1 and 2**

The extension at first floor level currently under construction to the rear of House A and House B constitutes development that is exempt development in accordance with Class 1 of Part 1, Schedule 2, Planning and Development Regulations 2001 as amended.

#### **Item 3**

The alterations/extension joining the utility room and living room of House B constitutes development that is exempt development in accordance with Section 4(1)(h) of the Planning and Development Act 2000 as amended.

#### **Item 9**

The office type structure currently under construction to the rear of House A constitutes development that is exempt development in accordance with Class 3 of Part 1, Schedule 2, Planning and Development Regulations 2001 as amended.

#### **Items 4, 5, 6, 7 and 8**

These items relate to variations to a development in its construction from that indicated within planning drawings upon which a grant of planning permission was issued and are considered to fall outside the scope and meaning of exempt development.

## 3.2. Planning Authority Reports

### 3.2.1. Planning Reports

- Items 1 and 2 – First Floor Extension

The extension currently under construction complies with all 7 conditions and limitations of Class 1 of Part 1 Schedule 2 - exempted development. Planning Condition 2(c) was complied with and recorded in that the windows were constructed in accordance with the south elevation drawing. (Photos attached to planner's report – photos 1 and 2).

- Item 3 – Filling in of void area

The permission granted depicted the utility room and living room of House B separated via an inset void with solid wall to utility side, glass panel to living room side and open roof. The development was constructed to conform with this proposal as per photo 3 of planner's report and thereafter alterations commenced as per photo 4. The filling of the void results in an extra c. 2.5m<sup>2</sup> and is considered that the development is in accordance with Section 4(1)(h).

- Item 4 – Substitution of door for door and window

It is considered that the substitution of a door for a door and window at upper ground floor level in House A was carried out as part of the construction of the house and constitutes a variation within that permission. It is considered to be of such a minor nature as to not constitute a breach of planning permission.

- Items 5 and 6 – Internal alterations to houses

Based on the referrer's submitted documents, there is no indication that physical alterations have taken place, merely that room destination/ usage has changed. The variation of room designation/ use within a residential house is not considered to constitute a material change in the use of the structure and therefore is not considered to constitute development in accordance with Section 3(1) of the Act.

- Items 7 and 8 – Alterations to courtyard and external terrace

It is considered that the terrace area and access stairs at upper ground floor level to the rear of Houses A and B were created and installed as part of the construction of the house itself and do not constitute a stand alone development in accordance with Section 3(1) of the Act. In this case the variation in design and position of the access stairway within the terrace area is considered to be of a minor nature as to not constitute a breach of the planning permission.

- Item 9 – Office type structure in rear garden

It is considered that the office type structure currently under construction to the rear of the house constitutes development that is exempt development in accordance with Class 3 of Part 1, Schedule 2. The works to erect the office type structure is considered to have commenced post completion of the 'house' for the purpose of the Act.

## 4.0 Planning History

### **PA D14A/0151/ ABP 06D.243484**

Permission granted by Planning Authority and by An Bord Pleanála on appeal for demolition of house and construction of 2 No. houses, and widening of entrance as granted under Reg. Ref. D12A/0340.

## 5.0 Policy Context

### 5.1. Development Plan

The site is zoned 'A' – 'To protect and /or improve Residential Amenities in the Dun Laoghaire Rathdown County Development Plan 2016-2022.

## 5.2. Natural Heritage Designations

None relevant.

## 6.0 The Referral

### 6.1. Referrer's Case

The referrer's case can be summarised as follows:

- See pages 2-5 of our letter dated the 21<sup>st</sup> of February 2018, where we detail the extent to which the development had not been carried out and completed prior to the commencement of additional works.
- The developer cannot avail of the exempted development provisions as conditions 1 and 7 have not been complied with.
- The development was constructed from the outset with a view to the utility room and living room being a single entity as a RSJ beam with block and poured concrete bridged the gap shown on the drawings for House B.
- The filling in of this gap results in additional floor space and cannot be considered to comply with Section 4(1)(h).
- A house plan and photograph of the lower ground floor of House B taken from a property website is attached to demonstrate how the interior differs from the granted permission - this confirms that physical alterations have taken place.
- Section 3(1) of the Act is not relevant to the works involved in the construction of the external terrace.

### 6.2. Planning Authority Response

- It is considered that there are no new issues raised within the referral documentation that require additional assessment and observation on.

### 6.3. Owner/ occupier's response

- The development was carried out in accordance with the permission granted under PA Reg. Ref. D14A/0151 (ABP Ref. PL06D.243484) and as such exempted development regulations could be applied to the houses.
- The relevant compliance submissions as conditioned by the Planning Authority were agreed with the Planning Authority and Ferreira Architects issued a Certificate of Completion prior to any additional work taking place at the property.

- Items 1 and 2 – First Floor Extension

The houses were firstly built in accordance with the planning permission and the extensions at first floor level were carried out thereafter.

- Item 3 – Filling in of void area

The internal void area between the living room and the utility area of House B is being maintained in accordance with the permission. As part of the construction requirement for the dwelling, a continuous RSJ beam was inserted above this void that will connect the living and utility rooms at upper ground floor level. There is therefore no extension to the dwelling as a result of this and can only be considered a 'de-minimis' alteration to the permitted design.

- Item 4 – Substitution of door for door and window

The associated elevational change to the rear of the dwelling with the provision of a window in lieu of a doorway does not materially affect the external appearance of the structure to such an extent that it would render its appearance inconsistent with the character of the structure or indeed neighbouring structures.

- Items 5 and 6 – Internal alterations to houses

There has not been any materially significant change to the internal layout at lower ground floor level of House B. Bedroom No. 4 has moved from the western side of the floor to the eastern side and the family room is now known



as a study and has moved to the western side of the floor in lieu of Bedroom No. 4.

- Items 7 and 8 – Alterations to courtyard and external terrace

There has been a slight variation between the permitted plans and the as built plans for the upper ground floor terrace given that the proposed 'walk on glass' has been moved from the centre of the terrace to the north-eastern side of the terrace. Such a minor variation can be considered 'de-minimis' in nature.

- Item 9 – Office type structure in rear garden

The structure is a domestic garage/ shed and is not an office type structure. It is considered to be exempted development.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

#### Section 2(1)

In this Act, except where the context otherwise requires—

“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, and ...

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

### Section 3(1)

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(1)

The following shall be exempted development for the purposes of this Act –

- (h) 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;

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

**Article 6** states:-

(1) 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.

**Article 9 (1)** states:-

Development to which Article 6 relates shall not be exempted development for the purposes of the Act

- (a) if the carrying out of such development would

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

## Schedule 2 Part 1 Exempted Development

Class 1 Development within the curtilage of a house.

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.

### 7.3. Relevant Case Law

#### 7.3.1. Horne v Freeney (1982)

Internal alterations were undertaken during the course of construction of an amusement arcade. Here it was held that the permission was indivisible and that the planning permission should have been undertaken in its entirety. Mr. Justice Murphy considered that it was not possible to undertake alterations during the construction simply because the variation would have been exempted once the building was completed.

### 8.0 Assessment

8.1. It should be stated at the outset that the purpose of this referral is not to determine the acceptability or otherwise of the alterations and amendments to the dwellings, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development.

#### 8.2. Is or is not development

8.2.1. Section 3(1) of the Planning and Development Act, 2000, defines 'development' as meaning, 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 structure or other land*'.

- 8.2.2. 'Works' are defined under Section 2 of the Act as including 'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...'

Therefore, it is considered having regard to the above definitions that all 9 items in this referral involve 'works' and 'development' within the meaning of the Act.

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

- 8.3.1. Items 1 - 9 consist of a wide range of alterations and amendments made at various stages during the construction process of the two dwellings at this location.
- 8.3.2. A key issue to be addressed in the first instance is whether or not the developer can avail of the exempted development provisions. At the time of the referral to the Planning Authority, part of the works including the first floor extensions and the 'office type structure' were under construction and the houses were unoccupied. The referral is in the name of the developer of the site. At the time of my site inspection, the houses were fully completed and occupied and are now in new ownership.
- 8.3.3. The Planning Authority report stated that 'it is considered that the development permitted under D14A/0151 (PL06D.242484) was commenced and implemented to an extent that renders each of the 2 main buildings constructed on the property as constituting a 'house' for the purpose of the Act in the context of affording the availability of exempt development provisions.
- 8.3.4. I note that photographs are attached to the planner's report of both the first floor windows and the void at lower ground floor level. I note that the first floor windows appear to have been constructed in accordance with the permission in the first instance before the first floor extension was constructed. However the void as originally constructed also provided for a continuous RSJ beam as part of the construction which was not shown on the planning drawings.
- 8.3.5. The response submitted on behalf of the developer states that the relevant compliance submissions as conditioned by the planning authority were agreed with

the planning authority and a certification of compliance was issued by Ferreira Architects prior to any additional works taking place at the property. There is no information in either the response from the developer or the Planning Authority in relation to the date the certificate of compliance was issued.

- 8.3.6. The case made by the Planning Authority is that the office type structure (this is currently in use as a tool shed and an outdoor utility room) and the first floor extensions are exempted under Classes 1 and 3 of Part 1, Schedule 2, Planning and Development Regulations 2001. I am satisfied that both the shed and the first floor extensions come within the scope of these classes.
- 8.3.7. However, in order to avail of the exempted development provisions, the developer would have had to carry out the complete the development in accordance with the permission granted under PL06D.243484 in the first instance. Having regard to my site inspection, the evidence on file from the planning authority and the referrer and the response of the developer, I am of the view that the house was not completed in accordance with conditions 1, 2 (d) or 7 of the permission at the time the extensions and office type structure were constructed and therefore the developer cannot avail of the exempted development provisions.

The following items are of relevance to the Board in this regard:

1. There are photographs on the file which show that at the time the shed (otherwise referred to as office type structure) and the first floor extensions were under construction, the development was not completed in accordance with conditions 1, 2(d) and 7 of the permission granted under PL 06D.243484.
2. Filling in of void area of House B (Item 3). It is clear from the photographs on file and from the developer's response that a continuous RSJ was inserted above the void during the construction of the house. This is not provided for in the planning drawings.
3. I note that the rear elevation of house A was not constructed in accordance with the planning drawings (Item 4). The rear elevation provided for a small window serving a utility room and double doors from the living area to the garden. The rear elevation of house A at upper

ground floor level was constructed as per photograph 10 attached to my report and consists mainly of glazing.

4. I note that there are alterations to the upper ground floor of both houses in terms of the omissions of internal walls between the utility room and the kitchen and living room. I also note that the lower ground floor of house B differs from the plans in so far as internal walls were altered and omitted (Items 5 and 6).
5. It is clear that the patio areas and staircases of both houses were not constructed in accordance with the planning drawings in that the drawings indicate spiral staircases with walk on glass in a central location contrary to what is now built on site (Photographs 3, 4, 5, and 8 - Items 7 and 8). The Planning Authority noted in their report that these works were installed during the construction of the house and constitute a variation within the planning permission. I note also that condition 2 (d) of PL06D.243484 required that the proposed glass balustrade and handrail along the western boundary of the upper ground floor level terrace of house B shall be replaced by a wall not less than 1.8m in height. I noted on the site inspection that works in accordance with this condition have not taken place (Photograph 4).

8.3.8. The case made by the developer in relation to the other variations to the planning permission carried out during the construction process is that they are 'de-minimus' and come within Section 4(1)(h) of the Planning and Development Act.

8.3.9. In this regard, it is important to note the judgement in relation to *Horne V Freeney* which concluded that for any development to avail of exempted development provisions in terms of Section 4(1)(h) exemptions of the Planning and Development Act, 2000 (as amended), it must have been completed in full accordance with the permission.

8.3.10. I consider that it is clear from the photographs and details submitted by the Planning Authority, the developer, the referrer, and my site inspection that the constructed houses were not completed in accordance with conditions 1, 2 (d) and 7 of the permission. Mr. Murphy states in his judgement that permission is not indivisible and planning permission requires that the totality of the works are carried out. The

judgement essentially concludes that a developer cannot partially carry out a development as distinct from the whole of a permission and any exemptions can only be applied to a built structure. As such, any arguments that the alterations and amendments are exempted development having regard to Section 4(1)(h) would fall.

#### 8.4. **Restrictions on Exempted Development**

The development in question contravenes conditions 1, 2(d), and 7 of An Bord Pleanála Reference PL06D.243484 and therefore development which might otherwise be considered to be exempted development is de-exempted having regard to Articles 6 and 9 of the Planning and Development Regulations 2001 as amended.

### 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 works undertaken relating to the following:

1. The extension at first floor level currently under construction to the rear of House A.
2. The extension at first floor level currently under construction to the rear of House B.
3. The alterations/ extension joining the utility room and living room of House B.
4. The substitution of a door for the door and window at upper ground floor level in House A.
5. The extent to which the interior of House B has been constructed other than in accordance with the lodged plans.
6. The extent to which the interior of House A has been constructed other than in accordance with the lodged plans.
7. The extent to which the courtyard/ terrace to the rear of House B has

- been constructed other than in accordance with the lodged plans,
8. The extent to which the courtyard/ terrace to the rear of House A has been constructed other than in accordance with the lodged plans, and
  9. The office type structure constructed within the rear garden of House A
- to two dwellings located at 25 Dalkey Avenue, Dalkey, Co. Dublin is or is not development and is or is not exempted development.

**AND WHEREAS** Patrick and Charia Cleary requested a declaration on this question from Dun Laoghaire Rathdown County Council and the Council issued a declaration on the 20<sup>th</sup> day of March, 2018 stating that items 1, 2, 3, and 9 were development and were exempted development and items 4, 5, 6, 7, and 8 related to variations to a development in its construction from that indicated within planning drawings and were considered to fall outside the scope and meaning of exempt development.

**AND WHEREAS** Patrick and Charia Cleary referred this declaration for review to An Bord Pleanála on the 11<sup>th</sup> day of April, 2018:

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

- (a) Sections 2, 3, and 4 of the Planning and Development Act, 2000, as amended,
- (b) Articles 6 and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Classes 1 and 3 of the Second Schedule to the Planning and Development Regulations, 2001, as amended,



- (d) the planning history of the site, including An Bord Pleanála Reference PL06D.243484, and the terms and conditions of that permission,
- (e) the nature and extent of the works that have been carried out and the date when such works were carried out,
- (f) the documentation on file, including submissions from the referrer, the developer and the planning authority, and
- (g) relevant case law, and in particular *Horne vs Freeney* [1982 IEHC 20],

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

- (a) The works undertaken on site constitute development, as defined under Sections 2 and 3 of the Planning and Development Act 2000, as amended;
- (b) The exemptions afforded under Classes 1 and 3 of the Second Schedule to the Planning and Development Regulations, 2001, as amended cannot be availed of for items 1, 2 and 9 as the houses had not, prior to these works, first been built in accordance with the plans and particulars of An Bord Pleanála Reference PL06D.243484 and furthermore, would not be exempted development under Article 6 of the Planning and Development Regulations, 2001, by reason of the restriction on exemption set out in Article 9 (1)(a)(i), as the development in question would contravene conditions 1, 2(d), and 7 of the said permission.
- (c) The other development that has taken place on the site, as outlined in items 3-8 of the referral, are not within the scope of Section 4(1)(h) of the Planning and Development Act, 2000, as amended, not being works for the maintenance, improvement or other alteration of an existing structure, but rather works carried out during the construction of the two houses, such houses, being new structures, and having regard to case law, the exemptions afforded

under Section 4(1)(h) cannot be availed of as the houses had not first been built in accordance with the plans and particulars of An Bord Pleanála Reference PL06D.243484.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act, hereby decides that the works undertaken are development and are not exempted development.

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Emer Doyle  
Planning Inspector

7<sup>th</sup> March 2019