



An
Bord
Pleanála

Inspector's Report ABP-302528-18

Question	Whether revisions to an approved granny flat are/ are not exempted development.
Location	5 Royal Canal Terrace, Broadstone, Dublin 7 (protected structure)
Declaration	
Planning Authority	Dublin City Council North
Planning Authority Reg. Ref.	0280/18
Applicant for Declaration	Paul Kelly
Planning Authority Decision	Is not exempted development
Referral	
Referred by	Paul Kelly
Owner/ Occupier	Paul Kelly
Observer(s)	Treasa & Kenneth Faulkner
Date of Site Inspection	31 st May 2019
Inspector	Donal Donnelly

1.0 Site Location and Description

- 1.1. The subject site is located on Royal Canal Terrace, which fronts onto Phibsborough Road (R135) in the Broadstone area to the north of Dublin city centre. Royal Canal Terrace comprises 11 no. 2-storey over basement houses dating from 1826. Long gardens to the rear of the terrace extend back to Broadstone depot and there is a rear service laneway with access between No's. 4 & 5.
- 1.2. No. 5 is an end of terrace 3-bay 2-storey house with pitched roof behind parapet wall. To the rear of the house is a 2-storey lean-to extension and a single storey conservatory. A recently constructed "granny flat" is located along the rear boundary of the property. This structure comprises a flat roof element curving around the rear boundary with intruding mono-pitched element. The floor area of the "granny flat" is approximately 50 sq.m.

2.0 The Question

- 2.1. The question has been referred to the Board as to whether or not modifications carried out to the design of a permitted "granny flat" are or are not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. Dublin City Council issued a notification of Declaration on 15th August 2018 that the following revisions to the approved "granny flat" are not exempted development:
 1. Revised rooflight.
 2. Revision to window in laneway elevation.
 3. Revision to windows in garden elevation.
 4. Revised external cladding to extension.
 5. Revised extent of extension roof overlap.
 6. Revision to drainage layout.

3.2. Planning Authority Reports

3.2.1. The following points of note are contained within the Planner's Report:

- If modifications and extension as described in the Section 5 request were carried out at the time of construction of the "granny flat", (i.e. before completion of the permitted development) then this would conflict with Condition 1 of the permission, and in accordance with Article 9(1), the modification would not be exempt.
- Date of construction is stated to be 24th March 2014 and by early 2016 external envelope was largely completed and the building weather-tight – appears to Planning Authority that modifications are contemporaneous with the construction of the house.
- Provisions of Article 6 do not apply as the "granny flat" was not constructed in accordance with the plans, particulars and specifications lodged with the application.

4.0 Planning History and Precedent

Dublin City Council Reg. Ref: 2026/11 (PL.29N.238610)

4.1. Permission granted in July 2011 for extension and conversion of existing garage for use as a detached "granny flat" at the rear.

4.2. Condition 1 attached states as follows:

"The development shall be carried out and completed in accordance with the plans and particulars lodged with the application except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars."

4.3. Condition 2 states as follows:

“The ancillary family accommodation shall be incidental to the use of the main house. It shall not be sold or let as an independent living unit. Once the accommodation is no longer required for ancillary accommodation purposes, it shall revert back to the being part of the original family house in accordance with the submitted Reversion Floor Plan shown in Drawing Number PKA0111-3 submitted to the planning authority on the 13th January, 2011.”

An Bord Pleanála Ref: RL3011

- 4.4. A question arose as to whether the existing first floor windows to the rear, as modified from those permitted, are or are not development or are or are not exempted development.
- 4.5. The Board concluded that the said first floor windows are works that were carried out during the construction of the dwelling houses and are development and, therefore, cannot avail of the exemption under section 4(1)(h) of the Planning and Development Act, 2000.

5.0 Policy Context

5.1. Dublin City Development Plan, 2016-2022

- 5.1.1. The subject site is zoned “Z2” where the objective is “to protect and/ or improve the amenities of residential conservation areas.”
- 5.1.2. All dwellings along Royal Canal Terrace, including No. 5, are protected structures.

6.0 The Referral

6.1. Referrer’s Case

- 6.1.1. The referrer requests the Board to review the Declaration of the Planning Authority within a submission received by the Board on 10th September 2018. The grounds for review are summarised as follows:
- Subject works by virtue of their size, trivial nature, and limited effect on their surroundings have not been carried out such that the appearance of the

permitted “granny flat” is rendered inconsistent with the appearance of the structure or neighbouring structure, (as per interpretation of alteration in Act).

- Planning Act more broadly anticipates that certain development by reason of its size, nature or limited effect on its surroundings, as being exempt from the planning process, (section 4(1) (h) & (j)).
- It is not possible to classify the subject works as being development without first defining ‘compliance’.
- Not disputed that the subject works represent a variation/ alteration to the design for which permission was granted and to which Condition 1 refers – works do not offend against the principles of proper planning and sustainable development and have therefore been carried out in material ‘accordance’ with the drawings and documents on foot of which permission was granted.
- Subject works are not to a protected structure (Section 57) – no original external features associated with the protected structure are extant on site to the rear and works do not affect the character of the protected structure.
- It is not evident from the Planner’s Report that Dublin City Council took account of similar precedent references to the Board.
- Micro and rigid application of planning legislation to works can only serve to encourage frivolous and vexation use of the planning process.

6.2. Planning Authority Response

6.2.1. None received.

6.3. Observation

6.3.1. An observation was received by the owners of No. 6 Royal Canal Terrace, which adjoins the subject site to the north. The main points raised in this submission are summarised as follows:

- Referrer does not intend to complete the development in accordance with the first condition of the permission.

- Without the family circumstance at the time and the desire to provide accommodation for the referrer's mother, the application (PL29N.238610) would have been for a mews development and the location for such a mews development is unsuitable.
- Board's order under Reasons and Considerations notes *"the temporary nature of the proposed use and proposal for reversion when temporary use ceases."*
- Development cannot be used for the provision of accommodation for the applicant's late mother and it appears that the applicant intends to complete the development and use it for different ancillary accommodation purpose – this contravenes Condition 2 of PL29N.238610.
- Compliance should mean that development is built to the dimensions and includes the features and finishes shown on drawings submitted with the application.
- Modifications and extension were carried out at the time of construction of the "granny flat" and this conflicts with the first condition of the grant of permission. Also, by not completing the development in accordance with the Reversion Floor Plan, the referrer is not complying with the 2nd condition.
- Chimney flu, not shown on original drawings, will discharge noxious fumes over observer's garden.
- Non-opening rooflight has been replaced with an opening Velux. Velux window is on the side of the development and facing onto the observer's garden less than 1m from the boundary.
- There is no integrated guttering system between No's. 5 & 6 as shown on drawings.
- Industrial type metal cladding fixed to north wall of development contravenes the render finish shown on drawings.
- Revised plans do not show and disclose the discharge pipe placed on the exterior of the rear wall by the referrer.
- Window on lane not shown on original drawings – window at back of development faces directly onto a boundary.

- Referrer squared the corner between the garages of No's. 5 & 6 and this renders it virtually impossible for observers to take car out of garage.
- Revision of roof overlap not shown on original drawings.
- One or two contraventions of the conditions of a grant of permission could be considered non-material – there are at least 10 points where the development contravenes the original permission.

6.4. Owner/ occupier's response

6.4.1. The referrer responded to the observer's submission with the following comments:

- Certain similarities can be found in cases RL3044, RL2996 and RL2671 where Board determined works/ variations are exempted under Section 4(1)(h).
- Board has declared that c) the 'restrictions on exemptions' under Article ((1)(a)(viii) of the Planning and Development Regulations, 2001, do not apply to exemptions conferred by the primary legislation.
- Subject referral items may be considered under the terms of 4(1)(h) of the Planning and Development Act, 2000 (as amended) by virtue of their being so trivial as to 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."*
- In Cairnduff v O'Connell [1986] IR 73, the Supreme Court held that works comprising the insertion of a window in a side wall of a 3-storey house, the replacement of a window by a door and the construction of a balcony and a staircase *"had not so materially affected the external appearance of the structure to render it inconsistent with the character of the building itself or of adjoining buildings."*
- Planning Authority did not consider external cladding to be so critical as to warrant any requirement that samples be approved.
- Drainage has been installed in accordance with the applicable legislation.

7.0 Statutory Provisions

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

7.1.1. In order to assess whether or not the activity constitutes development that is exempted development, regard must be had to the following items of legislation:

7.1.2. Section 2 (1) of Part I provides the following interpretations:

“alteration” includes—

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof,

that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures...’

“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.’

7.1.3. 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.”

7.1.4. Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act and includes the following:

(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.”

(j) *“development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such.”*

7.1.5. Notwithstanding Section 4(1)(a) – (l) and the regulations made under Section 4(2), *“...the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if those works would not materially affect the character of (a) the structure, or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.”*

7.1.6. Section 4 (2) provides for the making of Regulations. The main Regulations are the Planning and Development Regulations, 2001 (as amended).

7.2. Planning and Development Regulations, 2001 (as amended)

7.2.1. Article 6 (1) of the Planning and Development Regulations 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.”

7.2.2. Classes 1-8 of Part 1 of Schedule 2 relate to development within the curtilage of a house. Those which may be of relevance to the development in question include the conversion of a garage; provision of a chimney/ flue for heating system; the construction of a garage, store, shed, etc.; the construction of a block wall or gate; or the provision of a hard surface to the rear of the house.

7.2.3. Under Article 9, development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

8.0 Assessment

8.1. Introduction

8.2. From the outset, it should be noted that the purpose of this referral is not to determine the acceptability or otherwise of changes to the permitted “granny flat” structure 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. Likewise, this assessment does not assess whether or not the structure is authorised; planning enforcement is a matter for the planning authority and does not fall within the jurisdiction of the Board.

8.3. A Declaration by Dublin City Council that revisions to an approved “granny flat” structure is not exempted development has been referred to the Board for review under Section 5(3)(a) of the Planning and Development Act, 2000 (as amended). The Planning Authority is of the opinion that the modifications and variations to the design of the “granny flat” are development within the meaning of the Act and are not exempted development, as the “granny flat” has not been constructed in accordance with the plans, particulars and specifications lodged with planning application Reg. Ref: 2026/11 (PL9N.238610), and is therefore in contravention of a condition of this permission. The referrer, on the other hand, considers that the development has been carried out in material ‘accordance’ with the drawings and documents on foot of which permission was granted.

8.4. Is or is not development

8.4.1. The modifications to the approved “granny flat” structure as listed in the Declaration of exempted development include (1) a revised rooflight, (2) revisions to window in laneway elevation, (3) revisions to window in garden elevation, (4) revised external cladding to extension, (5) revised extent of extension roof overlap, and (6) revision to drainage layout.

8.4.2. Section 2 (1) of the Planning and Development Act, 2000 (as amended) provides an interpretation of 'works' as including '*any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...*'. An “alteration” includes '*...the replacement of a door, window or roof.... that materially alters the external*

appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures...'. The "alteration" of the "granny flat" structure may be considered "works" where the appearance of the as-constructed "granny flat" is inconsistent with the permitted structure. In addition, the definition of works is broad and covers any act or operation of construction. The alterations to the "granny flat" structure therefore can be described as "works".

- 8.4.3. Section 3 (1) states that *'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.'*

Development would therefore take place if it is considered that 'works' have occurred in this case.

8.5. Is or is not exempted development

- 8.5.1. The applicant refers to Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) whereby the following shall be exempted development for the purposes of the 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."

- 8.5.2. It may be argued that the sum of the revisions to the structure are such that the external appearance has been materially affected to an extent that it is inconsistent with the appearance of the permitted structure. The Declaration lists six revisions to the permitted plans and the Observer on the case contends that there at least 10 points where the development contravenes the original permission.
- 8.5.3. The referrer also makes reference to the Section 4(2) of the Act whereby the Minister may by regulations provide for any class of development to be exempted development for the purposes of the Act where he or she is of the opinion that *"...by reason of the size, nature or limited effect on its surroundings, of development*

belonging to that class, the carrying out of such development would not offend the principles of proper planning and sustainable development.”

- 8.5.4. Under Article 6 (1) of the Planning and Development Regulations, “*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.*”
- 8.5.5. In relation to the above, there are exemptions under Classes 1, 2, 3, 5 and 6 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001 (as amended) relating to development within the curtilage of a house. The modifications to the “granny flat” may therefore avail of these classes of exempted development.
- 8.5.6. Notwithstanding the above, and in accordance with Article 9 of the Regulations, development to which article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act, or be inconsistent with any use specified in a permission under the Act. Similarly, and in accordance with the judgement of *Horne v Freaney*, a development seeking exemption rights under Section 4(1)(h) must first have been completed in full accordance with its permission.
- 8.5.7. Condition 1 of the Board’s Decision to grant permission for the “granny flat” under PL29N.238610 states that “*the development shall be carried out and completed in accordance with the plans and particulars lodged with the application...*”. Clearly, the “granny flat” as-constructed was not completed in full accordance with PL29N.238610 and therefore the provisions of Section 4(1)(h) of the Planning and Development Act, 2000 (as amended) and Article 6 of the Planning and Development Regulations, 2001 (as amended) relating to exempted development do not apply.
- 8.5.8. The observer on the case has raised a number of other issues relating to certain details and the use of the structure. This referral, however, relates to the question referred to the Board only.

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 or not modifications carried out to the design of a permitted “granny flat” development are or are not development or are or are not exempted development:

AND WHEREAS Mr. Paul Kelly requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 19th day of August, 2018 stating that the matter was development and was not exempted development:

AND WHEREAS Mr. Paul Kelly referred this declaration for review to An Bord Pleanála on the 10th day of September, 2018:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,
- (g) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) Permission was granted for the “granny flat” under Reg. Ref: 2026/11 (PL29N.238610) and Condition 1 of said permission states that the development shall be carried out and completed in

accordance with the plans and particulars lodged with the application,

- (b) Under Article 9 (1)(a)(i) of the Planning and Development Regulations, 2001 (as amended), development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,
- (c) The revisions from the permitted “granny flat” are works that were carried out during construction and before completion of the permitted development and in contravention of the plans and particulars lodged with planning application Reg. Ref: 2026/11 (PL29N.238610),
- (d) The “granny flat” has been constructed in contravention of Condition 1 of Reg. Ref: 2026/11 (PL29N.238610) and cannot therefore avail of the exempted development provisions of Article 6 of the Planning and Development Regulations, 2001 (as amended) and 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 (3) (a) of the 2000 Act, hereby decides that the revisions to the permitted “granny flat” structure are development and are not exempted development.

Donal Donnelly
Planning Inspector

14th June 2019