



An
Bord
Pleanála

Inspector's Report ABP-302542-18

Question

Whether the use of part of a house as a solicitors' office/practice is or is not development or is or is not exempted development.

Location

Beachside, Braade, Kincasslagh, Co. Donegal.

Declaration

Planning Authority

Donegal County Council

Planning Authority Reg. Ref.

S5 18/29

Applicant for Declaration

Geraldine Boyle

Planning Authority Decision

Is not exempted development

Referral

Referred by

Geraldine Boyle

Owner/ Occupier

Gillespie Boyle Solicitors

Date of Site Inspection

17th December 2018

Inspector

Donal Donnelly

1.0 Site Location and Description

- 1.1. The subject site is located in the townland of Braade in western Donegal in The Rosses area of the Donegal Gaeltacht. Donegal Airport is immediately to the north-east of the site and Carrickfinn Beach is directly to the north.
- 1.2. Access to the site is via the R266 Regional Road that continues past the airport and terminates at a car park serving the beach. A gravel driveway off the car park provides gated access to the subject site.
- 1.3. The site has an approximate area of 0.3220 hectare and is occupied by a contemporary style 2-storey dwelling with lean-to and flat roof elements. The floor area of the dwelling is 404.5 sq.m. The ground floor offices within the building, which are the subject of this referral, measure 29.7 sq.m. and 28.6 sq.m. respectively.

2.0 The Question

- 2.1. The question has been referred to the Board as to whether or not the use of part of a house as a solicitors' office/ practice is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. Donegal County Council issued a Declaration on 16th August 2018 that the use of part of a house as a solicitors' office/ practice is development and is not exempted development, as it constitutes an unauthorised development.

3.2. Planning Authority Reports

- 3.2.1. The following points are highlighted in the Planner's Report:
 - Problem arises in that the parent dwelling house the subject of this request has not been constructed in conformity with the approved plans and particulars under Reg. Ref: 12/50343, including the area subject of the request.

- Permission was granted for a 300 sq.m. dwelling and a dwelling of 404.5 sq.m. was constructed.
- Development at ground level does not have the benefit of planning permission and is therefore unauthorised development.
- Question presented is not a valid one – for a planning authority to assess whether or not a change of use is material, it is presumed and it must be, that the original use was an authorised one.
- There has not in fact even been a change of use, but rather an unauthorised development of a solicitors' office/ practice.
- Assessment of this question cannot proceed on the basis that the circumstances of this case do not constitute a change of use from an earlier use or an authorised use but rather constitutes a development which (i) was not approved within the scope of the parent permission and (ii) does not otherwise come within the scope of the exempted development provisions of the Act or Regulations.
- Use constitutes unauthorised development which was not approved as part of the plans and particulars of the parent permission and does not otherwise come within the scope of exempted development provisions.

4.0 **Planning History and Precedent**

Donegal County Council Reg. Ref: 12/50343

- 4.1. Planning permission granted on site for a 300 sq.m. dwelling house and septic tank. The plans submitted with this application show the living accommodation at first floor level and covered parking, 2 no. stores and a void at ground level. Permission has previously been refused on site on two occasions under Reg. Refs: 95/993 and 10/30299.

An Bord Pleanála Ref: RL2220

- 4.2. The question was asked as to whether the use of part of a dwelling house as an office is or is not development or is or is not exempted development. The referral related to a two storey semi-detached dwelling located in a residential area at No. 26

Castlecountess, Tralee, Co. Kerry. Part of the ground floor (c. 25%) of the dwelling was used as an office for a self-employed architect, with desk space for four persons. There was a separate doorbell and signage for the office. A key issue was whether there would be new planning consequences, particularly in terms of parking demand in a residential area.

- 4.3. The Board decided that the use was development and not exempted development, concluding that a material change of use had occurred that was not covered by the exempted development provisions of Section 4 of the Act and the Regulations made thereunder.

5.0 Policy Context

5.1. Donegal County Development Plan, 2018-2024

- 5.1.1. The subject site lies within a “Structurally Weak Rural Area” and in an area of “High Scenic Amenity”.

5.2. Natural Heritage Designations

- 5.2.1. The subject site is within the Gweedore Bay and Islands SAC and pNHA and adjoining the West Donegal Coast SPA.

6.0 The Referral

6.1. Referrer’s Case

- 6.1.1. The referrer’s case, as per letter received by the Board on 11th September 2018, is summarised as follows:
 - Office is contained within the actual house for a purpose incidental to the use of the house – professional person is entitled to have a home office.
 - Part time receptionist is employed from a reception/ cloakroom – this area is used by children in afternoons/ evenings.

- Floor area of two offices (29.7 sq.m. & 28.6 sq.m.) is not significant in relation to the total ground floor area (207.8 sq.m.) – office use is one seventh of the floor area of the entire house.
- Referrers would normally see between 2-3 clients per week and they also have a room for seeing clients at an auctioneer's office in Gweedore. Any additional traffic would be miniscule.
- Use of part of house as an office is not in any way harmful to the amenity of the area and provides a useful and sustainable service for the local community.
- Referrer is not seeking a general Declaration that use as a solicitors' office is an exempted development but simply a Declaration that the use of part of the dwelling by the referrer and her husband in respect of their profession is exempted development.
- Referrer has no intention of expanding the practice – it is in effect a small part-time sustainable home business.
- Office areas were shown on the original ground floor plans in different areas – Declaration sought under Section 5 is in relation to the principle of a personal home office and not to the details of the specific location within the house.
- Referrer will be seeking separately to resolve other issues with the Planning Authority in relation to minor alterations to the internal layout.
- Reason for refusal of Declaration by the Council is misconceived as it deals with the internal layout and structure of the house rather than the net issue of whether professional persons are entitled to practice their profession in part of the house.

6.2. Planning Authority Response

6.2.1. No further comment to make.

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) sets out the interpretation of a “house” as a *“...building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building.”*
- 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 (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. Section 4(1)(h) exempts *“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”*
- 7.1.6. Section 4 (2) provides for the making of Regulations. The main Regulations are the Planning and Development Regulations, 2001 (as amended).
- 7.1.7. Section 4 (4) states that *“notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.”*

7.2. Planning and Development Regulations, 2001

- 7.2.1. Article 5 of Part 2, Exempted Development sets out interpretations for this part and includes “business premises” which *inter alia* means “*any structure or other land (not being an excluded premises) which is normally used for carrying on any professional, commercial or industrial undertaking or any structure which is normally used for the provision therein of services to persons...*”.
- 7.2.2. Under Article 10, development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out, would not:
- (a) *involve the carrying out of any works other than works which are exempted development,*
 - (b) *contravene a condition attached to a permission under the Act,*
 - (c) *be inconsistent with any use specified or included in such a permission, or*
 - (d) *be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.*

8.0 Assessment

- 8.1. From the outset, it should be noted that the purpose of this referral is not to determine the acceptability or otherwise of an office use within a dwelling 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.
- 8.2. A Declaration by Donegal County Council that the use of part of a dwelling house as a solicitors' office/ practice 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 was of the opinion that the proposal is development within the meaning of the Act and is not exempted development, as it constitutes an unauthorised development which was not approved as part of the

plans and particulars of parent permission Reg. Ref: 12/50343. The referrer, on the other hand, considers that the use of part of the house as a solicitors' office is exempted development under Section 4(1)(j) of the Act.

8.3. The Question of whether or not a material change of use has occurred

- 8.3.1. The change of use in this case relates to the ground floor of the dwelling containing 2 no. solicitors' offices when the permitted plans show the ground floor including covered parking, 2 no. stores and a void. I would be in agreement that the use of internal rooms within a dwelling for personal office use could be considered exempted development under Section 4(1)(j) of the Act as "*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.*" Furthermore, any alteration of a structure that affect only its interior, 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, is exempted under Section 4(1)(h) of the Act.
- 8.3.2. Notwithstanding, I would be of the opinion that the materiality of the change of use in this case should be considered with regards to the extent to which the use of the house is being used as a business premises. In this regard, a house is defined within the Planning and Development Act, 2000 (as amended) as '*a building or part of a building which is being or has been occupied as a dwelling...*'. Article 5 of Part 2 of the Planning and Development Regulations, 2001 (as amended) sets out an interpretation of a "business premises" as *inter alia* "*any structure or other land (not being an excluded premises) which is normally used for carrying on any professional, commercial or industrial undertaking or any structure which is normally used for the provision therein of services to persons...*".
- 8.3.3. Reference is made in the Planner's Report to case law relating to material change of use. In Galway County Council v Lackagh Rock, Justice Barron suggested that the Courts would look to matters which affect the proper planning and sustainable development of the area and whether a further burden was imposed by the present use. In Carrickhall Holdings Ltd. v Dublin Corporation, the Supreme Court held that the change of use from a hotel bar to a public bar was development which was not exempted development on the basis that the change of use resulted in a change in

the whole character of the business and resulted in increased traffic, parking and other changes in the amenities for local residents. Similarly, in *Westport UDC v Golden*, the implications in terms of traffic, noise and litter were appropriate considerations in deciding that a change of use from a sit-in restaurant to a fast food outlet was material. In *Cork Corporation v Connell*, the court had regard to fact that large crowds, particularly young people, would be attracted to an area in the case of a change of use from a hardware store to an amusement arcade.

- 8.3.4. Matters to be considered in deciding whether or not the change of use is material in this case may include the area of the dwelling devoted to the use, employment of staff, clients visiting the premises, car parking and traffic impact, and other external physical changes such as the presence of signage or name plates. This specific matter was addressed in *“Irish Planning Law and Practice”* where it is stated that *“if an architect used one room of his dwelling as a studio, did not invite clients there, employ staff or have a plate outside the door, this would not constitute a material change of use”*.
- 8.3.5. The solicitors’ offices occupy a total of 58.5 sq.m. of the 207.8 sq.m. ground floor of the property. The total floor area of the building is given as 404.5 sq.m. An area between the offices is used by a receptionist who works part-time Monday to Friday 10:00 to 13:00 hours. It is submitted that the solicitors would not normally see more than 2-3 clients per week and that they also have a room at an auctioneer’s premises in Gweedore for seeing clients. There is a prominent sign at the entrance to the property for “Gillespie Boyle Solicitors” with contact details and stating “consultations by prior appointment only”. The entrance doorway also advertises “Gillespie Boyle Solicitors”. Ample car parking is available to the front for residents and those visiting the premises.
- 8.3.6. Having regard to the above factors, I would be of the opinion that a material change of use has taken place at the property from the permitted residential and ancillary uses to a business use. There are three people employed and the premises is open to visiting members of the public, albeit by prior appointment. Most tellingly in my opinion, is the signage and door lettering which I consider accurately portray the nature of the business taking place. I consider that no such signage would be necessary or present where an office(s) was being used for a purpose incidental to the enjoyment of the house, notwithstanding the fact that said offices may also be

used for personal/ family use outside normal working hours. The property is normally being used for carrying out a professional/ commercial undertaking to persons and this use is materially different and goes beyond the use of the house or land within its curtilage for a purpose incidental to the enjoyment the house.

8.4. Other restrictions on exempted development

- 8.4.1. Article 10 of the Regulations provides that development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2 shall be exempted development for the purposes of the Act subject to certain criteria, including the requirement that the development, if carried out, would not “...*be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.*”..
- 8.4.2. There is no class of use under Part 4 of Schedule 2 that allows for a change of use from residential to office use as exempted development. Thus, as the change of use in question does not fall under any exemption under this Part, it follows that the criteria relating to this part do not apply in this case. As noted above, any enforcement issues are matters for the Planning Authority and not the Board.

Appropriate Assessment

- 8.4.3. It is stated under Section 177U(9) of the Planning and Development Act, 2000 (as amended) that “*in deciding upon a declaration or a referral under section 5 of this Act a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.*”
- 8.4.4. Section 4 (4) of the Act also states that “*notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.*”
- 8.4.5. The subject site is located within the Gweedore Bay and Islands SAC and approximately 7.5m from the West Donegal Coast SPA. Any works relating to the change of use are, for the most part, internal to the building. The development may attract low levels of additional traffic and visitors to the site; however, this is

considered to be negligible within the context of the site and surroundings, including nearby car park.

- 8.4.6. Any issues relating to the unauthorised nature of the building on site in terms of non-compliance with the permitted plans and particulars is a matter for the Enforcement Section of the Planning Authority. This referral relates to the part change of use of the building only.
- 8.4.7. Having regard to the nature and scale of the development and the nature of the receiving environment and/or proximity to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.

9.0 Recommendation

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

WHEREAS a question has arisen as to whether the use of part of a dwelling house as a solicitors' office is or is not development or is or is not exempted development:

AND WHEREAS Ms. Geraldine Boyle requested a declaration on this question from Donegal County Council and the Council issued a declaration on the 16th day of August, 2018 stating that the matter was development and was not exempted development:

AND WHEREAS Ms. Geraldine Boyle referred this declaration for review to An Bord Pleanála on the 11th 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)(j) of the Planning and Development Act, 2000, as amended,

(d) the planning history of the site,

(e) the pattern of development in the area:

AND WHEREAS An Bord Pleanála has concluded that:

(a) the use of part of the house as an office which has occurred is a material change of use, which is “development” within the meaning of section 3 of the 2000 Act, and

(b) the use does not come within the scope of section 4 of the 2000 Act or the Regulations made thereunder:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the use of part of a dwelling house as a solicitors’ office is development and is not exempted development.

Donal Donnelly
Planning Inspector

31st January 2019