



An
Bord
Pleanála

Inspector's Report ABP-303124-18

Question

Whether the installation of 3 No. rooflights on a flat roof is or is not development or is or is not exempted development.

Location

Site adjacent to No. 24 Ardbrough Road, Dalkey, Co. Dublin.

Declaration

Planning Authority

Dún Laoghaire Rathdown County Council

Planning Authority Reg. Ref.

11618

Applicant for Declaration

Darragh and Alison Fegan

Planning Authority Decision

Is development and is exempted development.

Referral

Referred by

Darragh and Alison Fegan

Owner / Occupier

Michael McDonagh & Noreen Farrar

Observer(s)

None.

Date of Site Inspection

28th February, 2019

Inspector

Robert Speer

1.0 Site Location and Description

- 1.1. The site in question is located along the southern side of Ardbrough Road in Dalkey, Co. Dublin, approximately 670m south of Dalkey village centre, where it occupies an elevated position affording views northwards towards Dublin Bay. The surrounding area is primarily residential and is generally characterised by a variety of vernacular housing types interspersed with more contemporary / conventional construction whilst the wider topography is dominated by Dalkey Hill which rises steeply to the south and serves as a popular recreational resource for the area.
- 1.2. The site itself forms part of a triangularly-shaped cluster of tightly-knit cottages, the vehicular access to which is gained from a pair of narrow cu-de-sacs off Ardbrough Road. It is presently occupied by a recently developed, contemporarily-designed, two-storey dwelling house (with a single-storey, flat-roofed projection extending westwards from same) which faces directly onto Ardbrough Road with an unfinished garden area and a parallel parking space to the west of same. To the immediate east the site adjoins a large, two-storey property known as 'Ardbrough House' whilst the lands to the west are occupied by a relatively new two-storey dwelling house. To the south the site is bounded by further residential development, including a dwelling house known as 'Shamrock Cottage' which occupies a more elevated position relative to the subject site.

2.0 The Question

- 2.1. On 16th October, 2018 Mr. Darragh Fegan submitted a request to Dún Laoghaire Rathdown County Council for a declaration in accordance with Section 5 of the Planning and Development Act, 2000, as amended, to determine whether or not the installation of 3 No. rooflights on a flat roof at a site adjacent to No. 24 Ardbrough Road, Dalkey, Co. Dublin, would constitute development which was exempted development.
- 2.2. Having conducted a site inspection, and following a review of the submitted information, in my opinion, the question before the Board can be formulated as follows:

'Whether the installation of 3 No. rooflights on a flat roof at a site adjacent to No. 24 Ardbrough Road, Dalkey, Co. Dublin, is or is not development and is or is not exempted development'.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1. On 12th November, 2018 the Planning Authority issued a declaration which determined that *'the works to the site adjacent to 24 Ardbrough Road, Dalkey, Co. Dublin, namely, the three rooflights on the flat roof'* constitute development which is exempted development.
- 3.1.2. Accordingly, pursuant to Section 5(3)(a) of the Planning and Development Act, 2000, as amended, Mr. Fegan has now referred the matter to the Board for determination.

3.2. Planning Authority Reports

3.2.1. Planning Reports:

Refers to the site context, the planning history, and the applicable policy provisions of the Development Plan before concluding that the insertion of 3 No. rooflights within the flat roof over the single-storey element of the existing dwelling house constitutes development pursuant to Section 3(1) of the Planning and Development Act, 2000, as amended (i.e. it involves the carrying out of 'works' as defined in Section 2(1) of the Act). The report subsequently states that as the rooflights will not alter the appearance of the existing dwelling, or otherwise render it inconsistent with neighbouring properties, they can be considered to constitute exempted development by reference to Section 4(1)(h) of the Act.

In reference to the allegation that the rooflights have been installed in a roof which is, in itself, unauthorised, the report states that investigations undertaken by the Planning Authority in relation to a previous enforcement case concluded that the development as constructed was acceptable and was not materially different to that permitted under PA Ref. No. D15A/0750.

3.2.2. Other Technical Reports:

None.

4.0 **Planning History**

4.1. On Site:

PA Ref. No. D07A/0507 / ABP Ref. No. PL06D.224147. Was granted on appeal on 3rd January, 2008 permitting Peter Dempsey permission for the construction of a two-storey dwelling and associated works and car parking.

PA Ref. No. D15A/0363. Was refused on 22nd July, 2015 refusing Noreen Farrar permission for alterations to previously approved plans for a two-storey dwelling (Reg. Ref. D07A/0507). The alterations will comprise an enlarged ground floor plan by extending to the west by 0.9 metre, altered entrance porch, revised elevations, a first floor balcony on the northern elevation and internal alterations.

- The western element of the proposed wraparound balcony will give rise to overlooking issues and will be visually obtrusive from the windows of the dwellings to the south. The proposed enlarged ground floor is located in front of part of the easternmost window of the dwelling to the south, Shamrock Cottage. It is considered that the proposed enlarged ground floor will be visually obtrusive from this window and will seriously detract from the residential amenity of this dwelling. Having regard to the impact of the proposed development, by reason of being visually obtrusive and resultant overlooking, the proposed development would seriously injure the residential amenity of adjacent dwellings and depreciate the value of properties in the vicinity and is, therefore, contrary to the proper planning and sustainable development of the area.

PA Ref. No. D15A/0750. Was granted on 28th January, 2016 permitting Noreen Farrar permission for alterations to previously approved plans for a two-storey dwelling at a site (Reg. Ref. D07A/0507). The alterations will comprise an enlarged ground floor plan by extending to the west by 0.9 metre, altered entrance porch, revised elevations, a first floor balcony on the northern elevation and internal alterations.

4.2. On Adjacent Sites:

PA Ref. No. D06B/1047. Was determined on 15th March, 2007 wherein the Planning Authority issued a split decision as follows:

- To GRANT permission for a single storey extension to the front elevation; and
- To REFUSE permission for a 26m² roof garden.

All at Shamrock Cottage, Ardburgh Road, Dalkey, Co. Dublin.

PA Ref. No. D09B/0347. Was granted on 24th September, 2009 permitting William & Anne McHugh permission for alterations to front of existing dwelling house, work includes a two storey extension with balconies on both sides, at The Ardburgh, Ardburgh Road, Dalkey, Co. Dublin.

PA Ref. No. D13A/0031. Was granted on 30th April, 2013 permitting Miriam English permission for development consisting of a first floor extension with a living room / diner and kitchen with staircase access. The north side (front) will have a small balcony. Some internal alterations at ground floor will provide a second bedroom and visitors toilet. All at Woodbine Cottage, 24 Ardburgh Road, Dalkey, Co. Dublin.

5.0 Policy Context

5.1. Development Plan

5.1.1. Dún Laoghaire Rathdown County Development Plan, 2016-2022:

Land Use Zoning:

The proposed development site is located in an area zoned as 'A' with the stated land use zoning objective '*To protect and-or improve residential amenity*'.

Other Relevant Sections / Policies:

Chapter 2: Sustainable Communities Strategy:

Section 2.1: Residential Development:

Policy RES4: Existing Housing Stock and Densification:

It is Council policy to improve and conserve the housing stock of the County, to densify existing built-up areas, having due regard

to the amenities of existing established residential communities and to retain and improve residential amenities in established residential communities.

Chapter 8: Principles of Development:

Section 8.1: Urban Design

Section 8.2: Development Management:

Section 8.2.3: Residential Development:

Section 8.2.3.4: Additional Accommodation in Existing Built-up Areas (i) Extensions to Dwellings

Section 8.2.3.5: Residential Development – General Requirements

5.2. Natural Heritage Designations

5.2.1. The following Natura 2000 sites are located in the general vicinity of the proposed development site:

- The Rockabill to Dalkey Island Special Area of Conservation (Site Code: 003000), approximately 1.21km to the east of the site.
- The Dalkey Islands Special Protection Area (Site Code: 004172), approximately 1.26km to the northeast of the site.
- The South Dublin Bay and River Tolka Estuary Special Protection Area (Site Code: 004024), approximately 3.8km to the northwest of the site.
- The South Dublin Bay Special Area of Conservation (Site Code: 000210), approximately 3.9km to the northwest of the site.

N.B. This list is not intended to be exhaustive as there are a number of other Natura 2000 sites in excess of the aforementioned distances yet within a 15km radius of the application site.

5.2.2. In addition to the foregoing, it should be noted that the proposed development site is located c. 10m northwest of the Dalkey Coastal Zone and Killiney Hill proposed Natural Heritage Area (Site Code: 001206).

6.0 The Referral

6.1. Referrer's Case:

- Consideration should have been given to the proximity of the living room window within the referrers' property to the rooflights given that it directly overlooks same.
- By way of background, the Board is advised that whilst permission was initially granted under PA Ref. No. D07A/0507 / ABP Ref. No. PL06D.224147 for the construction of a dwelling house on site, this was subsequently amended by PA Ref. No. D15A/0750 which authorised various alterations to the previously approved plans. The development as constructed deviates significantly from the approved plans, with particular reference to the inclusion of the 3 No. rooflights which are the subject of this referral.
- With regard to Section 4(1)(h) of the Planning and Development Act, 2000, as amended, it is considered that the rooflights in question occupy a significant extent of the total roof area and therefore materially alter its external appearance. Notwithstanding that the Planning Authority has determined that the rooflights are not visible from the streetscape and do not alter the appearance of the existing dwelling, it is clear that they are readily visible from the living room window of the referrers' property (c. 2m distant) which renders the external appearance of the 'as-built' roof inconsistent with the character of the overall roof and dwelling house.
- In its assessment of the subject referral, it would appear that the Planning Authority failed to consider the effect of the changes on the character of the house and other structures as per Section 4(1)(h) of the Act. In this respect, it is submitted that as the rooflights create openings in what was supposed to have been a solid roof (as per PA Ref. No. D15A/07560), the associated upwards spillage of light serves to render the external appearance of the roof inconsistent with the character of the roof structure and the house.
- The glare from the rooflights, as well as the light spillage which projects upwards onto the walls of the property, is very intrusive and visible when viewed from within the referrers' dwelling house.

- The rooflights allow for undesirable views of a bedroom area within the existing dwelling house from the living room window of the referrers' property. In this respect specific concerns are raised as regards the availability of such views to the referrers' children.
- The rooflights have been installed within a roof which significantly and materially deviates from that permitted under PA Ref. No. D15A/0750 and, therefore, the entire roof structure, including the rooflights, is unauthorised. In this respect the Board is advised that the enlarged ground floor plan (with its associated flat-roof element) approved under PA Ref. No. D15A/0750 was to have extended over 900mm from the building line of the referrer's property (i.e. 'Shamrock Cottage'), however, the existing dwelling house has not been correctly positioned with the result that the ground floor area is now located approximately 1,870mm from the building line of Shamrock Cottage. The flat-roofed component was also increased in length by 200mm. These changes are further compounded by the inclusion of the rooflights which do not have the benefit of planning permission.
- In response to the decision of the Planning Authority to refuse permission for PA Ref. No. D15A/0363 (which sought to alter the house design originally permitted under PA Ref. No. D07A/0507 / ABP Ref. No. PL06D.224147), amended proposals were subsequently approved under PA Ref. No. D15A/0750. However, the existing enlarged ground floor plan as constructed on site is more obtrusive than the works approved under PA Ref. No. D15A/0750 and is also of a greater size and more impactful to the referrers' dwelling than the development refused under PA Ref. No. D15A/0363. Accordingly, the existing 'as-built' dwelling house, including the rooflights which are the subject of this referral, seriously injures the residential amenities of the referrers' property.

The dwelling house as constructed on site bears little resemblance to the 3D-imagery provided in support of PA Ref. No. D15A/0750 which served to support the decision of the Planning Authority to grant permission for same. The development has not been carried out in accordance with the terms and conditions of PA Ref. No. D15A/0750 in that the dwelling house has been constructed further west than was approved with the result that the new

construction impedes the referrers' living room window whilst the rooflights in question are positioned below same.

The referrers have also been advised that the flat-roof as constructed almost certainly constitutes a material alteration to the approved plans which would have required a prior grant of planning permission. Furthermore, the roof does not satisfy any of the conditions and limitations which would allow it to be considered to constitute exempted development.

- During the course of proceedings undertaken by the referrers in the High Court against the developers pursuant to Section 160 of the Planning and Development Act, 2000, as amended, it was considered that a key aspect of their case (in the absence of any enforcement action by the Planning Authority) was the deviation of the ground floor extension and flat roof from the approved plans. In the opinion of Senior Counsel, it was considered that it would be difficult for the developers to explain how, despite a previous planning refusal, the ground floor extension and flat roof had been built further over than was permitted under PA Ref. No. D15A/0750. Moreover, it was noted that as the new extension was of a larger size, it would have a greater impact than the development previously refused permission.
- Prior to the hearing of the Section 160 proceedings in the High Court, a settlement was reached between the parties whereby the proceedings would be struck out subject to certain provisions, including a requirement that the 3 No. 'roof-plane windows' within the roof of the ground floor extension be closed such that the roof in question would amount to a flat mono-pitched lean-to structure (Please refer to Exhibit No. 7 of the supporting documentation). However, there are concerns that the developers may seek to have the rooflights declared as exempted development by the Local Authority. Instead, a ruling that the rooflights are not exempted development would accord with what was agreed to in the High Court.
- Condition No. 3 of the grant of permission issued for ABP Ref. No. PL06D.224147 (PA Ref. No. D07A/0507) prohibited specific ordinarily exempted development from being carried out without the benefit of planning of permission in the interest of residential amenity.

- Having regard to the site location on lands zoned as 'A' with the stated land use zoning objective *'To protect and-or improve residential amenity'*, consideration should have been given to the positioning of the referrers' property relative to the subject site as it looks directly down into the rooflights. In accordance with Section 15 of the Planning and Development Act, 2000, as amended, there is a general duty on a planning authority to secure the objectives of the development plan, which includes consideration of issues such as land use zoning, light pollution and overlooking.
- The rooflights have had a detrimental impact on the residential amenity of the referrers' dwelling house by reason of obtrusiveness, overlooking and light pollution, which has in turn caused mental distress and depreciated the value of their home. Furthermore, there are concerns that the rooflights will impact on the ability of the referrers to undertake the necessary remedial works.
- There are concerns that the Planning Authority failed to take appropriate enforcement action as regards various material deviations from the approved plans, including the following:
 - The existing dwelling house has been developed as a detached property whereas it was to have adjoined the dwelling to the immediate east as approved under PA Ref. No. D15A/0750.
 - Inadequate consideration has been given to the rationale for the refusal of PA Ref. No. D15A/0353.
 - Additional windows / fenestration have been included in the new dwelling house which were not detailed in any of the relevant grants of permission.
 - Non-compliance with Condition No. 3 of PA Ref. No. D15A/0750 which required the first floor living area window on the western elevation to be glazed with opaque or frosted glass.
 - The positioning of the dwelling house as constructed does not accord with the approved plans and particulars and, therefore, has a detrimental impact on the residential amenity of the referrers' property.

- There have been multiple instances of non-compliance with the conditions attached to the grants of permission issued in respect of PA Ref. No. D07A/0507 / ABP Ref. No. PL06D.224147 & PA Ref. No. D15A/0750.
- Contrary to the position adopted by the Planning Authority, it is submitted that the deviations from the approved plans are not minor and are of a material nature. Accordingly, the development as constructed is unauthorised.
- In its initial assessment of the Section 5 reference, the Planning Authority referred to PA Ref. No. D13A/0031, however, that planning application does not relate to the site in question and is irrelevant to the determination of the referral.
- The Planning Authority's assessment of the initial Section 5 reference does not detail the extensive planning history of the subject site. Moreover, it does not refer to the emphasis placed by previous planning inspectors / case planners on the need to consider the positioning of the referrers' property in determining the position and scale of any development proposed on site. For example, in their assessment of ABP Ref. No. PL06D.206288, the reporting inspector understood the difficulties associated with the subject site and stated that it was '*. . . a difficult site to develop, due to its restricted size and proximity to other dwellings . . .*' Similarly, the Planning Authority referred to the property as a '*sensitive infill site*' in its determination of PA Ref. No. D04A/1189.

Planning authorities have indicated on multiple occasions that any development on the referral site should not cross the building line of the referrers' property, however, this did not prohibit the works carried out on site from extending beyond same.

N.B. The Board is advised that the subject referral has been accompanied by a considerable amount of supporting documentation, including copies of signed affidavits prepared in respect of the Section 160 proceedings, however, I am satisfied that the salient points set out in same have been suitably summarised in the foregoing paragraphs.

6.2. Planning Authority's Response:

- The Planning Authority has no further comments to make in relation to the Section 5 deliberations.
- It is incorrect to say that the development permitted under PA Ref. No. D15A/0750 was to have adjoined another dwelling as it did not involve any form of semi-detached construction. The submitted drawings depicted the shaded outline of those buildings adjoining the site. Furthermore, those drawings did not take account of any roof overhang from adjacent properties and also lack clarity as regards the location etc. of the site boundaries.
- The decision to refuse PA Ref. No. D15A/0363 was based on the fact that the enlarged ground floor area would have extended eastwards in front of a window within 'Shamrock Cottage', would have given rise to concerns as regards overlooking from the proposed balcony, and would have been visually obtrusive when viewed from within 'Shamrock Cottage'.

Neither the extended ground floor area permitted under PA Ref. No. D15A/0750 nor the development as constructed on site can be deemed to be representative of the proposal refused permission under PA Ref. No. D15A/0363 given the absence of any balcony (and consequential overlooking) and as it is not visually obtrusive.

- The high-level window within the western elevation of the existing dwelling house has been constructed 500mm lower than was permitted under PA Ref. No. D15A/0750. Furthermore, it is readily apparent from the planning drawings and 3D-imagery provided with PA Ref. No. D15A/0750 that the adjoining properties to the east, west and south were not accurately reflected which gives rise to inconsistencies between the depiction of the development in the application documentation and the actual construction on site.
- Whilst clear glass was installed within the first floor living room window on the western elevation of the dwelling house contrary to the requirements of Condition No. 3 of the grant of permission issued in respect of PA Ref. No. D15A/0750, it has been accepted that this was fitted in error by the window supply company and that it will be replaced in the short term prior to

completion of the development. This error was known to both the Planning Authority and the applicant and it was agreed that compliance with Condition No. 3 could be achieved in due course without the need to revert to enforcement action.

- It is not uncommon for drawings submitted at planning application stage to fail to accurately depict the on-site reality of boundary positions and / or adjacent properties. In certain instances, on-site discoveries may necessitate adjustments (e.g. an amended positioning or revised dimensions) to be made in order to accommodate a development. If any such adjustments are of a minor nature, it is reasonable to conclude that the development continues to accord with its grant of permission and that there is no need to lodge a new planning application. In this regard, it is submitted that acceptable tolerances must be acknowledged as a factual occurrence when transitioning from planning application stage to on-site construction.
- The assessment of a planning-related matter, and any recommendation made with regard to same, is subject to further adjudication by senior staff prior to the issuing of a formal decision.

6.3. Owner / Occupier's Response:

- In response to the reliefs sought by the referrers under Section 160 of the Planning and Development Act, 2000, as amended, the site owners (Mr. Michael McDonagh & Ms. Noreen Farrar) instructed their solicitors to issue a 'Calderbank Letter' along the lines of the High Court Order to Mr. Darragh Fegan, without any admission of liability. Mr. Fegan accepted this 'Calderbank Letter' and the presiding judge ruled it as a consent order prior to any hearing of the case. The property owners are not in a position to speculate as to why Mr. Fegan accepted the terms of this 'Calderbank Letter' or why he consented to the High Court Order rather than proceed to a hearing of the reliefs sought.
- The underlying premise of the subject referral is that the rooflights in question cannot constitute exempted development as they have been installed within an extension which is, in itself, an unauthorised development. However, it is considered that the referrer is fundamentally in error on this point.

On several occasions, the Planning Authority has expressed the view that the dwelling house as constructed on site is in substantial compliance with the terms and conditions of PA Ref. Nos. D07A/0507 & D15A/0750 and that any deviations from same are of such a minor nature as not to warrant an application for retention.

- With regard to the 'material deviations' alleged by the referrers, it is submitted that the grounds of referral have mis-stated the detailed exchanges made in relation to the Section 160 proceedings and also ignore the comprehensive enforcement investigations undertaken by the Planning Authority.

(*N.B.* The site owners have felt compelled to respond to each of the individual breaches of condition alleged by the referrers, however, in the interests of conciseness, and as the Board has no function as regards matters of enforcement, in my opinion, it is unnecessary to expand on same, although I would acknowledge the points raised and would refer the Board to same for further consideration).

For example, in response to the referrers' assertion that the existing dwelling house has not been constructed in the correct location / position, whilst it is acknowledged that there has been a minor movement / repositioning of the house on site, it is considered to be in substantial compliance with the relevant grants of permission.

Similarly, in relation to the referrers' comments pertaining to the positioning of the first floor of the new dwelling relative to the building line of Shamrock Cottage, it is submitted that there has been a minor movement of the house of between 110mm from the western boundary to in total 345mm to the eastern boundary. However, the Planning Authority has again determined that the house is in substantial compliance with the relevant grants of permission.

- With regard to the drawings prepared by the referrers' engineer which seek to set out the extent of the deviations evident in the dwelling house 'as-built' when compared to the approved plans, it should be noted that a considerable amount of doubt has been cast on the measurements used, particularly as the engineer in question had no access to the referral site.

- The report prepared by the referrers' planning consultant continues to rely on the inaccurate measurements set out in the drawings prepared by their consulting engineer. Whilst the purpose of this report is to seek to show that the dwelling house as constructed on site constitutes unauthorised development, it is of fundamental importance to note that it is not based on an accurate site survey.
- It is evident from OSi aerial imagery that the north-facing living room within the referrers' property does not have the benefit of planning permission (although it would appear to be immune from enforcement). Furthermore, there is no planning permission in place for building onto the boundary of Shamrock Cottage and any such works would not constitute exempted development.
- Contrary to the referrers' initial submission, the rooflight does not look into a bathroom, although the subject referral would appear to have corrected this assertion.
- The drawings prepared by the referrers' consulting engineer have been shown to be less than accurate (survey drawings compiled on behalf of the property owners were subsequently acknowledged by the referrers' professional team) and have been used by the referrers to exaggerate the extent of the minor deviations in order to argue that the first floor roof as constructed is 'unauthorised' and thus the rooflights must also be 'unauthorised'.
- The suggestion that the site owners have acknowledged that the house is not in compliance with planning on the basis of the referrers' acceptance of the 'Calderbank Letter' is refuted.
- The premise of the referrers' submission that the rooflights cannot be exempted development as the roof itself is unauthorised is an attempt to re-open a complaint to the Planning Authority that the roof (and the house) constitute unauthorised development. This issue has already been categorically determined by the Planning Authority which formed the view that the house is in substantial compliance with the relevant grants of planning permission and that any deviations are of a minor nature.

- It is considered that the Planning Authority made the correct decision in respect of the referrers' initial Section 5 reference given the provisions of Section 4(1)(h) of the Planning and Development Act, 2000, as amended.
- The Planning Authority has correctly determined that the rooflights in question do not result in any material change to the external appearance of the structure of the roof when viewed from the street (which has been acknowledged by the referrers). Notably, the referrers have not submitted that the alterations result in the roof being inconsistent with the character of the structure with neighbouring properties. The decision of the Planning Authority alludes to the mix of housing types along Ardbrough Road, many of which have rooflights, and it has been correctly set out that the rooflights are exempt within the meaning of Section 4(1)(h) of the Planning and Development Act, 2000, as amended.
- It has been submitted that the determination of the initial Section 5 reference should have considered the impact of the change in the appearance of the roof consequent on the installation of the rooflights when viewed from a window serving the referrers' dwelling house. In response, it is considered that the rooflights cannot be held to be inconsistent with the external appearance of the roof merely because they are visible from within the referrers' property.
- The rooflights do not materially affect the external appearance of the roof and the mere fact that light can 'spill' from the rooflights is not a material consideration otherwise no rooflight could ever be held to constitute exempted development. Furthermore, it is not accepted that any light spillage from the rooflights is having a detrimental impact on the residential amenity of the referrers' property.
- The suggestion that views will be available to the referrers' children from their home through the rooflights into a bedroom area within the existing dwelling house are rejected given the difference in height and the angle between the respective windows. Moreover, even if such views were available, this would not de-exempt the rooflights. The fact that a window may be visible to another property is not unusual in planning terms, particularly in built-up areas.

- It is reiterated that the Planning Authority has already determined that all aspects of the existing dwelling house on site are compliant with the relevant grants of permission.
- Dún Laoghaire Rathdown County Council is the relevant body as regards determining whether a structure, or any part of it, is authorised / unauthorised. The Board has no function with regard to enforcement and as such is not the body prescribed to determine the planning status of the existing dwelling house.

- The referrers have stated the following:

'Ruling that these rooflights are not exempt in this special case would be complying with what was agreed to in the High Court Order and with what the offending developers agreed to do so that they could avoid a conviction and fines'.

This statement is misleading and the Board can determine the subject referral without reference to the High Court Order.

- The relevance of the referrers' reference to Condition No. 3 of ABP Ref. No. PL06D.224147 (PA Ref. No. D07A/0507), which de-exempts development prescribed in Classes 1 & 3 of Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended, is questionable as it does not relate to the subject matter of the referral i.e. the rooflights.
- Whilst the referrers may be dissatisfied with the decision of the Planning Authority, there is no evidence that their concerns were not properly considered.
- The Planning Acts do not afford any protection to private views over private property (which is the referrers' fundamental objection to the rooflights in question).
- Section 4(1)(h) of the Planning and Development Act, 2000, as amended, does not allow for consideration of the objectives of a development plan in the determination of whether or not a particular development falls within the provisions of same. Therefore, Section 15 of the Act is not relevant in this instance.

- A ruling by the Board that the rooflights constitute exempted development would be consistent with its previous determination of similar Section 5 referrals e.g. ABP Ref. Nos. RL2996, RL2451 & RL3396.
- The site owners disagree with and refute the allegations made by the referrers as regards unauthorised development. Such statements are of a frivolous and vexatious nature.
- PA Ref. No. D13A/0031 relates to an adjacent property and is not immediately relevant to the determination of the subject referral, other than as part of a review of the planning history of the area.
- The referrers have adopted an excessively rigid approach to planning compliance which is an unreal standard not recognised by the Planning Act which permits minor deviations.
- It is reiterated that Dún Laoghaire Rathdown County Council has determined that the roof of the existing house is in substantial compliance.

N.B. The foregoing submission has been accompanied by a considerable amount of supporting documentation, including copies of signed affidavits, however, I am satisfied that the salient points set out in same have been suitably summarised in the foregoing paragraphs.

6.4. **Further Responses:**

None.

7.0 **Statutory Provisions**

7.1. **Planning and Development Act, 2000**

7.1.1. Section 2(1) of the Act defines “works” as follows:

“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.

7.1.2. Section 3(1) of the Planning and Development Act, 2000, as amended, states the following:

“Development” in this Act 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 use of any structures or other land.

7.1.3. Section 4(1)(h) of the Act states that the following shall be exempted development for the purposes of the Act:

‘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’.

7.1.4. Section 4(2) of the Act states that the ‘Minister’ may by Regulation provide for any class of development to be exempted development for the purposes of the Act.

8.0 Assessment

8.1. Is or is not development

8.1.1. Section 3 of the Planning and Development Act, 2000, as amended, defines “development” as the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land. In my opinion, the installation of the 3 No. rooflights in question has clearly involved an act of development having regard to Section 2 of the Act where “works” are defined as:

“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 to exterior of a structure.

8.1.2. Accordingly, having established that the construction of the 3 No. rooflights constitutes development, the question arises as to whether or not these works constitute exempted development.

8.2. Is or is not exempted development

- 8.2.1. Having conducted a site inspection, and following a review of the available information, in my opinion, the principle basis on which the referrers have sought to establish that the rooflights in question do not constitute exempted development derives from their assertion that the existing dwelling house, including the single storey flat-roofed element within which the rooflights have been installed, has not been completed in accordance with the terms and conditions of the relevant grants of planning permission (i.e. PA Ref. No. D07A/0507 / ABP Ref. No. PL06D.224147 & PA Ref. No. D15A/0750) and thus constitutes unauthorised development. In effect, the case has been put forward that as the existing dwelling house is unauthorised, the installation of the rooflights cannot benefit from the exempted development provisions set out in the Planning and Development Act, 2000, as amended, and the associated Regulations.
- 8.2.2. At the outset I would advise that the Board has no function in respect of issues pertaining to enforcement and that the pursuit of such matters is generally the responsibility of the Planning Authority. In this regard whilst I would acknowledge that the referrers have sought to establish that certain aspects of the works already undertaken on site do not accord with the relevant grants of permission (e.g. the positioning / location of the newly constructed dwelling house relative to neighbouring properties / site boundaries, the size and extent etc. of the single-storey construction, and the fenestration details), I do not propose to offer any comment on the veracity of same given that the subject referral is specific to the installation of the rooflights in question and does not relate to the wider issue of the materiality of any other deviations from the approved plans. However, in order to address the wider implications of the referrers' assertion that the subject rooflights cannot be considered to constitute exempted development on the basis that the dwelling house itself is unauthorised, I would refer the Board to the multiple instances when the Planning Authority informed the relevant parties that it was satisfied that the works undertaken on site with regard to the construction of the development approved under PA Ref. No. D07A/0507 / ABP Ref. No. PL06D.224147 & PA Ref. No. D15A/0750 were in compliance with the grants of permission.

- 8.2.3. For example, in correspondence dated 31st August, 2016 and addressed to Mr. Martin Dunbar (a consulting engineer engaged by the site owner i.e. Ms. Noreen Farrar), the Planning Authority expressly stated in response to an allegation of unauthorised development consisting of non-compliance with Condition No. 1 of PA Ref. No. D15A/0750 that *'it is considered that the house being constructed conforms to the planning permission as granted with regards to positioning, size and format'* (please refer to Appendix 3 of the site owner's response to the grounds of referral). Similarly, on 30th March, 2017 the Council informed the site owner (Ms. Farrar) that *'The Planning Authority considers that planning permission Register Reference D15A/0750 is compiled with'*.
- 8.2.4. More recently, in correspondence issued to the referrer (Mr. Fegan) dated 9th May, 2018 as regards Enforcement File Ref. ENF.13516 (a copy of which is enclosed in the documentation forwarded by the Planning Authority to the Board for consideration), the Council stated that *'while the house is not being constructed to the exact position as indicated in the drawings submitted with the planning application, it is considered that the deviations are minor in nature, not material to an extent that would necessitate the benefit of a new planning permission and, as such, do not warrant enforcement action'*.
- 8.2.5. Therefore, on the basis of the foregoing, it would appear that the Planning Authority has adopted the position that the existing dwelling house as constructed on site does not constitute unauthorised development and that any deviations from the approved plans are not material in nature. Accordingly, given that the Planning Authority has essentially declared the existing dwelling house to be compliant with the relevant grants of permission, the property would not be immediately precluded from potentially availing of the exempted development provisions set out under Section 4(1)(h) of the Planning and Development Act, 2000, as amended, with regard to the installation of the rooflights which are the subject matter of this referral. By way of further comment, I would submit that it is not the function of the Board to determine matters of compliance / non-compliance from an enforcement perspective and thus it is entirely reasonable to rely on the decision of the Planning Authority in this regard.
- 8.2.6. Section 4(1)(h) of the Act, 2000 states that the following shall be exempted development for the purposes of the Act:

'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'.

8.2.7. Whilst I can appreciate that the Planning Authority has sought to rely on this provision in its determination of the initial Section 5 reference, it would appear on the balance of probability that the rooflights in question were installed during the construction of the permitted dwelling house and thus cannot avail of the exemption offered by Section 4(1)(h). In support of the foregoing, I would refer the Board to imagery available from 'Google Earth Streetview' and dated August, 2018 which would appear to show provision being made for the installation of the rooflights during the initial construction of the dwelling house. Furthermore, whilst it was not possible to view the rooflights from the exterior of the property during the course of my site inspection due to them having to be covered over in line with a Consent Order issued by the Courts, an internal inspection would seem to suggest that they were installed as the house itself was being constructed.

8.2.8. At this point I would draw the Board's attention to its previous determination of ABP Ref. No. RL15.RL3324 wherein it was held that as the construction of the rooflights in that particular instance had been undertaken during the construction of the house for which planning permission was granted on the basis of drawings and specifications which did not include for the installation of the rooflights in the location in question, the rooflights did not come within the scope of Section 4(1)(h). In my opinion, there are direct parallels to be drawn between the subject referral and the determination of ABP Ref. No. RL15.RL3324 and, therefore, having regard to the permitted nature of the existing dwelling house, and as the rooflights in question would appear to have been installed at the time of its construction, the installation of the said rooflights cannot be considered to constitute works for the maintenance, improvement or alteration of an existing structure and thus do not come within the scope of Section 4(1)(h) of the Act.

N.B. By way of precedent, further support for the foregoing conclusion can be found by way of reference to the Board's previous determination of ABP Ref. Nos. RL29S.RF0989, PL06D.RL2678 & PL06D.RL3011.

8.3. **Appropriate Assessment:**

- 8.3.1. Having regard to the nature and scale of the development under consideration, the nature of the receiving environment, the availability of public services, and the proximity of the lands in question to the nearest European site, it is my opinion that no appropriate assessment issues arise and that the development would not be likely to have a significant effect, either individually or in combination with other plans or projects, on any Natura 2000 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 installation of 3 No. rooflights on a flat roof at a site adjacent to No. 24 Ardbrugh Road, Dalkey, Co. Dublin, is or is not development or is or is not exempted development:

AND WHEREAS Mr. Darragh Fegan requested a declaration on this question from Dún Laoghaire Rathdown County Council and the Council issued a declaration on the 12th day of November, 2018 stating that the matter was development and was exempted development:

AND WHEREAS Mr. Darragh Fegan referred this declaration for review to An Bord Pleanála on the 29th day of November, 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, as amended,

- (c) Section 4(1)(h) of the Planning and Development Act, 2000, as amended,
- (d) the planning history of the site; and
- (e) when the works were carried out.

AND WHEREAS An Bord Pleanála has concluded that:

- a) the construction of the said three rooflights to the subject dwelling does not come within the scope of section (4)(1)(h) of the Planning and Development Act, 2000, as amended, because the works in question were carried out during the construction of the dwelling house for which planning permission was granted on the basis of drawings and specifications which did not include the installation of the three rooflights in the location in question and, therefore, do not constitute works for the maintenance, improvement or alteration of an existing structure.

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 installation of 3 No. rooflights on a flat roof at a site adjacent to No. 24 Ardbrough Road, Dalkey, Co. Dublin, is development and is not exempted development.

Robert Speer
Planning Inspector

4th April, 2019