



An
Bord
Pleanála

Inspector's Report ABP-303200-18

Question

Whether structure constructed at the site incorporating increase in parapet height and increased length over that permitted under Dublin City Council Ref No 2690/16, An Bord Pleanála Reference No 29S246883 is or is not development and is or is not exempt development.

Location

16, Cullenswood Park, Ranelagh,
Dublin 6

Declaration

Planning Authority

Dublin City Council South

Planning Authority Reg. Ref.

0422/18

Applicant for Declaration

Highgate Properties Ltd.

Planning Authority Decision

Is exempted development

Referral

Referred by

Highgate Properties Ltd.

Owner/ Occupier

John McCarthy.

Observer(s)

None.

Date of Site Inspection

11th March 2019

Inspector

Bríd Maxwell

1.0 Site Location and Description

- 1.1. The referral site comprises a two-storey detached dwelling of recent construction on an infill site located on the eastern side of Cullenswood Park in Ranelagh, Dublin 6. The dwelling occupies a narrow triangular plot and lies to the east of another recent infill 1-3 Cullenswood Place, which comprises of three no three-storey flat roofed stepped structures. The referral dwelling is a two-storey structure with a flat roof. The rear/western wall of no 16 lies on the boundary with units 2 and 3 Cullenswood Place.

2.0 The Question

- 2.1. The question as referred is “whether the ‘as constructed’ structure at 16 Cullenswood, Dublin 6 (Plan Ref 2690/16) is or is not development and is or is not exempted development”. I recommend the rewording of the question as follows: Whether the ‘as constructed’ structure at 16 Cullenswood, Dublin 6 incorporating increase in parapet height and increase in length over that permitted under Dublin City Council Reference No. 2960/16, An Bord Pleanála Reference No PL29S246883 is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

- 3.1.1 By order dated 14th November 2018, Dublin City Council decided as follows:

“Having regard to

The approved drawings for ref PL29S246883

The submissions of the applicant and the owner;

Previous decisions by An Bord Pleanála; and

The decision by An Bord Pleanála (ABP 300772-18)

It is considered that the deviations between what has been constructed and the approximate figure dimensions in relation to the height of the structure and the length of the western wall are minor in the context of the development, do not have any

material impacts on adjoining property and therefore are de minimus, and are exempted development.”

3.2. Planning Authority Reports

3.2.1. Planning Reports

Planner’s report concludes that the issue of height of the as constructed dwelling(+535mm) has been assessed by the Board. As regards the increase in length (+735mm) this is considered to be minor. It is considered that the increase in height and length are not materially different to that which was previously approved.

4.0 Planning History

- **ABP-300772-18.** Following issue of enforcement notice by Dublin City Council a reference was made on behalf of the owner. On the question as to whether the minor increase in parapet height of a two-storey dwelling, as constructed over that permitted under An Bord Pleanála reference number PL29S.246883 at 16 Cullenswood Park, Ranelagh, Dublin is or is not development or is or is not exempted development:

An Bord Pleanála concluded that –

“(a) The construction of the dwelling involved works and is, therefore, development,
(b) the drawings submitted in respect of planning permission granted under An Bord Pleanála reference number PL29S246883 did not give specific dimensions but allowed for variation through the use of approximate dimensions, and
(c) the deviation in this instance between what has been constructed and the approximate figure dimensions is minor in the context of the development, does not have any material impacts on adjoining property and is, therefore, de minimus, and is exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the minor increase in parapet height of a two-storey dwelling, as constructed over that permitted under An Bord

Pleanála reference number PL 29S.246883 at 16 Cullenswood Park, Ranelagh, Dublin, is development and is exempted development.”

▪ **PL29S246883. 2690/16**

Following first party appeal of decision of Dublin City Council to refuse permission the Bord decided to grant permission for demolition of single storey detached garage and construction of two storey one-bedroomed detached dwelling, subject to conditions. I note that the Board’s Inspector had recommended refusal on grounds of inadequate private amenity space and negative impact on adjacent residential units.

5.0 Policy Context

5.1. Development Plan

The Dublin City Development Plan 2016-2022 refers.

5.2. Natural Heritage Designations

None

6.0 The Referral

6.1. Referrer’s Case

6.1.1 The referral is submitted by DTA Architects on behalf of Fergal O Mahony, Director Highgate Property Ltd. owner of adjoining development 1-3 Cullenswood Place. The submission includes a number of appendices which seek to elucidate the case on behalf of the referrer. The grounds of referral are summarised as follows:

- The entire consideration of the unauthorised development at the subject property and the additional extent of the boundary wall in both length and height has, it is submitted, been the subject of mis-representation and interpretation in submittals to both Dublin City Council and to the Board. (Ref EX 00446/16 PL29S300772)
- In considerations to date neither the city council, nor the Board had verifiable information to make a judgement and accordingly judgements are made in error.

- Note Judicial Review proceedings (High Court Record No 2018/852JR Highgate Properties Limited V An Bord Pleanála) taken by the applicant with respect to the original Section 5 referral PL29S300722. Applicant has been given leave to appeal the Board’s decision on the basis that there are substantial grounds for contending that the decision by the Board is invalid and ought to be set aside.
- Precedent value of the Board’s determination should therefore be discounted.
- Planning Authority in accepting the original application (PA Ref: 2690/16 ABP Ref:29S246883) , and now in its inconclusive reference to the issue is culpable in allowing discussion of approximate dimensions to obfuscate and undermine the applicant’s rightful objection to the boundary wall as constructed and its impact on residential amenity.
- The use of approximate dimensions is not allowed for in Article 23(f) of the Planning and Development Regulations.
- Planning Officer is in error in failing to make an independent comment or judgement with regard to the additional height of +535mm and in coming to the view that the difference failed to take account of the information submitted and relied on Board’s decision.
- A laissez faire interpretation of allowable variation is not construction industry or planning norm, particularly in a tight urban environment and on a small two storey structure where dimensions are critical and impacts significant.

Actual degree of variation equates to +9.04% in height and +7.11% in length as follows:

	Consented	As constructed	Additional Over	Percentage Addition
Height (above path)	23.165m OD 5.914m	23,700m OD 6.449m	+535mm	+9.04%
Length	10.200m	10.935m	+725mm	+7.11%

- It is not credible that the Board or City Council can set a precedent that percentage increases of this magnitude are accepted as being *de minimus* and exempted development. In the case of a taller building of 9 floors for example a 9% increase could be construed as an additional floor.

- Additions are outside any normative construction or standard and should not be accepted under the provisions of exempted development.
- Reviewing drawings and timelines it is evident that alterations did not occur on site but were decided in advance of any site work. Alterations were deliberate, envisaged from an early point and were incorporated in the pre-fabrication drawings prior to construction. Submissions to the Board that the alterations occurred on site are not credible, given the close alignment between the Kingspan prefabrication drawings which would have fixed all dimensions and the as-constructed building. The case made by the referrer that during construction accommodations had to be made to address a sloping pavement, additional storm water provisions is unsound.
- Planning Officer failed to take account of material submitted with regard to daylight and sunlight. The submission demonstrated that the increase in plan and section of the subject structure as documented, had a perceptible impact on the dwellings over and above that of the as consented development of Plan ref 2690/16 and that unauthorised development and increase in height and massing of the subject structure has a significant and direct material impact on the residential amenity and enjoyment of no 2 and 3 Cullenswood both in terms of visual and daylight impact.
- Reject contention that it is reasonable in the absence of precise dimensions on drawings caveated by “approx” in the original application to allow an additional 5% to all dimensions and having done so to consider the additional dimension over this to be *de minimus*.
- Request that the Board agree that the increase in length of the boundary wall is of a material nature, that the cumulative alterations of length and height are significant and require to be dealt with by reference to the Planning and Development Act.
- Document entitled “Impact on No’s 1-3 Cullenswood Place of Development at 16 Cullenswood Place” compiled by DTA Architects further expands on this. Visual Impact assessment based on photographic survey documents illustrates that the increase in plan and section has a perceptible impact on the views from the living areas of the dwellings over and above that of the consented development. (Appendix F Red line represents outline of as consented development.)
- BPG3 Daylight study quantifies the actual magnitude of impacts on 2 & 3 Cullenswood Place. Study confirms that when consented and as constructed

scenarios are compared, there is a reduction in skylight levels at windows of habitable rooms varying from 7.7% to 25%, the average daylight reductions in the gardens reduces in a range from 6.5% -13%, light levels at ground floor bedrooms in No 2&3 were found to reduce further. First floor living area to no 3 as a result of the as constructed form contravenes BRE guidelines. There is a further reduction of daylight available to the garden of no 3 from a 36% below guideline as consented to 44% in the as constructed scenario.

6.2. Planning Authority Response

6.2.1 The Planning Authority did not respond to the grounds of referral.

6.3. Owner/ occupier's response

6.3.1 The submission by Auveen Byrne Associates, Consultant Town Planners on behalf of the owner is summarised as follows:

- The differences between the 'as consented' and 'as constructed' height and length of 16 Cullenswood Park are so small as to be immaterial deviations from the approved development.
- Previous decision of the Board ABP300772-18 deemed deviation in height to be *de minimus* and exempted development.
- Exercises conducted and submissions made referred to the 'as constructed' dwelling therefore minor excess in height and length have already been addressed and demonstrated no material impact on the adjoining property.
- Referrer's estimation of a greater deviation from the permitted height and length arises from their inaccurate method of measurement of same. Perceived impact is therefore exaggerated.
- No basis for the applicant's conclusion that the cumulative impact of added height and length has a material impact on the amenity of residences at Cullenswood Place such that development has taken place which is not exempted development.

- Surveyed top level of the western wall of no 16 Cullenswood Park “as constructed” and as presented in report by Derek Tynan Architect on behalf of the referrer is not disputed. As previously presented in 0446/17 ABP3200772 no on site or adjacent ground or ground floor levels are shown on the drawings approved 2690/16 29S246833. Drawings show proposed height from top of the pavement to the underside of the parapet of the building as 5.850m approx. That dimension is shown for both the north and south ends of the building. No height is given to the top of the parapet. If an allowance of 5% (0.293m) is made to address the approximate status of the measurement given, and the parapet height is assumed to add 100mm than the permitted height of the building is 6.243m. The level of the pavement varies slightly (imperceptibly to the eye) across the building elevation. The average height of the building as constructed is 6.541m to the top of the parapet. The difference from the permitted height as calculated above is 0.296m. This is an increase of 4.77% on the permitted height. It is respectfully suggested that the measured or percentage increase in height is of such a minor nature that the deviation of the height of the building from that permitted is not material. Referrer’s case is based on the erroneous interpretation of the permitted height. As the referrer estimates a lower permitted height the difference calculated between the permitted height and the actual as constructed height is significantly exaggerated.
- In relation to the length of the western wall the difference between the permitted and as constructed dwelling is alleged by the referrer to be 0.735m (10.935m –10.200m). It is assumed that DTA report scaled measurement off drawing 3040/26H to estimate the as consented measurement. However, ABP confirmed in Inspector’s Report on ABP300772-18 Section 7.2.3 that the “approved drawings do not scale exactly as presented.” This confirms that the alleged scaled measure of 10.2m calculated by DTA is not a reliable measurement of the length of the relevant wall as permitted. Notably every measurement submitted as part of the approved plans is followed by the word approx. Furthermore, all plans clearly state as a clarification and caveat that *“Dimensions and layout approximate only to be verified on site, proposed structural alterations to proper approval of structural engineer”*. As the referrer erroneously estimates a lower permitted length, the difference calculated between the permitted length and the actual length as constructed is significantly exaggerated.

- The closest indicator of the approved length of the external wall of the dwelling would be the approximate measurements of the internal length of the western wall as indicated in the approved plans. The approximate internal dimensions indicated in approved drawing 3040/26H shows internal western gable wall measured at 9.478m. Allowing for a 5% approximation this would suggest the deemed approved length of the internal western wall would be 9.952m. (9.478+5%). Geomap survey confirms that the as constructed internal length of the western gable wall of the dwelling is 10.193, meaning a total excess internal length above the deemed approved internal length which is 0.241m. (10.193m-9.952 deemed approved length). This represents a 2.42% excess of the deemed approved internal length of approximately 9.952m.
- Surveyed length of the external wall is 10.935m. Actual length of the internal wall is 10.194m. The difference is 0.742m (10.935-10.193) which represents the width of the internal walls.(measured at 0.371m each). This 0.371m width includes the outer brick of the wall, the cavity, the timber frame, insulation and plasterboard, and is within a standard construction width of an external wall on a timber frame structured dwelling.
- ABP have previously ruled that an excess height of 4.77% was *de minimus* and consequently exempted development. Accordingly, it is suggested that an excess of 2.42% in length is also *de minimus* and exempted development.
- Conclusions assessing material impact on the applicant's properties are based on erroneous interpretations of the as permitted height and length of 16 Cullenswood Park and accordingly conclusions as regards impacts are significantly exaggerated.
- Studies by Coady Architects and Digital Dimensions submitted as part of ABP300442-18 confirm that the as constructed dwelling did not give rise to any material adverse additional impact on adjoining properties.
- As regards the genesis of departures from approved plans, the increase in height and length arose due to practical on-site adjustments related to step up from pavement and increase in height of upstand of 190mm in flat roof was effected to minimise risk of stormwater drainage overflowing to adjoining rear gardens of newly constructed dwellings to the west. Increase in depth of ceiling joists to comply with insulation requirements and ensuring adequate support structure for felt roof. Minor alterations to the building in relation to storm water could be regarded as being

undertaken in compliance with condition 3 of original permission “Water supply and drainage arrangements including the disposal and attenuation of surface water shall comply with the planning authority requirements for such works and services.”

- Minor increase in internal length of circa 241mm was to ensure the ground floor landing at the bottom of the stairs complied with Part K of the Building Regulations.
- As the developments at 130 Ranelagh and 16 Cullenswood Park were constructed at much the same time, the occupants of 1, 2 and 3 Cullenswood place took possession of their properties in the full knowledge of the existence of no 16 Cullenswood Park and its impact.
- Red line marking overlaying photographic images submitted by referrer impairs their value as survey images. Methodology for the as consented images is not set out and imaging is not therefore verifiable.
- Visual impact is exaggerated as,
 - A building under construction will always appear larger and of greater visual impact than one as built as finishes will have a significant effect in visually “settling down” a building.
 - The strong red line on the ‘as constructed’ building which does not appear in the ‘as consented’ image, significantly exaggerates the visual impact of the former.
 - The crude “chopping off” of the excess height and length chops out the strong line at the top and right-hand side of the sheeting of the building, thus the as consented image appears less strong.
- As regards sunlight / daylight analysis the introduction to “Site Layout Planning for Sunlight and Daylight specifies that it is not mandatory and should be interpreted flexibly in the interest of good planning.
- The morphology of the development at 1,2,3 Cullenswood place is of key consideration to impact of the house 16 on sunlight and daylight to its rooms and open spaces. The development as designed and constructed is not conducive to the achievement of good sunlight and daylight to some windows and to the gardens.
- Dwellings 1,2 and 3 Cullenswood are sizable houses on a tight site. Private open space serving the units is provided on three levels comprising a small ground floor

rear garden, a first-floor rear terrace serving the living room and a second-floor larger terrace. Rear of the dwellings face east, thus each dwelling shades its own ground and first floor open spaces from evening light. Bedroom windows are at ground floor level. At first floor level bedroom window in the northern part of the rear elevation and on the set back building line a living room and terrace on the southern part. The east facing windows of the living rooms of No 2 Cullenswood Place and no 3 Cullenswood Place are in a tunnel where externally they are behind structures on all sides. The overhanging second floor is a particular problem in obstruction of vertical sky component.

- The BPG Report lodged with the referral shows the as constructed dwelling no 16 Cullenswood Park meets the guidance in “Site Layout Planning for Sunlight and Daylight” almost to the same extent as the ‘as consented’ dwelling. The single exception is Vertical Sky Component at window E, the first floor living room window of no 3 Cullenswood Place. However notably with the garage in place at no 16 the VSC at that window would have been only 6.3% compared to the recommendation in the guideline of 27%. The window fails to meet guideline daylighting by virtue of the design of the building and the added impact of the additional height is less than one percentage point i.e. 0.6% (5.1% less 4.5% per row E of Table 1 and 2 of BPG3 Report).
- In ABP300772-18 An Bord Pleanála specifically accepted that the development does not have a material adverse impact on the applicant’s adjoining properties.
- Development carried out at 16 Cullenswood Park was carried out under and substantially in accordance with the planning permission ref 2690/16 ABP246883 and is therefore not development requiring permission for the purposes of the S32 of the Act.
- Precedent decisions by the Board support this view with specific reference to the concept of immaterial variation as outlined in O Connell v Dungarvan Energy Limited and Lever Finance Limited v Westminster City Council. Also, PL06DRL2671 Mount Alverno Dalkey Co Dublin, and PL24RL2606 Lighthouse Road, Ballynacourty, Dungarvan Co Waterford.
- Notably the Board in determination of ABP300772 considered that the construction of the dwelling involved works and therefore constituted development. It is requested

that the Board review this element of interpretation as it is contended that the dwelling constructed pursuant to a planning permission DCC ref 2690/16 29S 246883. The exceedance of permitted height and length is *de minimus* and immaterial. Therefore, the building has been carried out substantially in accordance with the governing permission. There is no development at no 16 other than development in accordance with planning permission.

- There is no merit in debating the validity or merits of documentation submitted 2690/16 PL29S246883. There is no requirement to give Ordnance datum in planning application. A temporary local benchmark can be used.
- Report attached from Digital Dimensions entitled “Potential Daylight impact of the “as constructed” dwelling, 16 Cullenswood Park, Ranelagh, Dublin 6. Note BRE Guide is advisory and is not mandatory. In relation to the four windows relevant for consideration

	Permitted VSC %	Constructed VSC %	% of former value Constructed
Unit 130D (No 3) Ground Floor Bedroom Window	25.5	23	90
Unit 130D (No 3) First Floor Bedroom Window	39.5	38	96
Unit 130C (No 2) Ground Floor Bedroom Window	24	19.5	81
Unit 130C (No 2) First Floor Bedroom Window	39	34.5	88

- The as constructed VSC of the ground floor bedroom windows of 130C and 130D are marginally lower than the VSC of the dwelling’s windows as permitted but are at least 0.8times (80%) of their former permitted values and therefore meet the recommendations of the BRE Guidelines.

- The windows at ground floor are both bedroom windows and do not have as high a requirement for daylight compared to the main living space at first floor level.
- The increase in height level of 298mm at 16 Cullenswood Park has a minor adverse impact from a daylight perspective on the dwellings at 130B, 130C and 130D.
- The BRE guidelines recommend if a window has a VSC in excess of 27% or is not less than 0.8 times its former VSC percentage value, then there should be no noticeable reduction in light.
- Note that the original design of 2 and 3 Cullenswood Place respectively did not take BRE guidelines into account. To maximise site usage the development at 2 and 3 Cullenswood Place has led to the main living rooms to contain overhead projections and obstructing gable on each side designs which the BRE guidelines recommend avoiding in relation to the design of the main living spaces. This is the main cause for the low VSC% to start with and the design gives no allowance for any future development around it.
- Sunlight and Overshadowing Analysis by Coady Architects. Refers to the sunlight and overshadowing to the rear gardens of adjoining dwellings. Conclusions are that the rear garden of 130C(No 2) and 130D(No 3) are overshadowed by 16 Cullenswood Park however they are overshadowed by a negligible amount by the increased 'as constructed' height. The increase is within the acceptable level as outlined in BRE Guidance Document 2011 Site layout planning for daylight and sunlight.

6.4. Further Responses

Response of referrer to the response of the owner is summarised as follows:

- The Board now has sufficient information to form an opinion which supports the contention that the construction is significantly higher and longer than that consented under Plan Ref 2690/16.
- Parallel Judicial Review proceedings before the High Court 2018/852JR.

- Reject contention of erroneous calculations by the referrer.
- Form of latitude in consideration of “alternative facts” cannot be accepted by the Board as its implications for compliance with consented development would be catastrophic for enforcement under the Act. If projected to a 10-storey building this cumulative allowance of 10% extra over suggests in extremis that an additional storey could be added as an immaterial variation.
- Interpretation of additional height and length should not be accepted as normative.
- Suggestion that these matters arose due to “practical on-site adjustments” is contradicted by the fact of existence of prefabrication drawings for the enlarged development prior to start on site. If these deviations were envisaged they could have been regularised by way of an application to the City Council for amendments of the permission which would have allowed opportunity for third party comment.
- Letter from Highgate Properties attached includes full copy of sworn affidavit and all pleadings in the Judicial Review proceedings. Reiterates contentions with regard to undesirable precedent if accepted, assertion regarding premediated nature of the variations.
- Question relevance of the precedent cases cited. Current issue warrants deviation from the principles set out in the Clifton Hall case, as Mr McCarthy’s deviations from Planning Permission have greatly impacted on third party rights . Request the Board’s consideration of the difference between the Clifton Hall case and the current matter.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

The following statutory provisions are relevant in this case:

Section 2(1) : In this Act, except where the context otherwise requires

“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.”

“Structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and (a) where the context so admits, includes the land on, in or under which the structure is situate,”

Section 3(1) “In this Act “development “ means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structure or other land.

Section 4(1) Sets out developments that shall be exempted development for the purposes of the Act.

Section 5(1): If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of the Act, any person, may, on payment of the prescribed fee, request in writing from the relevant planning authority any information necessary to enable the authority to make its decision on the matter.

5.(1)(4) Notwithstanding Subsection (1) a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.”

7.2. Planning and Development Regulations, 2001

Article 6(1) of the Planning and Development Regulations, 2001 states that “Subject to Article 9 development of a class specified in Column 1 and part 1 of Schedule 2 shall be exempted development for the purpose of the Act.”

9(1)(a)(i) 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.

7.3. **Other**

RL2606 Addressed the matter of interpretation of planning permission specifically with regard to the question as to whether works undertaken in respect of the increase ridge height of a house located at Lighthouse Road, Ballynacourty, Dungarvan. The constructed ridge height in the case was 304mm higher than the permitted ridge height. The Board decided that the increase in ridge height of the new dwellinghouse is *de minimus*, and would accordingly be in accordance with the planning permission and therefore works undertaken to the ridge height is exempted development.

RL2671 Whether certain works undertaken at Mount Alverno, Dalkey are or are not development or are or are not exempted development. An overall increase in height of replacement dwelling by some 0.5m above that permitted was deemed to be *de minimus* and therefore exempted development.

Cork County Council v Cliftonhall Ltd. IEHC 85 Highcourt Ruling by Finnegan J in 2001 The case arose when the applicant alleged that the respondent had carried out a residential development of six blocks but not in accordance with the approved plans and particular. Judge Finnegan held that an increased ridge height of 0.5m in one of the blocks was immaterial in the context of the entire development and concluded that the increased ridge height would not result in a material non-compliance with the planning permission. The case provides an insight with regard to the nature of the breach of a planning permission being relevant to the question as to whether there has, in fact, been any unauthorised development at all, in that planning permissions are to be interpreted flexibly so as to allow for a tolerance in respect of what had been described as “immaterial deviations”.

8.0 Assessment

8.1. Is or is not development

- 8.1.1. I note that the Owner Occupier in response to the referral has requested that the Board review the interpretation of whether the matters subject of the referral constitute development. The first party referrer contends that the dwelling, constructed pursuant to the planning permission, and exceedance of permitted height and length is *de minimus* and immaterial. Therefore, the building, it is contended, has been carried out substantially in accordance with the governing permission. It is stated therefore that “there is no development at No 16 other than development in accordance with planning permission.”
- 8.1.2. Section 2 of the Planning and Development Act 2000, as amended, defines works as “any act or operation of construction, excavation, demolition, extension, alteration or renewal”. I would concur with the approach as set out in the report of the previous reporting Inspector ABP300772-18. Clearly the increase in height and length of the permitted wall is works as it is “an act of construction, extension and alteration” of a permitted wall. Section 3(1) of the Act, defines development as the carrying out of works, in or under land or the making of any material change in the use of any such structures or other land. I am satisfied that the increase in height and length is works, and such works were carried out on land therefore the subject matter of the referral constitutes “development” as per section 3(1) of the Planning and Development Act 2000, as amended.

8.2. Is or is not exempted development

- 8.2.1. I note that within the previous referral case on the site as presented to the Board ABP300772-18, the Board adjudicated on the case and determined that the increase in parapet height as constructed is development and is exempted development. The conclusion was based on the determination that the deviation between what has been constructed and the approximate figure dimensions is minor in the context of the development, does not have any material impacts on the adjoining property and is therefore *de minimus* and is exempted development. The reporting Inspector

noted the details of the case as then presented by the first party referrer¹. The Inspector noted numerous discrepancies in terms of the precise height specifications. Drawing No 3040/25J (the approved plan) depicted the front elevation with the height on south side noted to be ('5850 approx'). This height however extends only from the pavement level to underside of the parapet cap, and the scaled measurement of the overall height including parapet cap is 6m. The drawings were also noted to include the caveat "*Dimensions and layout approximate only, to be verified on site, proposed structural alterations to prior approval of structural engineer*". The case as submitted indicated a constructed height of 6.495m. However, the drawings submitted by the referrer of the as constructed East elevation noted an overall height of 6.495m but at the stated scale of 1:100 measured as 6.2m. Similarly, the overall height of building at the north elevation was depicted as 6.587m but again scaled at 6.3m.

- 8.2.2. The previous reporting Inspector expressed the view that it is reasonable that appropriate accommodations be made to address a sloping pavement and additional storm water provisions as set out in the case by the first party and therefore an allowance for a degree of flexibility was considered appropriate. I note that the referrer within the current case has questioned the motivation and timing of the decision to carry out the alterations stating that such amendments were envisaged from an early (pre-construction) stage. In my view however, discussion on this issue is unproductive in that it is in any event not germane to the case to be addressed.
- 8.2.3. The previous reporting Inspector further noted that "In deciding to grant permission for a dwelling with an under-parapet height of "approx., 5.850m" the Board was aware that there was a degree of flexibility, given the qualification regarding the stated dimensions. The use of the word "approximately" when describing the height and the fact that the stated height did not extend to the overall height. The Board was satisfied that the dwelling as proposed was acceptable".
- 8.2.4. The Referrer has outlined a challenge to the conclusions drawn in ABP300772 as set out in the JR Case [2018/852JR] however in the absence of a ruling to the contrary this remains relevant precedent in the current case, notwithstanding the survey details now provided which provide a greater degree of clarity with regard to

¹ In contrast to the third-party referrer in the current case.

the deviation from the approximate dimensions as permitted. The key focus for consideration therefore in the current referral is to assess the question of cumulative development and specifically the materiality and effect of the combined height and length increase.

8.2.5. I note that case law - *Cork County Council v Cliftonhall Ltd* . [2001] IEHC 85 provides a steer with regard to the focus for consideration in assessing the matter of material / non-material deviations from the terms of existing permission. The case demonstrated that the question of material /non-material deviations should be approached from a practical and common-sense perspective. The question arising is whether the deviation is of such materiality that it would realistically impact on the rights or interests of third parties or be such as would affect planning considerations. I note that the decision of in *Cork County Council v Cliftonhall* is noted to be a borderline case. Here permission had been given for the construction of six apartment blocks. The ridge height of one of the blocks was 0.5m higher than the ridge height of 11.5m shown on the plans. Finnegan J noted that the deviation was 7% in the case of one of the blocks and found that “with some reluctance” this was “immaterial in the context of the entire development of six blocks”. He noted that: “In reaching this conclusion I am influenced by the photographs exhibited in the application. Careful consideration of these satisfies me that the reduce the height... even by 1.3m would not materially alter the effect of the development in terms of visual impact, on the locality in general or the occupiers of houses...”. I note the case also included a deviation in the footprint of the development and the judgement found that the combined effect of altered footprint and increased ridge height Finnegan noted “*with some dissidence I hold that there is not a material non-compliance*”

8.2.6. I note the visual impact assessment submitted by the referrer and in particular the photographic analysis depicting the as constructed and as permitted development. I note the submissions of the first party which question the methodology and whilst I acknowledge the veracity of the noted limitations in terms of the photographic analysis having considered the case in detail I consider that the combined increase in height and length of the structure is material and does alter the effect of the development in terms of its visual impact.

8.2.7. On the matter of potential daylight and sunlight impact. I note the submissions by the referring party which contend that the increase in plan and section of the structure has a perceptible impact on the dwellings over and above the consented development. The BPG3 report notes that when the daylight levels predicted for the as consented and as constructed development are compared a number of reductions are identified. The reductions are noted as follows:

Across the seven windows assessed the average reduction in skylight levels is predicted to be 7.7%, maximum reduction is 11.8%.

Across the two living room windows assessed the average reduction in annual sunlight levels is 7.6% and maximum reduction is predicted to be 15.2%.

Across the two living rooms windows assessed the average reduction in winter sunlight levels is predicted to be 12.5% the maximum reduction is predicted to be 25%.

Across the two gardens assessed the average reduction in sunlight availability is predicted to be 6.5%, the maximum reduction is predicted to be 13%.

8.2.8. I note the owner occupiers observations with regard to the significance of the morphology of 1-3 Cullenswood Place in considering the issue of sunlight and daylight impact. Indeed, it is acknowledged by all parties that the development at 1-3 Cullenswood Place as designed is not conducive to the achievement of good sunlight and daylight. However, I am satisfied that it has been demonstrated that the cumulative increase in height and length has resulted in a material impact. As regards the matter of concurrent construction of the properties and the assertions on behalf of the first party that the occupants of property 103 Cullenswood have not experienced an alteration of effect, this again is irrelevant to the question as posed by the case which is the matter of materiality of effect. Having considered the detail of the information as provided on the referral file I conclude that the cumulative deviation between what has been constructed and the approximate figure dimensions for height and length is material and is therefore not exempted development.

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 as constructed structure at 16 Cullenswood, Dublin 6 (Plan Ref 2690/16 incorporating increase in parapet height and increase in length over that permitted under Dublin City Council Ref No 2690/16 An Bord Pleanála Ref 29S.246883 is or is not development or is or is not exempted development:

AND WHEREAS Highgate Properties Ltd requested a declaration on this question from Dublin City Council and the Council issued a declaration on the 14th day of November, 2018 stating that the matter was development and was exempted development:

AND WHEREAS Highgate Properties Ltd referred this declaration for review to An Bord Pleanála on the 11th day of December, 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) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (d) the planning history of the site,
- (e) the pattern of development in the area:

(f) the submissions made to the Board, photographic evidence, reports and drawings submitted with the referral.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The construction of the dwelling involved works and is therefore development
- (b) The plans for planning permission PL29S246883 did not give specific dimensions but allowed for variation through the use of approximate dimensions.
- (c) The cumulative deviation between what has been constructed and the approximate figure dimensions for height and length is material and is therefore not exempted development.

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

Bríd Maxwell

Planning Inspector

6th June 2019