



An  
Bord  
Pleanála

## Inspector's Report ABP 302175-18

### Question

Whether the removal of three features and retention of a shed is or is not development or is or is not exempted development. This specifically excludes the use of the roof of this structure for sitting out purposes.

### Location

3 Wellfield Close, Wicklow, Co.  
Wicklow.

### Declaration

Planning Authority

Wicklow Co. Council

Planning Authority Reg. Ref.

Ex28/18

Applicant for Declaration

Seamus Mitchell

Planning Authority Decision

Is not exempted development

### Referral

Referred by

Seamus Mitchell

Owner/ Occupier

Seamus Mitchell

Date of Site Inspection

16/11/2018

Inspector

Siobhan Carroll

## Contents

1.0 Site Location and Description .....	3
2.0 The Question .....	3
3.0 Planning Authority Declaration.....	3
3.1. Declaration .....	3
3.3. Planning Authority Reports .....	3
4.0 Planning History.....	5
5.0 Policy Context.....	5
5.1. Development Plan.....	5
6.0 The Referral.....	5
6.1. Referrer’s Case .....	5
6.2. Planning Authority Response .....	8
7.0 Statutory Provision.....	10
7.1. Planning and Development Act, 2000 (as amended).....	10
7.2. Planning and Development Regulations, 2001 (as amended) .....	10
8.0 Assessment.....	13
8.1. Is or is not development .....	13
8.2. Is or is not exempted development .....	13
9.0 Recommendation.....	16

## 1.0 Site Location and Description

1.1. Wellfield Close off Monkton Row is located in the centre of Wicklow Town. The subject property no. 3 Wellfield Close is a detached two-storey dwelling with associated vehicular driveway and gated access. The first floor of the dwelling has been constructed at street level with lower floor accessible via external steps to the front and rear of the property. The property is served by a yard to the rear. The subject shed is situated in the south-western corner of the yard 5m from the dwelling.

## 2.0 The Question

2.1. Whether the removal of three features comprising a walkway (between house and the roof of the shed), a railing atop this shed and a timber fence beside the roof of the feature, the retention of a garden shed of 19.1sq m and which is located to the rear of a dwelling at 3 Wellfield Close, Monkton Row, Wicklow is or is development and is or is not exempted development. This specifically excludes the use of the roof of this structure for sitting out purposes.

## 3.0 Planning Authority Declaration

### 3.1. Declaration

3.2. Wicklow County Council issued a declaration under Section 5 of the Planning and Development Act 2000, on the 27<sup>th</sup> day of June, 2018 stating that the Planning Authority considers that removal of three features comprising a walkway (between house and the roof of the shed), a railing atop this shed and a timber fence beside the roof of the feature, the retention of a garden shed of 19.1sq m which is located to the rear of a dwelling is development but is not exempted development.

### 3.3. Planning Authority Reports

#### 3.3.1. Planning Reports

- The construction of the shed constitutes development.
- Following an assessment of the planning history of the site, Wicklow Town Council, Planning Ref: 1823/92, it would appear that extensive works of

excavation in excess of 1m below ground level has been carried out to the rear of the dwelling in the absence of planning permission.

- The construction of the garden sheds could not have been carried out without these works having first taken place.
- The excavation works carried out on site exceed the conditions and limitations under Class 3 to facilitate construction of the sheds. Therefore, it does not come within the scope of the development set out in Class 3 of Part 1 of Schedule 2 of the Planning and Development Regulations.
- Regarding the use of the roof of the shed as an amenity space it is noted that it is laid out and designed as an amenity space. It is considered that the use of the roof as an amenity space would comprise development. The reference question refers to the removal of three features comprising a walkway between the house and the roof of the shed, a railing atop the shed and a timber fence beside the roof. It is specified that it excludes the use of the roof of the structure for sitting out purposes.
- It is not considered possible to isolate the roof of the shed and its use as an amenity space from the shed as they form part of the same structure. The three elements are to be removed however it is not considered that these works would be sufficient to ensure that the roof cannot be used as an amenity space particularly as the roof of the shed is easily accessible.
- The walkway is to be removed however the steps which form part of the shed structure are to be retained and therefore the steps should be considered in the assessment of the referral.
- It is considered that the erection of the steps constitutes works and is therefore development. The steps are not required for the use of the structure as a shed. The steps provide direct access to and facilitate the use of a flat roof as an amenity space. This is a change of use which is considered material and constitutes development.
- The Planning Authority concluded that the removal of three features comprising a walkway (between house and the roof of the shed), a railing atop this shed and a timber fence beside the roof of the feature, the retention of a

garden shed of 19.1sq m and which is located to the rear of a dwelling is development and is not exempted development.

## **4.0 Planning History**

PA Reg. Ref. 17/1424 – Permission was granted for the retention of the existing porch as constructed.

PA Reg. Ref. 16/844 – Permission was refused for the retention of the existing porch as constructed for the following reason;

1. The proposed development would represent consolidation of unauthorised development on this site, having regard to the existing development on site (shed, patio, steps and railings) for which no permission exists, the provision of such a form of development unduly impacts on the amenities of adjoining properties, undermines the planning regulations and would be contrary to the proper planning and sustainable development of the area.

PA Reg. Ref. WTC92/1823 – Permission was granted for revisions to the subject dwelling.

## **5.0 Policy Context**

### **5.1. Development Plan**

The operative development plan is the Wicklow Town – Rathnew Development Plan 2013 – 2019. The site is zoned RE: Existing Residential. The objective for this zoning is to protect, provide and improve residential amenities of existing properties and areas while allowing for infill residential development that reflects the established character of the area in which it is located and with minimal impact on the existing residential amenity.

## **6.0 The Referral**

### **6.1. Referrer's Case**

- The subject shed is of a type, height, size and position which would not require permission if erected in most rear gardens.

- Regarding the issue of ground works it is clear that the land in the vicinity of the referral site undulates considerably and that the site and adjacent properties occupies several levels.
- Condition no. 11 and no. 12 of the parent permission under Reg. Ref. 1377/865 relates to land levels and condition no. 5 of reg. Ref. 1823/92 refers to local terrane.
- The Council has concluded that the referrer undertook ground works in connection with the shed to the degree that the report of the Planning Officer states, “it would appear that extensive works of excavation (in excess of 1m below the original ground level have been carried out to the rear of the dwelling house in the absence of planning permission.
- It is set out in the case made by the referrer that there is a lack of evidence to corroborate the Council’s assertion in relation to excavation works.
- A copy of a drawing which was previously provided to the Council in response to an enforcement related letter dated 26<sup>th</sup> of November 2016 indicates the ground levels to the rear of the dwelling. The Council have placed certain ground levels in red ink on the drawing.
- The referrer questions the validity of these ground levels as determined by the Planning Authority in dealing with the enforcement proceedings.
- The Council has predicated its conclusion on the extent and level of the excavation works to the rear of the dwelling as being accurate.
- It is set out in the assessment of the Planning Officer that the levels were changed to facilitate the erection of the shed. However, it is contended that the claims of excavation are unfounded and it is therefore requested that the Board reject the Council’s conclusion.
- There are no records in the history files under Reg. Ref 1377/86 and Reg. Ref. 1823/93 which depict land levels in the garden prior to permission being granted. There are no historical notes on file to support the details presented by the Council in relation to the site levels.

- It is argued that the only excavation which took place to the rear of the dwelling comprised of the provision of structural foundations for the development, therefore such works comprise exempted development.
- The Council set out in its decision that Article 9(1)(a)(viii) of the Planning and Development Regulations, 2001 (as amended) – which reads as follows; *‘Development to which article 6 relates shall not be exempted development... (a) if the carrying out of such development would – (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...’* that the clause removes the exemption provided for under Article 6 of the Planning and Development Regulations, 2001 (as amended). This is based on the claim that the land on which the shed is situated has been altered. It is submitted that the Planning Authority has incorrectly taken the view that once any unauthorised excavation has occurred that a landowner can never avail of the exempted development provision.
- The referrer refutes the position of the Council that consent is need for the subject shed on the basis that *‘the sheds were constructed on lands which were excavated without planning permission.’* The suggestion of recent unauthorised excavation does not take into account the possibility that the ground level was altered in order to facilitate the erection of the house.
- Regarding the use of the roof, this referral specifically excludes the use of the roof of this structure for sitting out purposes.
- The report of the Planning Officer states that *‘it is not considered possible to isolate the roof of the shed and its use as an amenity space.... as they form part of the same structure.’*
- It is considered that this argument could apply to all flat roofed buildings in rear gardens of dwellings and for many side and rear extensions.
- Therefore, it is submitted that every structure with a relatively flat roof has the potential to be used for amenity or sitting out purposes.
- It is respectfully submitted that it is for the referrer to decide the scope of the particular development under examination.

- It is acknowledged in the report of the Planning Officer that the ‘roof of the shed is accessed via a walkway ....to be removed’, however the report also states that ‘the steps are to be retained and must therefore be considered’.
- The steps form part of the roof itself and if removed the roof would theoretically be accessible via a small stepladder. The referrer is in the process of lodging a new referral with the Council indicating the stepped roof element omitted.
- In conclusion, the Planning Authority unequivocally accepts that the subject shed satisfies all of the regulatory prerequisites for exempted development status in terms of height, size, position and use.
- The matter concerning the use of the roof has specifically been excluded from the referral. It is considered unreasonable that the Council have concluded that this building needs consent on the basis on an element which does not form part of the proposal.
- The substantive issue which the Planning Authority concluded that the ground levels were altered to facilitate the erection of the subject shed. Aside from works associated with the provision of a structural foundation, it is submitted that there is no evidence before the Board to support the Council’s conclusion.

## 6.2. Planning Authority Response

- The Planning requests that the following matters be taken into consideration.
- Regarding conditions 11 and 12 attached to PA Reg. Ref. 1377/86 and condition no. 5 of PA Reg. Ref. 1823/92, the Planning Authority is satisfied the conditions refer to areas of open space within the residential development of Wellfield and therefore those conditions are not relevant to this Section 5 referral case.
- The Planning Authority in determining the referral did not conclude as stated in the submission that the referrer Mr. Mitchell undertook ground works in connection with the shed.



- The Planning Authority is satisfied that the ground level to the rear of the property was lowered in excess of 1m below the original ground level in the absence of planning permission.
- The Planning Authority accepts that it is more likely that the works were carried out prior to and separate from the construction of the shed.
- The Planning Authority considers that it is appropriate to take into consideration that the subject sheds in question were constructed on an unauthorised lower level.
- The site is subject to enforcement proceeding, evidence obtained during this process indicates that the ground levels to the rear of the site upon which the shed is question has been constructed were lowered in excess of 1m in the absence of planning permission.
- A letter submitted to the Planning Authority from Deane Turner Associates Consulting Engineers in September 2015 on behalf of the referrer Mr. Mitchell makes reference to the sheds. It is stated in the letter that there were sheds demolished by Mr. Mitchell to facilitate the construction of sheds which are the subject of this referral. The letter also states that the floor level of these sheds was lowered to approximately 1.2m from their original ground level. A letter from Mr. Turner to the Planning Authority dates 5<sup>th</sup> of October 2016 revised the figure to 0.86m lower than the original ground level. The Planning Authority did not accept the basis of the submitted revised figure.
- Regarding the use of the roof of the sheds as an amenity space, the Planning Authority is satisfied that the shed structure was designed and constructed to facilitate the use of the roof as an amenity space.
- The Planning Authority is therefore of the opinion that the referrer's attempt to isolate the roof of the shed and its use as an amenity space from the shed is inappropriate.

## 7.0 Statutory Provision

### 7.1. Planning and Development Act, 2000 (as amended)

Under Section 2(1), the following is the interpretation of 'works':

"...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."

'unauthorised development' includes the "carrying out of unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use."

'unauthorised works' means any works on, in over or under land commenced on or after the 1st of October 1964, being a use which is a material change in use of any structure or other land and being development other than –

(a) Exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act, or.....

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any conditions to which that permission is subject'

Section 3 (1) states as follows:

"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) of the Act states that the following shall be exempted developments for the purposes of this Act:

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 (as amended)

Article 6 (1) states as follows:

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) (a) sets out the instances where 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 and (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,

## **Schedule 2**

### **Part 1 – Exempted Development – General – 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.

#### **Conditions and Limitations**

1. No such structure shall be constructed, erected or placed forward of the front wall of a house.
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 25 square metres.
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 25 square metres.
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.

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, 3 metres.
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.

## **CLASS 6**

(a) The construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house.

(b) Any works within the curtilage of a house for—

(i) the provision to the rear of the house of a hard surface for use for any purpose incidental to the enjoyment of the house as such, or,

(ii) the provision of a hard surface in the area of the garden forward of the front building line of the house, or in the area of the garden to the side of the side building line of the house, for purposes incidental to the enjoyment of the house as such.

### **Conditions and Limitations**

The level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground.

Provided that the area of the hard surface is less than 25 square metres or less than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, whichever is the smaller,

or

if the area of the hard surface is 25 square metres or greater or comprises more than 50% of the area of the garden forward of the front building line of the house, or 50% of the area of the garden to the side of the side building line of the house, as the case may be, it shall be constructed using permeable materials or otherwise allow for rainwater to soak into the ground.

## 8.0 Assessment

### 8.1. Is or is not development

- 8.1.1. Development is defined under Section 3(1) of the Planning and Development Act, 2000 (as amended) 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'*. Works is defined under Section 2(1) of the Act *"...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal..."*
- 8.1.2. Therefore, having regard to Sections 2(1) and 3(1) of the Planning and Development Act 2000 (as amended) it is considered that the erection of a shed, walkway, railings and timber fence, would constitute development under the above provisions of the Act.

### 8.2. Is or is not exempted development

- 8.2.1. The development which is the subject of the referral refers to the following the removal of three features comprising a walkway (between house and the roof of the shed), a railing atop this shed and a timber fence beside the roof of the feature. The subject referral also refers to the retention of a garden shed of 19.1sq m.
- 8.2.2. In relation to the subject removal of the walkway, railing atop the subject shed and timber fence beside the roof of the feature, I am satisfied that it constitutes exempted development as defined in section 4(1)(i) of the Planning and Development Act, 2000, as amended.
- 8.2.3. This sets out;
- 4.—(1) The following shall be exempted developments 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;*
- 8.2.4. In relation to the subject shed, it is located in the rear garden in the north-west corner. The height of the structure is 2.2m. The area of shed is circa 19.1sq m.

Class 3 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended refers to development within the curtilage of a house with specific reference to the erection of a garage, store or shed or similar structure. There are 6 no. conditions and limitations which refer to provisions Class 3, the subject shed is under 25 square metres, is not located to the front of the dwelling, it would not reduce the area of rear garden to less than 25 square metres, the flat roof has a height less than 3 metres and the use of the structure is for storage ancillary to the and not for human habitation or the keeping of animals.

- 8.2.5. The wording of the submitted question specifically excludes the use of the roof of this structure for sitting out purposes. The Planning Authority in their assessment of the referral and in their response submitted to the Board stated that in relation to the use of the roof of the sheds as an amenity space, that they are satisfied that the shed structure was designed and constructed to facilitate the use of the roof as an amenity space. The Planning Authority is therefore of the opinion that the referrer's attempt to isolate the roof of the shed and its use as an amenity space from the shed is inappropriate.
- 8.2.6. The shed has been designed and built with external steps located directly over the fuel storage section of the shed which provides access to the flat roof above the shed. The provision of the external steps provides easy access to the roof of the shed for amenity or other purposes which is a change of use of the structure, which represents a material change and which represents an unauthorised use. Accordingly, I would concur with the assessment of the Planning Authority on the matter.
- 8.2.7. Having reviewed the provisions of Class 6(a) of Part 1 of Schedule 2, of the Planning and Development Regulations, 2001, as amended which refers to development within the curtilage of a house. This provision of the Regulations specifically refers to landscaping works within the curtilage of a house. The conditions and limitations which refer to this state that *"the level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground."*
- 8.2.8. In relation to the alteration of ground level carried out to the rear of the dwelling, the referrer contends that the Planning Authority are incorrect in their assertion that the ground level to the rear of the property was lowered in excess of 1m below the original ground level in the absence of planning permission. In response to the

matter the referrer puts forward the case that there are no records in the history files under Reg. Ref 1377/86 and Reg. Ref. 1823/93 which depict land levels in the garden prior to permission being granted and there are no historical notes on file to support the details presented by the Council in relation to the site levels.

- 8.2.9. Drawing No: 1010-C2B submitted by the referrer illustrates a cross section of the dwelling and the ground levels to the rear of the property. The Planning Authority in determining enforcement proceedings in relation to the property placed ground levels in red ink on the drawing. While I note that the referrer disputes these ground levels, this drawing provides the only available record of ground levels of the dwelling as permitted under PA. Reg. Ref. 92/1823 and as built. As indicated on the drawing there is a height difference of 1.35m between the ground level as granted and the ground level as built.
- 8.2.10. The letter submitted by Deane Turner Associates Consulting Engineers in September 2015 on behalf of the referrer Mr. Mitchell to the Planning in response to enforcement proceedings stated that the floor level of these sheds was lowered to approximately 1.2m from their original ground level. While, I note this figure is later revised by Deane Turner Associates Consulting Engineers from 1.2m to 0.86m, having regard to plans and documentation available and having inspected the site, I would be of the opinion that the level of the ground at this area of the rear garden has been altered by more than 1 metre below the permitted ground level to the rear of the dwelling.
- 8.2.11. Accordingly, the change of ground level by excavation carried out does not come with the provisions of the exemption provided under of Class 6(a) of Part 1 of Schedule 2, of the Planning and Development Regulations, 2001, as amended.
- 8.2.12. Accordingly, I consider that the subject shed comes within the scope of the exempted development provided for under Class 3 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended. However, I consider that the restriction on the exemption provided under Article 9 (1) (a) (viii) in relation to Article 6 applies because the shed is a structure constructed on lands where unauthorised development has occurred i.e. on lands where there has been a change of ground level by excavation. As set out above the change of ground level by excavation is not exempted development and it did not receive planning permission.

## 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 removal of three features comprising a walkway (between house and the roof of the shed), a railing atop this shed and a timber fence beside the roof of the feature, the retention of a garden shed of 19.1sq m is or is not development or is or is not exempted development.

**AND WHEREAS** Seamus Mitchell requested a declaration on this question from Wicklow County Council and the Council issued a declaration on the 27<sup>th</sup> day of June, 2018 stating that the matter is not exempted development:

**AND WHEREAS** Seamus Mitchell referred this declaration for review to An Bord Pleanála on the 23<sup>rd</sup> day of July, 2018:

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

(a) Sections 2, 3 and 4 and Section 4(1)(a) of the Planning and Development Act, 2000, as amended,

(b) Article 6 and 9 of the Planning and Development Regulations, 2001, as amended, and Part 1 of Schedule 2 to those Regulations, including Class 3 and 6 and the conditions and limitations applicable

(c) the planning history of the subject site:



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

- (a) the construction of the subject shed constitutes “works” and is therefore “development” within the meaning of Section 3 of the Act, and
- (b) the removal of the walkway, railing atop the subject shed and timber fence beside the roof of the feature, constitutes exempted development as defined in section 4(1)(i) of the Act,
- (c) The lowering of the ground levels to the rear of the property has resulted in the level of the ground being altered by more than 1 metre above the level of the adjoining ground and,
- (d) Therefore, does not come within the scope of the exempted development provisions of Class 6, Part 1, Schedule 2 of the Planning and Development Regulations, 2001 as amended,
- (e) The external steps located on the roof above the fuel store section of the shed provides direct access to the roof of the structure for amenity or other purposes, this constitutes a change of use of the shed which is material, and which is an unauthorised use,
- (f) The shed is a development of a type coming generally within the scope of the exempted development provisions of Class 3, Part 1, Schedule 2 of the Planning and Development Regulations, 2001, as amended, but cannot avail of the exemption therein, being development which has occurred on lands where there is unauthorised development,

**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 retention of a garden shed of 19.1sq m is development and is not exempted development.

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Siobhan Carroll  
Planning Inspector

21<sup>st</sup> of December 2018