



An  
Bord  
Pleanála

## Inspector's Report ABP-305371-19

### Question

Whether changes to the internal layout of the proposed 3-bedroom house, permitted under planning reference 07/518, 12/411, 17/1264 and 18/1615 ABP303680-19 so that it will now only accommodate 2 bedrooms is or is not development or is or is not exempted development.

### Location

Gortnamona, Headford, Co. Galway.

### Declaration

Planning Authority

Galway County Council

Planning Authority Reg. Ref.

ID/CH/ED19/48

Applicant for Declaration

Sathel Ltd.

Planning Authority Decision

Is not exempted development

### Referral

Referred by

Sathel Ltd.

Observer(s)

None.

Date of Site Inspection

28<sup>th</sup> November 2019.

Inspector

Bríd Maxwell

## **1.0 Site Location and Description**

1.1. The referral site is located circa 0.5km to the north of Headford Town Centre, in County Galway. The site is accessed via an established housing estate. Agricultural lands adjoin to the northwest and southwest and a GAA sports ground to the southeast. The site is currently boarded off for construction works.

## **2.0 The Question**

2.1. The question as considered by Galway County Council was whether change of internal layout of the current proposed 3-bedroom houses so that they will now only accommodate 2 bedrooms, (proposed to suit current market demand in the area) is or is not exempted development. In terms of the overall development the proposal results in a reduction in the overall number of 3 bed houses from 44 to 10 and the increase in the total number of 2 bed houses from 12 to 46.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

3.1.1 By order dated 9<sup>th</sup> August 2019 Galway County Council issued notification of its decision to that

“The proposed change of house plans at Gortnamona, Headford, Co Galway is development and is not exempted development under Article 9(1)(a)(i) of the 2001 Planning and development Regulations.

### **3.2. Planning Authority Reports**

#### **3.2.1. Planning Reports**

3.2.1.1 The Planner’s report appears to misinterpret the subject of the referral in reference to the reduction in density from 76 units to 70 units, (Which arises from the reference to the description of the most recent permission on the site ABP303680 (18/1615). The report asserts that the development would conflict with Article 9 (1)(a) (i) of the Planning and Development Regulations 2001 as amended as the carrying out of such development would contravene an condition attached to the governing

permission. The proposed development therefore was deemed to be development and not exempted development.

### 3.2.2. Other Technical Reports

None

## 4.0 Planning History

**ABP303680-1918/1615** Permission confirmed by the Board following third party appeal for change of house plans and revised site layout reducing density from 76 houses to 70 units and associated site works and services previously granted under planning ref no 17/1264. Gross floor space proposed works 7383 sq.m.

**17/1264** Sathel Ltd - Extension of duration for extension to existing residential development consisting of 82 no accommodation units and creche facility together with associated site services. Previous Permission 07/518 and 12/411.

**12/411** R Corbett & G McDonagh Extension of duration for extension to existing single residential development consisting of 92 accommodation units and creche facility together with associated site services.

**07/518** R Corbett & G McDonagh Permission for extension to existing residential development consisting of 82 no accommodation units and creche facility together with associated site services.

## 5.0 Policy Context

### 5.1. Development Plan

5.1.1 The Galway County Development Plan 2015-2021 and Headford Local Area Plan 2015-2021 refer.

Within the core strategy Headford is identified as 'other villages (<1500 pop) the fifth tier within the settlement strategy.

Within the local area plan the majority of the appeal site is zoned R Residential Phase 2 while a small portion to the north of the site is not zoned.

Policy RD2 – Phased development on residential zoned lands – provides for a general presumption against residential development on lands zoned R Residential Phase 2 within the lifetime of the local area plan, subject to the exceptions provided for under the residential development objective RD1.

Development on Residential phase 2 lands will normally only be considered where 50% of the lands in Residential Phase 1 are committed to development.

Objective RD3 – Housing Options -Require that a suitable variety and mix of dwelling types and sizes are provided in developments to meet different needs.

## 5.2. Natural Heritage Designations

None.

The closest Natura 2000 sites are

Lough Corrib SAC and Lough Corrib SPA within 1.5km to the northeast of the site.

## 6.0 The Referral

### 6.1. Referrer's Case

6.1.1 The referral is submitted by MKO Planning and Environmental Consultants on behalf of the applicant. Grounds of referral are summarised as follows:

- The proposed internal alterations relate to 4 no units types namely house type B, house type C House type F2 & House type F3. These house types are 3 bed units and the proposed alterations comprise internal changes which will alter these to 2 bed units. This results in reduction of 3 bed units from 44 to 10 no increase of the number of 2 bed units from 12 no to 46 no.
- Proposal relates to internal alterations within 34 of the permitted units only. No external alterations are required.
- Galway County Council planning report demonstrates uncertainty with regard to the exact scope of works.
- No alterations or revisions to the site layout or density.

- The Planning Authority has taken the view that the proposed works would contravene condition 1 of the permission. Article 9 1(a)(i) of the Planning and Development Regulations 2001 (as amended) states;
  - (1) Development to which article 6 relates shall not be exempted development for the purposes of the Act (a) if the carrying out of such development would –
    - (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.
- Article 6 and Article 9, and their associated restrictions on exempted development rights, relate exclusively to the classes of development specified in Schedule 2 of the Planning and Development Regulations 2001 (as amended). The proposed development which is subject of this Section 5 referral is not a class of development which is listed in schedule 2 of the Planning and Development Regulations 2001 as amended. It is a class of development which is listed in Section 4 of the Planning and Development Act 2000 as amended to which neither Article 6 nor Article 9 are applicable. The proposed works would not be de-exempted by virtue of Condition 1 of the planning permission which permits the development to which they relate.
- Notwithstanding the above it is considered that the proposed alterations to the permitted development would be *de minimus* and would not constitute a material change within the scope of the permitted development.
- The Planning Authority has erred in the interpretation of the legislation in this instance. The proposed internal alterations would constitute development and would constitute exempted development as per the provisions of the legislation.

## 6.2. Planning Authority Response

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

## 7.0 Statutory Provisions

### 7.1. Planning and Development Act, 2000

**Section 2(1)** states:

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

**Section 3(a)** states:

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

**Section 4** states:

(1) The following shall be exempted development for the purposes of this Act:

(h) ‘development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures’.

**Section 32(1)** states that permission will be required under Part III;

“(a) in respect of any development of land, not being exempted development, and  
(b) in the case of development which is unauthorised, for the retention of that unauthorised development”.

### 7.2. Planning and Development Regulations, 2001

**Article 6** states:

“(1) Subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(1) states:

“Development to which Article 6 relates shall not be exempted development for the purposes of the Act

(a) If the carrying out of such development would

(i) 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. Case Law

#### **Horne v Freeney (1982)**

Internal alterations were undertaken during the course of construction of an amusement arcade. Here it was held that the permission was indivisible and that the planning permission should have been undertaken in its entirety. Mr Justice Murphy considered that it was not possible to undertake alterations during the construction simply because the variation would have been exempted once the building was completed.

#### **Cairnduf vs O’ Connell**

Works were carried out to a terraced house including a side window, a patio and steps. The Supreme Court (Finlay C.J) considered that the works did materially affect the external appearance of the structure but did not render such appearance inconsistent with the character of the structure nor of neighbouring structures. Therefore, the development was exempted under Section 4(1)(g) of the 1963 Act.

#### **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”.

## **7.4 Related Cases**

### **RL2737**

Case referred to the Board following declaration by Galway County Council. The Local Authority determined that a bay window to a rear of the house is development but not exempted development and that an opaque window situated on the side elevation of the house is development but not exempted development. The reporting inspector in reviewing the case concluded that the bay window situated on the rear elevation would not be visible from the public road and therefore would not be inconsistent with the character of the structure on which it is located and furthermore would not be inconsistent with the character of neighbouring structures. On this basis the reporting inspector concluded that the provision of a bay window in the rear elevation would be exempted development in accordance with Section 4(1)(h) of the Act. In relation to the opaque window located on the side elevation the reporting inspector concluded that this would not be exempted development having regard to its scale relative to the permitted window, which it replaced, and also given that the opaque window is visible from the public road. However, in conclusion the planning inspector noted the judgement of *Horne v Freeney* was relevant to this case. This judgement stated that for any development to avail of exempted development rights in terms of Section 4(1)(h) exemptions, it must first have been completed in full accordance with its permission. Accordingly, any exemptions would only apply to development fully completed in accordance with its permission. The Board agreed with the reporting inspector and concluded that the bay window and the opaque window were development and not exempted development.

### **RL2632**

This referral related to a question whether the relocation of a house by approximately 7 – 11 metres from the location as permitted in accordance with condition no. 1 is or is not development and is or is not exempted development. The owner of the property submitted it was necessary to relocate a house due to the discovery of a spring during



excavations. The Board decided that the relocation of the house was development and was not exempted development.

**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.

## 8.0 **Assessment**

### 8.1. **Is or is not development**

- 8.1.1. 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”. Clearly the amendment to the 3 bed house type as set out is works as it is “an act of construction, extension and alteration” of a permitted housing scheme. 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 amendment is works, and such works are proposed to be 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 the decision of Galway County Council refers to Article 9 1(a)(i) of the Planning and Development Regulations which states

(1) Development to which Article 6 relates shall not be exempted for the purposes of the Act (a) if the carrying out of such development would (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

The first party referrer is correct in the assertion that as Article 6 and 9, and their associated restrictions on exempted development rights, relate exclusively to the classes of development specified in Schedule 2 of the Planning and Development Regulations 2001 (as amended), they are not relevant to the development subject to the referral as it is not a class of development listed in Schedule 2 of the Planning and Development Regulations 2001 as amended.

8.2.2 In the context of Section 4 of the Planning and Development Act 2000, which states

*4.(1) The following shall be exempted development for the purposes of this Act –*  
*(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures:”*

The development as set out involves internal modifications to 34 of the dwellings within the overall development of 70 dwellings<sup>1</sup>. The modifications comprise the reduction in the number of bedrooms from 3 to 2 and the necessary alterations are entirely internal and do not affect the external appearance of the dwellings. In this regard I consider that that the proposal falls within the provisions of 4(1)(h). I have noted above the judgement of *Horne v Freeney* in terms of the determination that for any development to avail of exempted development rights in terms of Section 4(1)(h) exemptions, it must first have been completed in full accordance with its permission.

8.2.3 I consider that in terms of case law *Cork County Council v Cliftonhall Ltd* . [2001] IEHC 85 provides a relevant 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

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<sup>1</sup> As revised by ABP303680-19.

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*”

- 8.2.4 I note that the alterations as set out in the referral has no visual impact and in terms of materiality of effect are not significant in terms of effect on third parties or planning considerations. The stated purpose of the alterations is to suit current market demand in the area. I note it is established practice that in terms of housing estate development that planning permissions might offer an adaptability of internal dwelling layout or options to accommodate individual lifestyle or lifecycle circumstance. The proposal can in my view be considered in this context. I consider that the materiality of effect arising from the amendment, notwithstanding that it relates to 34 dwellings and involves the omission of 34 bedrooms, in this case is not significant. Having considered the detail of the information as provided on the referral file I conclude that the alteration is *de minimus* and is therefore 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 changes to the internal layout of the proposed 3-bedroom house permitted under planning reference 07/518, 12/411, 17/1264 and 18/1615 (An Bord Pleanála Ref 303680-19) is or is not development or is or is not exempted development:

**AND WHEREAS Sathel Ltd** requested a declaration on this question from Galway County Council and the Council issued a declaration on the 9th day of August, 2019 stating that the matter was development and was not exempted development:

**AND WHEREAS** Sathel Ltd referred this declaration for review to An Bord Pleanála on the 5<sup>th</sup> day of September, 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) of the Planning and Development Act, 2000,
- (c) Section 5(1)(h) of the Planning and Development Act, 2000.
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) the planning history of the site,
- (f) the pattern of development in the area:
- (g) the submissions made to the Board.

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

- (a) The proposed amendments involve works and is therefore development

- (b) The said works affect only the interior of the structure and 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.
- (c) The alterations in this instance are minor in the context of the development and do not have any material impacts on adjoining property and the development 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 change to the internal layout of the proposed 3-bedroom house is development and is exempted development.

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Bríd Maxwell  
Planning Inspector  
31<sup>st</sup> December 2019