



An  
Bord  
Pleanála

## Inspector's Report ABP305579-19

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### Question

Whether the replacement of an existing ventilation system within a protected structure with a new system is or is not development and if it is classed as development whether such development is exempted development.

### Location

Farmer Browns Eatery Limited 170  
Rathmines Road Lower, Dublin.

### Planning Authority

Dublin City Council.

Farmer Browns Eatery Limited.

### Referrer

Farmer Browns Eatery Limited.

### Owner/Occupier

### Date of Site Inspection

December 18<sup>th</sup> 2019

### Inspector

Paul Caprani.

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## **1.0 Introduction**

A question has arisen pursuant of Section 5 of the Planning and Development Act 2000 as to whether or not the replacement of an existing ventilation system with new extractor duct within a protected structure constitutes development and if so whether such development can be classed as exempted development. Dublin City Council determined that the ventilation system in question constitute development which was not exempted development by reasons of the provisions contained in Section 4(1)(h) of the Act. The owner/occupier of the premises have under the provisions of Section 5(3)(a) of the Act sought a declaration from An Bord Pleanála in relation to this matter.

## **2.0 Site Location and Description**

No. 170 Rathmines Road Lower which is the subject of the current referral comprises of a three storey building over lower ground floor/basement. It is located within a row of terraced buildings which appear to date from the early 19<sup>th</sup> century. The subject site is located at the northern end of Rathmines Town Centre approximately 2.5 kilometres south of Dublin City Centre. The site forms part of a terrace of late Georgian buildings along the eastern side of Rathmines Road. The buildings are of a similar style although they are not identical in design. The buildings accommodate a mixture of commercial and residential use. No. 170 accommodates a restaurant at lower floor/basement level with office and residential use above. The building incorporates a return to the rear which is much more recent in date to that of the main structure. A separate flat roof portacabin-type structure is located in the rear yard. This flat roof structure incorporates a metal extraction hood which projects approximately 1.2 metres above the roof profile (see photos attached).

## **3.0 Background to the Current Referral**

- 3.1. Information contained on file indicates that a restaurant use was established at the subject premises c.1989 and the current occupiers (Farmer Browns) have been trading from this premises since 2016. The current occupiers upgraded the

extraction hood on foot of communications with an Environmental Health Officer in Dublin City Council in February, 2019. The Environmental Health Officer informed the applicant that complaints had been received from neighbouring residents in respect of odours and fumes emanating from the kitchen extraction system serving the restaurant.

#### **4.0 Planning Authority Assessment of the Current Referral**

- 4.1. A Section 5 declaration submitted by Simon Clear and Associates was sought on behalf of the owner/occupiers in respect of the following question.

*Whether the replacement of the existing ventilation system with a new ventilation extractor hood to the roof over the kitchen area located to the rear of 170 Rathmines Road Lower is or is not development and is or is not exempted development.*

Reference was made to similar type referrals (RL2402 and RL3474) where it was concluded that the extractor plant and ducting to the rear of the building was development which was exempted development. Dublin City Council were invited to reach a similar conclusion in respect of the current question before it.

- 4.2. A report prepared by Dublin City Council notes that the property is the subject of an enforcement notice which highlighted the placement of the ventilation extraction hood/vent to the roof as unauthorised development. It is noted that there is no evidence or record of a grant of planning permission for the rear extension to the property. It is noted that a site visit was made by a DCC's Conservation Officer and it was noted that the vent is of some considerable scale and has a stainless-steel finish. It is stated that the vent is highly conspicuous and clearly visible from the laneway to the immediate north of the site. It is considered that the inappropriate scale and finish of the ventilation hood is considered to adversely affect the character and rear setting of the protected structure and that of neighbouring protected structures. It is considered that the subject ventilation extractor hood renders the appearance of the property inconsistent with the character of the structure and that of neighbouring structures and as such cannot be considered exempted development.

## 5.0 Referral to the Board

- 5.1. On foot of the Planning Authority's decision, a declaration was sought from An Bord Pleanála under the provisions of Section 5(3) of the Act. It sets out details in respect of the proposed development and states that the ventilation unit is necessary for the operation and use of the restaurant and that the ventilation unit has been placed in a position so as to reduce any undue negative impact on the occupants of neighbouring properties.
- 5.2. It states that the decision of the Planning Authority is reliant on the assessment of a Conservation Officer which carried out a site visit on the subject premises. The Conservation Officer acknowledges that the vent is located on the roof of the 20<sup>th</sup> century extension and is not directly attached to the protected structure. It is noted that no professional comments or assessment from the Planning Officer on the Conservation Officer's report are contained on file. No reference was made to history or precedent referrals or indeed was there any reference to planning legislation in determining the Section 5 referral. Reference is made to two precedent decisions RL2402 and RL3474 (see planning history).
- 5.3. In terms of the grounds of the referral, it is argued that the upgrading of the extractor system is exempted development under the provisions of Section 4(1)(h) and Section 57(1) of the Planning and Development Act 2000 being works for the maintenance, improvement and alteration of the permitted structure.
- 5.4. It is argued that the Conservation Officer's report neglects to consider the surrounding context. The vent is only visible from a laneway to the north of the subject site and is inconspicuous and insignificant when viewed from the public realm. It is argued that the extractor hood blends in with the surrounding context and does not materially affect the external appearance of the structure so as to render it inconsistent with the character of the structure. Neither the previous vent or the current vent has any impact on backland views to the rear of the terrace properties and to the clock tower of Rathmines Town Hall. The current structure was put in place on foot of advice from the Environmental Health Officer relating to complaints and significantly improves, odours and fumes emanating from the vent.
- 5.5. Reference is also made to Class 41(d) of the Planning and Development Regulations 2001, as amended, that works consisting of or incidental to the carrying

out of development in compliance with a notice under Section 26 of the Air Pollution Act is exempted development. In this instance the Environmental Health Officer did not issue directions to the property owner in writing or explain what powers are being used in directing the owner/occupier to upgrade the ventilation system.

- 5.6. On this basis it is recommended that the decision of Dublin City Council be overturned.

## 6.0 Submission from Dublin City Council

- 6.1. This submission had regard to the issues raised in the Section 5(3) referral to the Board. It states that Dublin City Council Planning and Property Development Conservation Section is a multi-disciplinary unit with professional architects, conservation officers and planners. This unit is entrusted with dealing with Section 5 applications relating to protected structures. The particular application was subject of consideration by both the conservation officer and the executive planner. The declaration was considered in the context of the rear of the premises when viewed from Parker Hill.
- 6.2. Only one of the precedent cases referred to by the applicant relates to a protected structure and Dublin City Council considers that each case should be considered on its individual merit. It is reiterated that the Planning Authority is of the opinion that the extractor hood is of an appropriate scale and finish so as to render the appearance of the property inconsistent with the character of the structure and that of neighbouring structures all of which are protected structures. Therefore, under the provisions of Section 4(1)(h), the ventilation extractor hood would not be considered to be exempted development.

## 7.0 Relevant Legislation

- 7.1. The following planning legislation is relevant to the referral before the Board.

### Planning Development Act 2000 (as amended)

Section 2(1) works includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

Section 3(1) in the 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 4(1) the following shall be exempted development for the purposes of the Act.

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

Section 57(1) Notwithstanding Section 4(1)(a), (h), (i), (ia), (j), (k) or (l) and any regulations made under Section 4(2), the carrying out of works to a protected structure, or a proposed protected structure shall be exempted development only if those works would not materially affect the character of (a) the structure or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.

#### Planning and Development Regulations 2001 (as amended)

Article 6(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 the Class in the said Column 1.

Class 41 works consisting of or incidental to

- (d) the carrying out of development in compliance with the notice under Section 26 of the Air Pollution Act, 1987 (No. 6 of 1987).

## **8.0 Relevant History**

- 8.1. No files are attached. However, two files re referred to in the referrer’s submission which are summarised below.

**RL2402** - a question arose as to whether the replacement of an extraction system and the installation of cooler units at the rear of a premises is or is not development and is or is not exempted development. This referral related to a Chinese Take-away that had been in use since the 1950s. In or around 2006 the extractor system and external flue were replaced, and two cooler units were installed all to the rear of the premises. Due to complaints received by the Planning Authority, (relating to noise and odour) these issues were the subject of enforcement proceedings. A reference was made to the Planning Authority and subsequently to the Board. The Board issued a split decision concluding that the replacement of the extraction fan was exempted development but the installation of cooler units was not exempted development on the following basis.

The replacement of the extraction system and the installation of cooler units were works and constituted development as per Sections 2 and 3 of the Planning and Development Act 2000. However, the replacement of the extractor system came within the scope of Section 4(1)(h) being works of maintenance or improvement that did not materially affect the external appearance of the structure. The installation of the cooler units did not come within the scope of Section 4(1)(h) and did not fall within a class of development referred to in Article 6 nor Schedule 2 of Part 1 of the Regulations.

**RL3474** - the question which arose in this case is whether (i) the extractor plant and ducting and (ii) the provision of a community laundry service as a minor part of an integrated services offered at a memorial centre (a protected structure) in Newmarket, County Cork is or is not development or is or is not exempted development. In considering this referral the Board concluded that the extractor plant and ducting would not materially affect the external appearance of the structure so as to render the appearance of the structure inconsistent with the character of the structure or neighbouring structures and that the extractor plant and ducting would not materially affect the character of the structure or any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest. Accordingly, the Board decided that the extractor plant and ducting to the rear of the building is development and is exempted development.



## 9.0 Assessment

9.1. I have read the entire contents of the file, visited the site in question and have had regard to the legislative provisions set out in both the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended). I consider that the issues raised in the referral can be assessed under the following broad headings.

- Whether the installation of the ventilation system and extractor hood constitute development.
- Whether the works can be considered exempted development under the provisions of Section 4(1)(h) or Section 57(1) of the Planning and Development Act 2000 (as amended).

### 9.2. **Whether the installation of the ventilation system and extractor hood constitutes development**

9.2.1. Works are defined in the Act as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. The installation of a ventilation system and extractor hood would in my view constitute “alteration”, “repair” and “renewal” as such it can reasonably be concluded that works have been carried out as defined in the Act. As works have been carried out on the site it is clear that the installation of the ventilation system and extractor hood being an act of alteration, repair or renewal constitute development in my considered opinion.

### 9.3. **Whether the works can be considered exempted development under the requirements of Section 4(1)(h) or section 57(1) of the Planning and Development Act 2000 (as amended)**

9.3.1. All works which are not specifically listed as exempted development under the Act would require planning permission. In this instance the relevant exemptions which may apply in the case of the current referral relate to Section 4(1)(h) of the Act and the exemption under Section 57(1) of the Act. Both of these sections extend an exemption for planning permission where the works consist of development for the maintenance, improvement or other alteration of any structure where these works do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or neighbouring

structures. It is clear that the ventilation system and extractor hood are not in any way visible from vantage points along the Rathmines Road towards no 170. Thus, the works which have been undertaken in no way alter or materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures when viewed from Rathmines Road.

9.3.2. I acknowledge that the extractor hood (but not the ventilation system) is readily visible from the laneway which runs to the north of the site which is referred to in the documentation submitted as Parker Hill. The extractor hood is set back a distance of approximately 15 metres from the public carriageway on Parker Hill. The rear of the protected structures from vantage points along Parker Hill cannot be regarded as pristine. There are numerous single storey and two-storey returns some of which are associated with the original fabric of the building and some including the subject site are modern additions. Furthermore, there is a wide variety of fenestration styles and the incorporation of unsympathetic window insertions and dormer window constructions. Modern aluminium type sheds are located to the rear of these structures and a Kingspan clad rectangular concrete structure accommodating a paint shop is located adjacent to the rear of the buildings in question. There is no coherent architectural design associated with the rear of the buildings in question when viewed from Parker Hill and as such the insertion of a c.1.2 metre extractor hood does not in my view in any way detract from the visual amenities of the area and would not be considered an inappropriate or incongruous insertion having regard to the wide varieties of features and architectural styles to the rear of these buildings.

9.3.3. Furthermore, the extractor hood is located on a modern-style portacabin which is completely detached from the main building and is of no architectural and historic integrity. This in my view also ensures that the insertion of the extractor hood in no way materially affects the external appearance of the historic structure and does not result in the carrying out of works which materially affect the external appearance of the structure so as to render the appearance inconsistent with either the character of the structure on the subject site or neighbouring structures.

9.3.4. With regard to Section 57(1) it states that the carrying out of works to a protected structure, or a proposed protected structure, shall be exempt only if these works do

not materially affect the character of (a) the structure, (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest. It is reasonable to conclude in this instance that the protected structure derives its special interest from its architectural and historic features particularly in relation to its front elevation and the fact that it forms a coherent terrace of buildings dating from the early 19<sup>th</sup> century. As referred to above, I do not consider that the rear of the building and the adjoining buildings possess the same architectural quality or integrity as the front elevation due to the various additions and modern alterations carried out. Perhaps more importantly, the extractor hood in this instance is not attached to the building which attracted the protected structure designation that is located on the roof of an entirely new structure in the rear yard of the site. In this regard I would agree with the referrer that the proposed development would not materially affect the character of the structure which attracted the designation, nor would it interfere or detract from its special, architectural and historic interest.

9.3.5. Therefore, I would not agree with the conclusion of Dublin City Council's conservation officer that the ventilation system and extractor hood does not affect the building's character to an extent that would trigger the caveats to the exception referred to above. As such, I consider that the ventilation system and particularly the extractor hood can avail of the exemptions set out under Section 4(1)(h) and Section 57(1).

9.3.6. **Exemption under the Provisions of Class 41(d)**

Class 41 exempts the carrying out of development in compliance with the notice under Section 26 of the Air Pollution Act 1987. As part of the background to the information submitted with the referral the applicant has indicated that the new ventilation system and extractor hood was installed on foot of communications with the Environmental Health Officer in Dublin City Council in February, 2019. The referral readily admits that no official notice was served on the restaurant either under Section 26 of the Air Pollution Act (1987) or otherwise. As no formal notice was submitted to the applicant under the provisions of the Air Pollution Act, it cannot be reasonably argued that a planning exemption can be availed of under the specific provisions of Class 41(d) of the Regulations.

### 9.3.7. **Restriction on Exemption due to Appropriate Assessment Requirement**

The nearest Natura 2000 site is the South Dublin Bay and River Tolka Estuary SPA and South Dublin Bay SAC both of which are located 4 kilometres to the east of the subject site. Given the minor nature of the works undertaken I do not consider that the proposed development would be likely to have any significant effects on the integrity of a European site in the vicinity having regard to its conservation objectives. Any restriction on exemption of development under the provisions of Article 9(1)(a)(viib) would not apply in this instance.

## 10.0 **Conclusion and Recommendation**

Arising from my assessment above I consider that the installation of a ventilation system and extractor hood at No. 170 Rathmines Road Lower constitutes development which is exempted development under the provisions of the Planning and Development Acts and Regulations (as amended). I would therefore recommend an order as follows:

**WHEREAS** a question has arisen as to whether the replacement of an existing ventilation system with a new system within the curtilage of a protected structure is or is not development and is or is not exempted development at No. 170 Rathmines Road Lower, Dublin 6.

**AND WHEREAS** the said question was referred to Dublin City Council on behalf of Farmer Browns Eatery Limited of 170 Rathmines Road Lower, on the 13<sup>th</sup> August, 2019.

**AND WHEREAS** Dublin City Council in its decision dated 10<sup>th</sup> September, 2019 determined that the works undertaken were not exempted development.

**AND WHEREAS** the said question was referred to An Bord Pleanála on behalf of Farmer Browns Eatery of 170 Rathmines Road Lower on the 7<sup>th</sup> October, 2019.

**AND WHEREAS** An Bord Pleanála in considering this referral had regard particularly to

- (a) Sections 2, 3, 4(1) and 57(1) of the Planning and Development Act 2000 (as amended), and
- (b) Class 41(d) of Schedule 2, Part 1 of the exempted development classes under Article 6 of the Planning and Development Regulations 2001 (as amended).

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

- (a) the replacement of the ventilation system and the installation of a new extractor hood on a separate building to the rear of the main building within the curtilage of the site would not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure, and
- (b) the extractor hood would not materially affect the character of the structure or any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.

**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 the new ventilation system and extractor hood to the rear of the building constitutes development that is exempted development.

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Paul Caprani,  
Senior Planning Inspector.

January 8<sup>th</sup> , 2019.

