



An  
Bord  
Pleanála

## Inspector's Report ABP-304475-19

### Question

Whether the diminution of the curtilage of a dwelling house for the purposes of gifting a garden to a family member for the purposes of building a dwelling house thereon is or is not development or is or is not exempted development?

### Location

Geraldine Villas, Lower Aghada, Co. Cork.

### Declaration

Planning Authority

Cork County Council

Planning Authority Reg. Ref.

D/226/19

Applicant for Declaration

Marie Dineen

Planning Authority Decision

Not development

### Referral

Referred by

Marie Dineen

Owner/ Occupier

Francis & Felicity Philpott

Observer(s)

None

**Date of Site Inspection**

15<sup>th</sup> August 2019

**Inspector**

Hugh D. Morrison

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## 1.0 Site Location and Description

- 1.1. The site is located in the village of Lower Aghada in an elevated position off the R630 overlooking Cork Harbour.
- 1.2. The site is of regular shape and it rises in level from north to south. This site extends over an area of 0.129 hectares. It presently lies within the curtilage of the more easterly of the two dwelling houses, known as Geraldine Villas.
- 1.3. The site is accessed by means of a shared ramped driveway from the R630 to the north.

## 2.0 The Question

- 2.1. The question posed by the referrer relates to a residential property at Geraldine Villas, Lower Aghada, Co. Cork. It is as follows:

Whether the diminution of the curtilage of a dwelling house for the purposes of gifting a garden to a family member for the purposes of building a dwelling house thereon is or is not development or is or is not exempted development?

## 3.0 Planning Authority Declaration

### 3.1. Declaration

That which the question refers to does not constitute development under Section 3 of the Planning and Development Act, 2000 – 2019.

### 3.2. Planning Authority Reports

#### 3.2.1. Planning Reports

The case planner expresses the view that the alteration of boundaries referred to in the question posed does not constitute development.

#### 3.2.2. Other Technical Reports

None

## 4.0 Planning History

- 06/10633: Demolition of sunroom + construction of three-storey extension and sunroom to dwelling house: Permitted.
- 18/5042: Applicants – Tess Philpott & Tony Wall: Construction of a two-storey detached dwelling house with detached garage, site entrance from existing private access roadway and all associated site development works: Permitted.
- D/218/19: Referral with respect to tree protection condition no. 3 attached to permission granted to 18/5042: Planning Authority advised that compliance or otherwise was not a matter for referral.

## 5.0 Policy Context

### 5.1. Development Plan

Under the East Cork Municipal District Local Area Plan 2017 (LAP), Aghada is identified as a key village and the subject site is shown as lying within an existing built up area.

### 5.2. Natural Heritage Designations

- Cork Harbour SPA (site code 004030)
- Rostellan Lough, Aghada Shore, etc. pNHA (site code 001076)

## 6.0 The Referral

### 6.1. Referrer's Case

The referrer expresses the view that the Board “does not allow the building of new houses in people’s back gardens resulting in the diminution of the curtilage of extant dwelling house premises for the purposes of gifting a greater portion of a domestic garden to a family member for the purposes of building a dwelling house thereon.”

## 6.2. Planning Authority Response

No further submissions of observations to make.

## 6.3. Owner/occupier's response

Two Land Registry maps of the site have been submitted: One shows the full extent of the curtilage in question along with that of the referrer's adjoining curtilage to the west, and the other shows the plot within the former curtilage, which is the subject of permitted application 18/5042.

The owner occupiers state that following the sub-division of the curtilage, the site which they would retain would be satisfactory. In this respect they cite the following considerations:

- This site would have an area of 1480 sqm, of which 1320 sqm would be private open space,
- Adequate parking for residents and visitors would be available and existing vehicular and pedestrian access from the R630 to their dwelling house and that of the referrer's would be unaffected,
- There would be no impact upon existing services and the amenities of the said dwelling houses would not be adversely affected.

## 6.4. Further Responses

The referrer draws attention to circuit court proceedings (record no. 2019/00902), wherein the Philpott's are seeking declaratory relief on their property. The view is expressed that prior to such relief any declaration by the Board would be *sub judice*.

The referrer also comments upon the considerations cited by the owner/occupiers, as follows:

- Part of the area cited is the subject of the aforementioned circuit court proceedings, including part of the private open space,
- Attention is drawn to the single vehicle width of the roadway, which is shared by the owner/occupiers and the referrer. Thus, if two vehicles meet, then one must reverse on a very steep gradient,

- A portion of the roadway, under which services are laid, is in the exclusive ownership of the referrer, and
- Concern is expressed that the small retained curtilage and the scope for vehicular congestion on the roadway would result in the obstruction of an emergency vehicle intent on reaching the site.

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

Section 2(1) states the following:

*In this Act, except where the context otherwise requires –  
“planning authority” means a local authority,*

Section 5(1) states the following:

*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 this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*

Section 5(3)(a) states the following:

*Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.*

Section 127(1) states the following:

*An appeal or referral shall –  
(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,*

Section 2(1) states the following:

*“land” includes any structure and any land covered with water (whether inland or coastal);*

*“structure” means any building, structure, excavation, or other thing constructed or made on, in or under 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...*

*“use”, in relation to land, does not include the use of land by the carrying out of any works thereon;*

*“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...*

Section 3(1) states the following:

*In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.*

Section 3(3) states the following:

*For the avoidance of doubt, it is hereby declared that, for the purposes of this section, the use as two or more dwellings of any house previously used as a single dwelling involves a material change in the use of the structure and of each part thereof which is so used.*

## **7.2. Planning and Development Regulations, 2001**

n/a

## **7.3. Other**

n/a



## 8.0 Assessment

### 8.1. Is or is not development

- 8.1.1. The current referral raises a question the relevance of which is unclear against the backdrop of application 18/5042 for the construction of a dwelling house on the very site that is the subject of this referral, i.e. this application proposes the sub-division of an existing residential curtilage to provide the needed house plot. The applicant's included the daughter of the owners of the site and permission was granted and remains extant. Nevertheless, the question has been raised and so I will seek to answer it.
- 8.1.2. Both the referrer and the landowner have submitted cases that include material planning considerations that have previously been weighed by the Planning Authority in coming to its decision on the aforementioned planning application.
- 8.1.3. The referrer also eludes to legal proceedings that in her view mean that a decision by the Board on the current referral risk being *sub judice*. However, insofar as these proceedings are separate from the referral process, I do not consider that this risk arises.
- 8.1.4. As submitted the referral question asks the following:
- Whether the diminution of the curtilage of a dwelling house for the purposes of gifting a garden to a family member for the purposes of building a dwelling house thereon is or is not development or is or is not exempted development?
- 8.1.5. I consider that this question needs to be re-phrased. Thus, the use of the word "diminution" implies a subjective judgement as to the effect of the sub-division of the residential curtilage, which is a distraction within the context of a referral assessment. Likewise, the reference to the purpose of the diminution is not relevant to this process.
- 8.1.6. Essentially the question posed by this referral is whether the sub-division of an existing residential curtilage into two residential curtilages constitutes development and so I propose that this be the question.
- 8.1.7. Under Section 3(1) of the Planning and Development Act, 2000 – 2019, (hereafter referred to as the Act), development is defined as entailing either "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.” The referral does not refer to any works. *Prima facie* there is no material change in the use of the land, i.e. it is in residential use and after the sub-division it would still be in residential use. However, I am mindful that under Section 3(3) of the Act, the sub-division of a dwelling house into two is explicitly identified as a material change in the use of the structure. In such cases, the intensification of use entailed in the sub-division is deemed to amount to a material change of use. By analogy, I consider that the sub-division of a residential curtilage would thus, likewise, entail an intensification of use, which would amount to a material change of use. Accordingly, I conclude that the sub-division of the residential curtilage would constitute development.

## 8.2. Is or is not exempted development

- 8.2.1. Neither the Act nor the Planning and Development Regulations, 2001 – 2019, contain any provisions that would render the development in question 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 sub-division of an existing residential curtilage into two residential curtilages is or is not development or is or is not exempted development:

**AND WHEREAS** Marie Dineen requested a declaration on this question from Cork County Council and the Council issued a declaration on the 24<sup>th</sup> day of April, 2019, stating that the matter was not development:

**AND WHEREAS** referred this declaration for review to An Bord Pleanála

on the 16<sup>th</sup> day of May, 2019:

**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) and (3) of the Planning and Development Act, 2000, as amended, and
- (c) the planning history of the site.

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

- (a) The sub-division of an existing residential curtilage into two residential curtilages would entail an intensification of residential usage of the land in question.
- (b) Under Section 3(3) of the Planning and Development Act, 2000, as amended, the sub-division of a dwelling house into two dwelling houses is a material change of use and so it is development.
- (c) By analogy, the sub-division of an existing residential curtilage into two residential curtilages would represent a similar intensification of use and so it would be development, too.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (b) of the 2000 Act, as amended, hereby decides that the sub-division of an existing residential curtilage into two residential curtilages is development and is not exempted development.

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Hugh D. Morrison  
Planning Inspector

2<sup>nd</sup> September 2019